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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

WISCONSIN SUPREME COURT.

FRANK MILLER, Resp't.,

v.

FRANK J. HOESCHLER, Appt.

(121 Wis. 558, 99 N. W. 228.)

Injunction—trespass—fence.

Equity will take jurisdiction of a suit to restrain repeated acts of trespass upon plaintiff's dooryard for the purpose of

erecting and maintaining a fence there, under its power to prevent a multiplicity of inadequate actions at law for the trespass.

(April 19, 1904.)

A PPEAL by defendant from an order of the Circuit Court for La Crosse County overruling a demurrer to the complaint in a suit to enjoin trespass upon plaintiff's dooryard. Affirmed.

The facts are stated in the opinion.

Subject Note.—Injunction to compel or prevent the erection, maintenance, or removal of fences or gates.

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I. Scope.

This note treats of the appropriateness of the remedy by injunction in suits where the right to erect, maintain, or remove fences or gates is in question. It includes all such cases, whether relief in other particulars was asked or not. Since the fact that other elements of injury were considered obviously weakens the force of the decision as an authority in fence cases, these additional elements have, in each instance, been indicated when important, so that the propositions may not be misleading.

Gates maintained by turnpike companies for the collection of toll, and safety gates

Messrs. Doherty & Baldwin, for appellant:

Plaintiff has an adequate remedy at law. Defendant may avail himself of that objection upon general demurrer.

Kilbourn Lodge No 3, A. F. & A. M. v. Kilbourn, 74 Wis. 452, 43 N. W. 168.

Where a statutory remedy exists for redress of a grievance, equity will not interfere.

10 Enc. Pl. & Pr. p. 931; Huels v. Hahn, 75 Wis. 468, 44 N. W. 507.

Equity will not entertain a suit to prevent a threatened trespass without first having the legal title determined in an action at law.

Smith v. Oconomowoc, 49 Wis. 694, 6 N. W. 329; 1 Pom. Eq. Jur. § 252; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 485.

erected by railroad companies at crossings, have not been treated; or has that loss of fences obstructing light, air, or view, and commonly known as "spite fences," been considered where the right to relief depended on the substantive law, and not on the nature of the remedy. Only those cases dealing with the obstruction of ways or highways have been taken, in which it was apparent that the obstruction complained of was a fence or gate.

As to liability for the malicious erection of a fence, see note to Letts v. Kessler, 40 L.R.A. 177.

Concerning fences obstructing light and air, see note to Passaic Print Works v. Ely & W. Dry-Goods Co. 62 L.R.A. 683.

As to prescriptive right to maintain fences, see note to Leahan v. Cochrane, 53 L.R.A. 901.

Concerning liability for consequential injuries from removal of fence, see note to Wyant v. Crouse, 53 L.R.A. 629.

II. Injunctive relief on ground of trespass.

a. Introductory.

The remedy which courts of law afford for trespasses being retributive, it is indispensable to the protection of persons in the use, integrity, and value of their property, that there should exist somewhere a preventive power. Unless there is some jurisdiction to prevent irreparable mischief by trespassers, there would be, as Lord Eldon puts it, "a great failure of justice in the country." This power is wisely lodged with the courts of chancery, to be exercised with enlightened discretion, by process of injunction.

Anciently courts of equity would not intervene by injunction in cases of trespass, but left the party to his legal remedy. But equitable jurisdiction to enjoin the commission of trespasses on real estate, though of comparatively recent origin, is now firmly established. It is an outgrowth of the interference by courts of equity to prevent

Mr. John A. Daniels, for respondent:

The special features necessary to equity jurisdiction may be found where there is great vexation to be feared from repeated or continued trespasses.

Willard, Eq. Jur. p. 383.

Now that the circuit court exercises legal and equitable jurisdiction in the same action, and may grant any relief which could formerly be obtained either at law or in equity, there is no necessity whatever for instituting a second action, when to do so would only tend to a multiplicity of suits, which the law abhors.

Stein v. Benedict, 83 Wis. 603, 53 N. W. 891.

The plaintiff may maintain his action in equity to enjoin the defendant from obstructing his door yard and his free pas-

waste. Their jurisdiction in that particular was founded upon the necessity of preventing irremediable injury, and was exercised only in cases where a privity of title existed between the parties. The remedy by injunction proved so efficient in thwarting the commission of waste that it was soon invoked to prevent injuries to real property by persons having no privity of title; the tort being denominated a trespass. This jurisdiction has been exercised in England since the time of Lord Thurlow, the first case of injunction for trespass apparently being that of Flamang, cited and followed in Mitchell v. Dors, 6 Ves. Jr. 147, by Lord Chancellor Eldon, who subsequently, in Hanson v. Gardiner, 7 Ves. Jr. 300, referred to it in these words: "I remember when, in a case of trespass, unless it grew to a nuisance, an injunction would have been refused; and even in the case of waste, if, by temporary acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mischief, Lord Hardwicke thought it was granted only as following the relief. Lord Thurlow had great difficulty as to trespass. I have a note of a remarkable case in which the name of one of the parties was Flamang. There was a demise of close A to a tenant for life, the lessor being landlord of an adjoining close, B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against this digging in the other close, though a continuation of the working in the former close, Lord Thurlow hesitated much, but did at last grant the injunction,—first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining on matter of trespass, where irreparable damage is the consequence." The jurisdiction thus initiated has been widely exercised.

In the leading case of Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484, where it was sought to enjoin a trespass by the removal of stone from a ledge of rock, Chan-

sage from his house to the street, and the right will be determined in that action, and, if the plaintiff shows himself entitled to it, a permanent injunction will be granted.

Rev. Stat. § 3180; *Neshkoro v. Neat*, 85 Wis. 126, 55 N. W. 176; *Winchell v. Waukesha*, 110 Wis. 105, 84 Am. St. Rep. 902, 85 N. W. 668.

In order to exclude the exercise of the equitable functions of the court, it is not enough that there is a remedy at law, but it must be plain and adequate, or, in other words, as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.

Wilson v. Mineral Point, 39 Wis. 160; *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178; *Cullickson v. Madsen*, 87 Wis. 19, 57 N. W. 965; *Miller v. Drane*, 100 Wis. 1, 75

N. W. 413; *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 211, 228, 21 L. ed. 43, 44.

Equity will interfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent a multiplicity of suits.

Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 372; *Storer v. Great Western R. Co.* 3 Eng. Ry. & C. Cas. 106; *North Union R. Co. v. Bolton & P. R. Co.* 3 Eng. Ry. & C. Cas. 345; *Rigby v. Great Western R. Co.* 4 Eng. Ry. & C. Cas. 186; *Adderley v. Dixon*, 1 Sim. & Stu. 807; *Coulson v. White*, 3 Atk. 21; *Livingston v. Livingston*, 6 Johns. Ch. 501, 10 Am. Dec.

cellor Kent, after fully reviewing the course of decisions in England and in the state of New York, announced the rule that, while an injunction would not be granted to restrain a trespasser because he is a trespasser, yet an injunction would issue where the injury is irreparable; when full and adequate relief cannot be granted at law; when the trespass goes to the destruction of the property as it has been held and enjoyed; or when it is necessary to prevent a multiplicity of suits in cases where the right is controverted by numerous persons, each standing on his own pretensions. In the course of the opinion he says: "A troublesome man may vex and harass his neighbor by throwing down his fences and turning cattle upon its grounds, or by passing over them, or otherwise annoying him; but it is to be presumed that repeated recoveries for damages, with the punishment of costs, and such smart money as a jury would naturally give, would soon effectually correct any such disposition. At any rate, I do not know that a court of equity has ever interfered merely to correct such a practice; and it would certainly require very strong evidence of the inefficacy of the ordinary legal remedies for compensation, as well as for correction, before this court would venture to assume a jurisdiction hitherto unknown."

The tendency of Chancellor Kent to limit relief by injunction to a comparatively few aggravated cases of trespass is opposed to the weight of modern decisions. In the progress of society, courts of equity have gradually yielded to the pressure of public necessity, and have accorded a much more liberal and energetic protection or relief by injunction in cases of destructive damage to property than was formerly given in cases of an analogous character. It is still affirmed that the injury must be great or irreparable,—one which cannot be adequately compensated in damages. But the right to invoke the jurisdiction of a court of equity depends upon the facts in each case, and the main inquiry is whether the legal remedy under the particular circumstances of the

case is adequate. Injuries have been held to be irreparable, and the legal remedy inadequate, under many circumstances where Chancellor Kent would probably have refused to interfere. This has practically enlarged the equitable jurisdiction without extending the principle itself. Moreover, dissent has not been wanting from the doctrine that it is better to permit a threatened wrong to be done, and then attempt to compensate for it by pecuniary damages, than to prevent its commission by the issuance of an injunction.

b. Restraining trespass generally.

1. Adequacy of remedy at law.

See also II., c, 1, *infra*.

The inadequacy of the legal remedy is the foundation or indispensable prerequisite for the interposition of a court of equity. But where, under the circumstances, the remedy at law is not practicable or efficient, equity will intervene.

Lessors who may become liable for consequential damages because of their lessee's failure to enjoy the leased premises due to the inclosure of the property with fences by a third person, which damages may exceed any sum recoverable by them in an action brought at law against the wrongdoer, are entitled to an injunction requiring the removal of the fence, on the ground that they have not at law a remedy so plain, adequate, and complete as in equity. *Barbee v. Shannon*, 1 Ind. Terr. 199, 40 S. W. 584.

So, one in peaceable possession of premises which he has purchased and devoted to the purpose of feeding live stock bought for shipment, is entitled to an injunction restraining one who enters upon the property and commences to inclose a portion of it with a fence and turns thereon a number of hogs, since the remedy at law is inadequate for the reason that the measure of damages recoverable would be the reasonable value of the use of the property during the time

353; *Boston Water Power Co. v. Boston & W. R. Corp.* 16 Pick, 525; *Jarden v. Philadelphia, W. & B. R. Co.* 3 Whart. 513.

Winslow, J., delivered the opinion of the court:

This is an action in equity to enjoin the commission of repeated and continuous threatened trespasses upon real estate. A general demurrer to the complaint having been overruled, the defendant appeals. The complaint alleges that the plaintiff owns, occupies, and has record title to, certain lots in the city of La Crosse, and has occupied the same for many years as a homestead; also that plaintiff occupies, and, by adverse possession for more than twenty years, has title to, a certain described strip of land between said lots and Ninth street,

in said city, which constitutes a part of his said homestead and dooryard, and constitutes his only means of access to said Ninth street; that defendant wrongfully entered on said strip in May, 1903, and constructed a wire fence on the side thereof nearest to plaintiff's house, thereby cutting off the plaintiff from the use of his dooryard and from all access to Ninth street from his said house; that plaintiff immediately removed said fence, but that defendant asserts and threatens that he will re-enter and reconstruct the fence as often as plaintiff removes same, and plaintiff fears that he will do so, and thus cause plaintiff an irreparable injury, and force the commencement of a multiplicity of trespass actions, unless the defendant be restrained from such acts.

The simple question presented is whether

the owner was kept out of possession, irrespective of the collateral or consequential injuries that might result to his business or stock. *Carter v. Warner*, 2 Neb. (Unof.) 688, 89 N. W. 747.

While a court of equity will not, as a general rule, interpose in the case of a mere naked trespass, yet, where the act done, or threatened to be done, would be destructive of the substance of the estate, or the injury is or would be irreparable, equity will afford relief.

Equity will not intervene to restrain one who has repeatedly opened the inclosure surrounding the premises of another, cut and removed hay and grain therefrom, turned cattle therein, and, claiming the right to do so, threatens to continue such acts to the destruction of crops and shrubbery, since no irreparable injury or destruction of the substance of the estate is shown. *Moore v. Halliday*, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801. The court remarked: The opening of the inclosure may have been accomplished by a mere removal of bars or unfastening of a gate that would not amount to a permanent injury to the fence, conceding that to be a part of the reality.

One faction of a religious society should not be enjoined from breaking open locked gates of the society's burying ground for the purpose of making burials therein, where the plaintiffs ask only that the defendants shall request permission of them and pay the usual charges by way of recognizing their right to control the cemetery, since the burials would be at most mere trespasses, doing not only no irreparable, but no serious, injury. *Miller v. English*, 6 N. J. Eq. 304.

Such irreparable injury as will authorize an injunction to restrain county commissioners from removing the fence around the original exemption from the general stock law, and building another fence around the lines of the additional exemption, including the plaintiff's plantation, is not shown, where it is not alleged that the old fence is to be removed from, or the new fence placed upon, 7 L.R.A. (N.S.)

any portion of the plaintiff's plantation, but he complains that it will be necessary for him at great expense to fence in his crops to protect them from stock running at large, the property of insolvent neighbors, and that, if he fails to do so, his tenants will desert his premises. *Hamer v. Brown*, 40 S. C. 336, 18 S. E. 938. The court observed: The only injuries complained of in this action are not such as will warrant the court in granting the injunction prayed for, and, though in a more aggravated form, they are only such as every planter endured from the Colonial days until the passage of the general stock law a few years ago.

But, an injury by unlawfully cutting down fences, shade trees, and ornamental shrubbery is irreparable, and ought to be suppressed by the preventive powers of a court of equity. *Tainter v. Morristown*, 19 N. J. Eq. 46.

A bill alleging that defendants forcibly entered the premises of the complainant, tore down his fences, destroyed his crops, dug up his soil, are erecting an abutment thereon to support a bridge or aqueduct, and are carrying away quantities of valuable clay, presents a case of irreparable damage entitling the complainant to injunctive relief, unless it appears that it was actually done by authority of law, such as in the exercise of a statutory right to appropriate property for the construction of an aqueduct to supply a city with water. *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550.

So, the possibility of irreparable injury will be taken into consideration in determining the propriety of dissolving an injunction, as well as of originally granting it. That important damage not remediable at law might ensue on the dissolution of an injunction restraining defendants from trespassing on land, cutting down valuable shade trees, and moving fences, is a ground for holding the injunction until full investigation on evidence in regular course, where the affidavits are in sharp conflict. *McKenzie v. McCrory* (Miss.) 40 So. 493.

An injunction restraining defendants in a

the complaint states a cause of action in equity, or, in other words, whether it appear therefrom that there is an adequate remedy at law. The principle that a court of equity will not interfere to prevent a mere threatened trespass upon real estate is very ancient and well understood. The idea is that such a wrong is merely temporary in its nature, and, under all ordinary circumstances, may be fully recompensed by an award of damages; hence that the legal action affords perfect and adequate relief. While this rule is still enforced, the tendency of recent decisions is to enlarge, rather than to narrow, the class of cases in which a court of equity will interfere to prevent threatened trespass. Not only will it act where the threatened trespass will work irreparable injury to the property it-

self, amounting essentially to destruction thereof, but also where, by reason of the continuous or repeated character of the threatened invasion, many actions at law would be necessary to be brought, in no one of which could compensation for the whole wrong be obtained. In such cases the legal remedy is held to be inadequate. It is simply an application of the very old principle that equity will interfere to prevent a multiplicity of actions at law. 3 Pom. Eq. Jur. 2d ed. § 1357. This principle has been frequently applied by this court in the case of the unlawful attempt by public officers to take private property for a highway or other public use. *Flanders v. Wood*, 24 Wis. 572; *Church v. Joint School Dist. No. 12*, 55 Wis. 399, 13 N. W. 272; *Smart v. Hart*, 75 Wis. 471, 44 N. W. 514; *Ruhland v.*

suit to determine title to church property of which plaintiffs are admitted to be in possession from further interference with the premises will be continued where they have torn down the fences and mutilated the church, and are preparing to erect another building upon the lot in such a manner as to injure, if not destroy, the present one. The injury thus done and threatened will be serious and irreparable. *Kasian v. Stefansky*, 6 Kulp, 445.

A temporary injunction restraining the authorities of a borough from removing a strip of double barbed-wire fence maintained by the plaintiffs along the boundary line of a street in a populous part of the borough will be dissolved where the fence is a nuisance *per se*, summarily removable by the municipal officer under the general borough law, and the plaintiffs do not allege that the proposed action of the borough authorities is likely to cause them irreparable injury. *Bower v. Watsontown*, 11 Pa. Co. Ct. 110.

It has been held, upon the ground of the inadequacy of the remedy at law, that an injunction will lie in the case of a trespass where the trespasser is pecuniarily irresponsible. While mere insolvency is not generally decisive of the right to grant an injunction, it constitutes in particular cases an important element in determining whether the court, in the exercise of a sound discretion, should award it, for, the trespasser being insolvent, the legal remedy, "though theoretically perfect, would be practically fruitless."

Equity will restrain by injunction an insolvent person who has repeatedly thrown down the plaintiff's fencing, and on one occasion converted a portion of it to his own use, and threatens to continue the commission of like trespasses. *Musselman v. Marquis*, 1 Bush, 463, 89 Am. Dec. 637.

This decision rests upon the principle that equity will interpose to enjoin the commission of repeated and successive trespasses by an irresponsible party from whom no adequate compensation could be obtained in an action at law.

7 L.R.A. (N.S.)

So, an injunction should issue to restrain trespassers who have repeatedly, without right, entered upon the plaintiff's property and interfered with the peaceable enjoyment of it, and have unlawfully torn down and cut away a screen or fence erected by him for his comfort and convenience, and threatened to do so in the future should he erect other similar structures, where the trespassers are insolvent and a judgment against them would be valueless. *Chambers v. Haskell*, 25 Ky. L. Rep. 1707, 78 S. W. 478.

Similarly, it has been held that a petition duly verified, showing that a trespass has been committed by tearing down the fence and exposing the growing crops of the plaintiff to injury from cattle, and that a repetition of such acts is threatened, insolvency of the defendant being alleged, and the allegations as to trespass being supported by evidence, entitles the plaintiff to an injunction in the absence of any counter showing. *Akin v. Jaudon*, 124 Ga. 404, 52 S. E. 768.

The injury sustained must, however, be one that, in legal contemplation, is irreparable. Thus, the insolvency of a trespasser, who has repeatedly opened the inclosure surrounding the premises of another, cut and removed hay and grain therefrom, turned cattle therein, and, claiming the right to do so, threatens to continue such acts, will not alone give chancery jurisdiction to enjoin his acts, in the absence of irreparable injury to the estate, which is not shown by the acts complained of. *Moore v. Halliday*, 43 Or. 243, 72 Pac. 801. The reason for the apparent conflict between this and the preceding case evidently lies in the restricted scope here given to the term "irreparable injury."

But the fact of insolvency should be alleged and proved.

An averment that the employees of a railroad company are about to enter upon and inclose with a fence a strip of plaintiff's land containing about 13 acres, and situated near its right of way, does not justify an injunction restraining them from so doing, where nothing but the threatened commission of the mere trespass is shown, for which

Jones, 55 Wis. 673, 13 N. W. 689. But it has not been confined to cases of threatened public use of lands. It has also been applied to actions between private parties,—as, for instance, the threatened unlawful and continuous entry upon lands for the purpose of mining (*Tippling v. Robbins*, 71 Wis. 507, 37 N. W. 427); of the threatened drawing of water from a mill race (*Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 305, 35 N. W. 744). In both of these cases the jurisdiction of equity was sustained upon the distinct ground of the pre-

vention of the multiplicity of inadequate actions at law for trespass.

Had the defendant desired to try the question of the title to the land in question before a jury in an action at law, he could have commenced his action of ejectment and obtained his desire. He can hardly complain of the act of the plaintiff in bringing him into a court of equity, when he attempted to take the law into his own hands.

Order affirmed.

there is an adequate remedy at law, in the absence of an allegation of the insolvency of the defendant. *Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892.

That defendants unlawfully claimed the right to tear down fences and enter the plaintiff's land for the purpose of cutting and removing wheat, does not justify the granting of an injunction, where the insolvency of the defendants is not alleged; since a mere threatened trespass, continuing only long enough to cut and carry away the wheat, is shown, for which compensation may be made in damages. *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309.

Injunctive relief will not be granted to restrain the removal or destruction of fences, or of any building complainant may erect, or to prevent interference with his possession, where the insolvency of the defendants is the specific fact and only fact averred that would give a court of equity jurisdiction, while the evidence shows that the principal defendant is a man of large means. *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071.

There are, however, cases holding that relief may be afforded against a threatened continued trespass although the offender is not insolvent.

A court of equity, to prevent a threatened continued trespass, will take cognizance of a suit instituted to enjoin persons from trespassing upon church property, and from destroying the fence around the building, although the defendants may not be insolvent, where they threaten to tear down and destroy the fence as often as it is restored. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, 83 N. W. 201.

The destruction of a fence by a trespasser who threatens to destroy it as often as the fence is replaced, and to continue cutting and removing hay from a lot, entitles the owner to injunctive relief against the trespasser, although the latter may not be insolvent. *Lynch v. Egan*, 67 Neb. 541, 93 N. W. 775.

But ordinarily a person pecuniarily responsible will not be enjoined from committing trespass by interfering with a fence constituting personal property, or asserting a title thereto.

A solvent person should not be enjoined from interfering with a fence which is an unauthorized erection upon government land, where it does not appear that he has done / L.R.A. (N.S.)

anything more than merely to assert his ownership of the fence. If any rights have been invaded there is a plain, adequate, and speedy remedy at law. *Ganow v. Denny*, 68 Neb. 706, 94 N. W. 959.

The nonresidence of the trespasser is, for reasons similar to those controlling in case of insolvency, entitled to much weight in determining the propriety of exercising equitable jurisdiction. Thus, an injunction will issue to restrain nonresident trespassers who enter upon lands in the quiet and undisturbed possession of another, with force and arms, and throw down his fences, destroy his stacks of hay, and turn their stock into his meadows, under the erroneous claim that the lands do not lie within the state from which the complainants derive their title, but wholly within another state. The court said: It would be unjust that a court of equity should turn from its doors a citizen of the state, who has been subjected to aggravated and repeated trespasses, and leave him to seek redress through the precarious remedy of a suit at law in a foreign jurisdiction. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

Generally speaking, injunctive relief to restrain a trespass will be denied where a remedy applicable to the particular case has been provided by statute. Thus, an injunction to restrain the supervisor of roads from trespassing upon the lands of the plaintiff for the removal of rock and stone to repair the highway was refused, although it was alleged that such official had pulled down fences and quarried rock and stone, and that the quarry was within an inclosure in which the plaintiff had a garden, orchard, meadow, and growing grain, which were turned out to the commons by opening the fences, where the statute authorizes the supervisors to enter on adjoining land to procure materials to repair roads, and the plaintiff's land is the nearest and most convenient place where suitable materials can be obtained,—especially where the statute gives a remedy to one aggrieved by the act of any supervisor by written complaint to the county court. *Kendall v. Post*, 8 Or. 141.

But the fact that the criminal law provides adequate punishment for trespassers who have repeatedly, without right, entered upon the plaintiff's property, and have unlawfully torn down and cut away a screen

or fence erected by him for his comfort and convenience, and threaten to do so in the future should he erect other similar structures, is not a ground for denying injunctive relief; since it would afford plaintiffs no compensation for past or future trespasses upon their property. *Chambers v. Haskell*, 25 Ky. L. Rep. 1707, 78 S. W. 478.

2. Multiplicity of suits.

A landowner may maintain an action to prevent trespass on his pasture land and the inclosure of the property with wire fences by third persons, who threaten to turn their own cattle in to graze to the exclusion of the owner and his lessees. *Barbee v. Shannon*, 1 Ind. Terr. 109, 40 S. W. 584.

The principle upon which equitable relief is granted in such cases is the avoidance of a multiplicity of suits, not necessarily and solely arising from the existence of a number of parties in whose favor or against whom a cause of action may exist, but arising from the necessity of bringing many and successive suits at law to obtain full redress for a continuous wrong. Jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the grievance complained of, and must, from the nature of the case, continue as long as that necessity exists.

So, one whose gates are repeatedly opened and his fences frequently broken down by a field tenant or cropper to drive cattle upon the land to graze and pasture before the removal of the crops is entitled to injunctive relief to prevent a multiplicity of suits. *Tantlinger v. Sullivan*, 80 Iowa, 218, 45 N. W. 765.

And a city which wrongfully enters upon premises occupied for business purposes, and removes and destroys the fence gate, and inclosure erected thereon, and drives teams and wagons carrying filth and dirt over a portion of the premises, will be enjoined at the suit of the owner. Equity will interfere to restrain repeated and continued trespasses when the wrongful acts may become the foundation of adverse rights, and occasion a multiplicity of suits to recover damages. *Johnson v. Rochester*, 13 Hun, 285.

3. Protection of equities.

One not entitled to a conveyance of the legal title to lots occupied by him, but held in trust by the municipal authorities, may enjoin them from tearing down the fence erected by him about the premises and designed to facilitate building operations, and from interfering with his rights, until such time as the legislature may make provision for the complete execution of the trust. The trust relation existing between the parties is sufficient ground to justify and require a court of equity to take cognizance of the case. *Bingham v. Walla Walla*, 3 Wash. Terr. 68, 13 Pac. 408. The court remarked: Equity can and ought to control the action

of the trustee during the pendency of the trust, against acts prejudicial to the rights of the *cestui que trust*,—especially where those acts are backed by the high hand of official power against which he is helpless.

An injunction will lie to restrain a railroad company from removing fences or buildings, or breaking ground, or making excavations upon premises, for the purpose of constructing its railroad, prior to the payment or tender of payment of damages as required by its charter, unless the owners have misled the company by concealing their title. *Ross v. Elizabeth-Town & S. R. Co.* 2 N. J. Eq. 422. The court said: If the complainants, several of whom acted for their mother in obtaining damages for her from the company, stood by and saw the company go on blindfold under a conviction that their mother had the estate in fee, they have forfeited all claim to the equitable interference of the court by thus acting and concealing their title. It would be an act of fraud and injustice, estopping them from exercising their legal rights.

c. Boundary fences.

1. Adequate remedy at law.

An injunction should not be granted to prevent the removal of a few panels of a boundary fence, since the remedy at law by way of damages for the injuries is adequate. *Jordan v. Lanier*, 73 N. C. 90.

And an injunction should not issue to restrain a solvent landowner from throwing down panels of a boundary fence as an act of ownership, where the damages sustained thereby would be trivial. *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276.

The threatened removal of a boundary fence will not be restrained by preliminary injunction where the trespass would be temporary only, and could be compensated in damages. *Minnig's Appeal*, 82 Pa. 373.

The removal of a boundary fence is an injury of a temporary and evanescent character, not justifying an application to a court of equity, but remediable by an action at law. *Whitman v. Shoemaker*, 2 Pearson (Pa.) 320.

That a boundary fence has been torn down does not authorize injunctive relief, where the trespass consisted of but a single act susceptible of compensation in damages. *Shell v. Kemmerer*, 13 Phila. 502.

But the purchaser of an interest in premises at an auditor's sale, who was thereafter awarded by decree in partition a portion of the property, consisting of open fields and woods, is entitled to an injunction against one in possession under a lease, but with notice of his superior title, who has resisted with force his attempt to build a fence on the partition line and driven him and his workmen from the ground. *King v. Wilson*, 54 N. J. Eq. 247, 34 Atl. 394. The court observes: An injunction here is the more efficient remedy, since the weight of the evidence is that the damage which will re-

sult from defendant's interference will be serious and not easily computed, and the defendant is of doubtful pecuniary responsibility.

One whose lands, held adversely for the statutory period, were entered by trespassers, who broke down a retaining wall and fence and set part of the line fence forward, is entitled to an injunction requiring a restoration of the fence and wall, and restraining further interference with the division line until a right to alter it shall have been established at law, although the plaintiff might have recovered damages from the trespassers and possession of the land occupied by them, and might pursue the like remedies upon a further invasion of her rights, where, in the discretion of the court, it appears that the common-law remedy, in view of all the circumstances, would fail to afford complete justice. *Bussier v. Weekley*, 11 Pa. Super. Ct. 463.

So, one who purchases property described in his deed as bounded by the lands of another and as separated therefrom by a wire fence, will be enjoined, at the suit of the adjoining owner, from cutting down the fence, where he has twice done so and threatens to remove every fence constructed there, and claims a right of way which he has not attempted legally to establish, when it is evident he intends to carry on a system of petty annoyances which would result in loss to the adjoining owner and profit to him. *Fonda, J. & G. R. Co. v. Olmstead*, 84 App. Div. 127, 81 N. Y. Supp. 1041. The court says: "I think the action is maintainable in this form." The ground of the decision evidently is that the damages recoverable in successive suits would fail to compensate the injured party.

A court of equity has jurisdiction to preserve the *status quo* by injunction until final hearing, in case of repeated and further threatened trespasses. Thus, one who erects a post and wire fence upon what he claims to be the line between his land and that of the adjoining owner is entitled to an injunction restraining the latter from removing the posts and cutting the wires until final hearing, or until the rights of the possession are determined by an action at law, where he alleges repeated and further threatened trespasses in that regard. *Roddy v. Dickson*, 25 Pa. Co. Ct. 91.

And an injunction may be granted to restrain one of two adjoining landowners from removing or tearing down the line fence which was owned by them in common, where he is insolvent and the objection that there is an adequate remedy at law is waived. The ground on which equity refuses to take cognizance of and proceed in such cases, namely, that the plaintiff has an adequate remedy at law, is in no sense jurisdictional. The court has power to hear and determine the action, and in general will do so, unless objection in proper form is taken. *Hoff v. Olson*, 101 Wis. 118, 70 Am. St. Rep. 903, 76 N. W. 1121.

So, the court may determine the rights 7 L.R.A. (N.S.)

of the parties to an action in equity to compel defendants to restore a division fence to its original position, and to quiet plaintiff's title to the land up to where the fence was originally located, although the action might properly have been brought as an ejectment suit cognizable at law, where defendants make no objection on that ground. *Cornish v. Follis*, 20 Ky. L. Rep. 300, 45 S. W. 1050.

To warrant injunctive relief there must be a showing of irreparable injury, which cannot be compensated in damages, or would be ruinous to the estate itself.

An injunction will not issue to restrain a landowner from erecting a fence upon what he claims to be the true boundary line between his property and that of an adjoining owner, where there is no showing of irreparable injury, or of more than the threatened commission of a common trespass remediable by suit at law. *Harvey v. Miller*, 24 App. D. C. 51.

So, the owner of land not in cultivation or inclosed is not entitled to an injunction upon mere proof that defendants, in the assertion of an adverse claim, are about to enter and build a boundary fence thereon; since no irreparable injury, irremediable at law, is shown. *Lutcher v. Norsworthy* (Tex. Civ. App.) 27 S. W. 630.

An encroachment upon an adjoining lot, and the erection of a wooden fence thereon, do not amount to a destruction of the inheritance, or constitute irreparable injury for which the courts of law are incompetent to compensate in damages, but are mere ordinary trespasses for which a jury is the peculiar and appropriate tribunal to give redress. *Herr v. Bierbower*, 3 Md. Ch. 456.

But a railroad company will be enjoined from planting and continuing willow trees along its right of way and near the division line, although it is intended to attach broads to the trees when of sufficient size, and maintain them as a fence, where the roots of the trees extend into the land of an adjoining owner, exhausting the soil, and the shade from them will render a strip of his land valueless for cultivation; since the act would be ruinous or irreparable, and would impair the just enjoyment of the property in the future. *Brock v. Connecticut & P. Rivers R. Co.* 35 Vt. 373. The court remarks: Whether one of two adjoining landowners, holding their titles in fee, and for the ordinary purposes of cultivation, would have the right to construct a fence in this manner on the line between them, to the manifest injury of the other, is a question we are not now called upon to decide. But we think, in order to justify the railroad company in resorting to this method of fencing its road, in view of its effect upon the adjoining proprietors, there must be some strong and controlling necessity for its doing so. We are unable to find from the evidence the existence of any such necessity.

So, one who shows that the defendants have removed part of her boundary fence

and thus taken part of her land, and threaten to commit a similar trespass and remove and rebuild in a similar way the rest of the fence, is entitled to injunctive relief; since the threatened trespass contemplates a permanent occupation and use of her property. Such an injury is not reparable by an action for damages. *Bussier v. Weekey*, 4 Pa. Super. Ct. 68.

2. Right not established at law.

Where a party's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, he is not entitled to remedy by injunction.

A preliminary injunction restraining a landlord from tearing down a boundary fence should not be awarded where the plaintiff not only fails to establish his right in the fence or in the ground on which it stands, but the evidence shows the right to both to be in the defendant. *Minnig's Appeal*, 82 Pa. 373.

And one claiming title by adverse possession should not be awarded an injunction against the adjoining owner, who has reset the fence so as to include a disputed strip, to compel the resetting of the fence and to restrain further trespasses until her title is determined by an action at law. Where rights which are legal are asserted on one side and denied on the other the remedies are at law. They cannot be settled under equity forms. *Bussier v. Weekey*, 5 Pa. Dist. R. 187.

But on appeal to the superior court, however, it was determined that one who has acquired title to property by adverse possession is entitled to enjoin a trespasser from disturbing her boundary fence and from setting it over upon her land, where the facts are not disputed but admitted by demurrer, and they establish her clear legal right in the land in controversy. In such case the plaintiff need not go into a court of law to establish the facts out of which her title grows before invoking the protection of a court of equity against the threatened invasion of her premises. A court of equity has jurisdiction, to the extent, at least, of protecting her against further encroachment on the property in her actual and peaceable possession. *Bussier v. Weekey*, 4 Pa. Super. Ct. 69.

3. Settlement of disputed boundary.

A bill in equity will not lie for the sole purpose of settling a disputed boundary. The existence of such a controversy is not a sufficient ground for equitable intervention, except in case of confusion of boundary occasioned by fraud, neglect, or misconduct, or when an action in equity is necessary to prevent irreparable mischief, or to suppress a multiplicity of suits and oppressive litigation, or where there are repeated trespasses by an irresponsible party and there is no adequate remedy at law.
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The existence of a dispute as to the boundary between independent proprietors of adjoining lands, one of whom has built a fence on the part of the line as he claims it, does not confer jurisdiction upon a court of equity to afford injunctive relief; since neither irreparable mischief, a multiplicity of suits, nor oppressive litigation, is threatened, and the law court affords an adequate remedy by an action of trespass. *Watkins v. Childs* (Vt.) 65 Atl. 81.

An injunction to restrain the defendants from trespassing upon lands, breaking down fences, plowing, building fences, and digging post holes will not be granted where the defendants claim under some color of right and the plaintiff's title is disputed; but the parties should be required to refer their claims to the proper tribunal for decision of the rights claimed by each. *Munyon v. Filmore*, 4 Ind. Terr. 619, 76 S. W. 257.

If it appears at the hearing of the cause, upon the pleadings and proof offered, that the real object of the suit brought to restrain a solvent landowner from throwing down panels of a boundary fence as an act of ownership is to settle in a court of chancery a controverted boundary of lands, the bill should be dismissed for want of jurisdiction. A controversy affecting the title and boundaries of land cannot be settled in equity, though the property, in an urgent case, may be protected by injunction until the question of right can be determined by a trial at law. *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276.

But an injunction will lie to restrain the erection of a new fence upon a disputed line so as to include a strip of land in controversy, where the defendant does not deny the peaceable possession of the strip beyond such fence by the plaintiff for more than twenty-five years, although he denies plaintiff's title to such strip. *Coal Co. v. Savage*, 4 Pa. Dist. R. 557. The court said: The case is undoubtedly near the edge of equity jurisdiction. When rights which are legal are asserted on one side and denied on the other, the remedies are at law; they cannot be settled under equity forms; this is undoubtedly the general rule. But, while the defendant, in a general way, denies the right of the plaintiff, he does not deny his long and continuous peaceable possession. The trespass which he threatens is not a sporadic one, but looks to the permanent occupation of the land. There is no reason why he should yield it to the threatened force of the defendant, and it seems to me that his hand should be stayed until he has established his alleged right at law.

A landowner is not entitled to an injunction to restrain an adjoining owner from taking down the fence and exercising ownership, under a claim of right, over a tract or land lying beyond them, since only a dispute between independent proprietors of adjoining lands as to the boundary is shown, which may be settled by a single suit at

law. *Walker v. Leslie*, 90 Ky. 642, 14 S. W. 682.

A bill in equity will not lie to restrain defendant from interfering with complainant's rights in certain lands, and from moving back upon her lots a fence which she claims stands upon the true line, where the land in dispute has never been adjudged to belong to the complainant, and each party claims a legal right thereto, as the purpose of the action, which is to establish a boundary line, may be secured by an action at law. *Andries v. Detroit, G. H. & M. R. Co.* 105 Mich. 557, 63 N. W. 528.

But in *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162, 102 Am. St. Rep. 412, 93 N. W. 251, it was held that one in possession of land was entitled to enjoin the removal of his fence by an adjoining owner, who threatened to construct one upon another line; and that a bill in such case should not be dismissed upon the ground that there is a dispute as to the boundary line, which should be tried in an action at law. The preceding case of *Andries v. Detroit, G. H. & M. R. Co.* was distinguished on the ground that the rule there laid down applies where there is a well-recognized dispute as to the true boundary line, which it is the purpose of the bill to ascertain and establish, but not where, as in the instant case, the complainant was in possession, claiming as owner, and the line on which the fence was built had been recognized and acquiesced in as the true line for from twenty to thirty years without dispute, until defendant undertook to remove it by force.

There is not such a confusion of boundary as to call for equitable interference to prevent the erection of a fence upon a disputed line, where the boundary line is definite and can be readily located, and the whole difficulty results from two different surveys varying from each other in their conclusions. *Harvey v. Miller*, 24 App. D. C. 51.

4. Protecting possession of trespasser.

One who, having neither the title to nor possession of land, enters thereon and places persons in occupation of a house on the premises, and builds a fence on what he claims to be the boundary line, which was torn down by the lawful occupant, who causes the trespassers to be forcibly removed, and maintains possession with a force of men too large to resist, is not entitled to injunctive relief. *Littlejohn v. Attrill*, 94 N. Y. 619. The court said: An injunction to preserve to a wrongdoer the fruit of his wrong, and to shut out the party in possession from his lawful occupation because taken from him by a trespasser, would be the reverse of equity. If the plaintiff or the persons ejected have a right of action their remedy is at law.

A property owner who sets over his fence to what he contends is the true boundary line, and thereby incloses a part of the lot of an adjoining owner in peaceable possession, is a trespasser, and not entitled to enjoin such adjoining owner from interfering with or removing the fence. *Currier v. Jones*, 121 Iowa, 160, 96 N. W. 766.

5. Motive for erecting or maintaining fence.

One who has destroyed, or has instigated the destruction of, two line fences sufficient for all practical purposes, with the motive of erecting another in order to charge an adjoining owner with its cost, is not entitled to enjoin the latter from interfering with its erection. The plaintiff does not come into equity with clean hands. *Auman v. Cunfer*, 30 Pa. Super. Ct. 368.

A landowner to whom fence viewers have allotted the duty of maintaining a specified portion of the fence forming the boundary between him and an adjoining proprietor will not be restrained by injunction at the suit of the latter from removing a hedge on such boundary line, for the purpose of replacing it with a wire fence, where the ground on which relief is sought is that the complainant intends to plant an orchard and erect buildings at a point which the hedge would serve to protect. *Hill v. Tohill* (Ill.) 80 N. E. 253.

d. Enjoining interference with fences under claim of highway or way.

1. General statement.

In this class of cases it should be noted that the fact that fences were interfered with or threatened with injury seems to have had little influence in shaping the decision. Their removal is significant only when they are viewed as visible symbols of ulterior and more important rights, an attack on which is disclosed by their destruction. Fences are like outworks the fate of which is determined by that of the position which they guard. It is with reference to these greater rights represented by them that equitable intervention is exercised or refused.

2. Highways, streets, or alleys.

(a) By public authorities.

(1) To open or change the route of highways.

One having a legal title to, and right of possession of, a tract of land upon which the public, without any legal authority whatever, is claiming an easement in the shape of a highway, may, if his attempts to take possession of the apparent highway and close it up with a fence are resisted by the public authorities, maintain an action for an injunction to restrain them from further interferences with his rights. *Oliphant v. Atchison County*, 18 Kan. 386. The court observed: We do not decide that this is the only remedy he may pursue, but that it is an adequate and proper one.

But a wrongdoer who has fenced in a street and two alleys cannot successfully invoke the powers of a court of equity to restrain the city from removing the obstructions which, upon proper application by the latter he would be compelled to remove or else be enjoined from maintaining. *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735.

Equity will not interfere where the remedy at law is adequate or has not been availed of.

Hence, equity will not enjoin the tearing down of fences for the purpose of opening a highway in obedience to the order of the court, lawfully issued, although the commissioners appointed for the purpose of assessing damages assessed none to the plaintiff and made no report on the subject of plaintiff's damages, where the statute affords a remedy by granting an appeal. *Chicago & A. R. Co. v. Maddox*, 92 Mo. 469, 4 S. W. 417.

But that supervisors are violating a mandate of the court which directed them to open a proposed highway along a certain location, for which they may be punished for contempt, does not afford such an adequate remedy at law as will prevent injunctive relief to restrain them from wrongfully removing fences and opening a road upon a different location, across the land of the complainant. *Kern v. Isgrigg*, 132 Ind. 4, 31 N. E. 455.

An injunction to restrain commissioners of highways from changing a county road under an order made for that purpose is properly denied at the suit of landowners, who will have to remove their fences and be subjected to very great inconvenience if the change is made, where the commissioners had jurisdiction to make the order which the complainants failed to take proceedings to review, either by appeal or by writ of certiorari. Equity will not assist those who have failed to avail themselves of the remedies which the law affords. *Bailey v. McCain*, 92 Ill. 277.

But injunctive relief will be afforded to restrain irreparable injury. Thus, commissioners of highways, who have failed, within the statutory period of five years lacking a day, to open a public road, will be enjoined from entering upon inclosed and cultivated land of the complainant and removing his fences for the purpose of opening up a small portion of the road, where the right of way has not been procured by release from the owners or by payment of the damages assessed for that purpose, nor have the means been provided for their payment, and it is impracticable, within the five years, to open the road and pay the damages. *Green v. Green*, 34 Ill. 320. The court said: Had the commissioners proceeded to open this portion of the road, it would have been done under color of law, and they could have justified the act in an action for damages. This, then, confers jurisdiction upon a court of equity to prevent an injury for which a recovery could not have been had at law, and brings the case within 7 L.R.A. (N.S.)

the rule that equity will restrain an act which, if performed, would produce irreparable wrong and injury.

So, township officers who attempt to remove a fence and permanently occupy a strip of the plaintiff's land for a public highway against his will and without having acquired a lawful right thus to use it by proceedings taken for that purpose under the statute will be enjoined. The ground upon which relief is granted in such a case is that the attempt to enter upon and take permanent possession of land for public use without the assent of the owner, and without the damages having been ascertained and paid or tendered, is, or would be if consummated, in the nature of an irreparable injury, for the prevention of which the writ of injunction constitutes the proper remedy. *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902.

Injunction is the proper remedy where a town proposes to tear down and remove gates, and wrongfully appropriate agricultural land for a road or street, under color or right, without assessment and tender of compensation to the owner. *Hardinsburg v. Cravens*, 148 Ind. 1, 47 N. E. 153.

An injunction is the proper remedy to prevent city officers from entering upon residence property and removing therefrom the fences, trees, and improvements, and using the same as a street under color of right, before just compensation has been assessed and tendered therefor. *New Albany v. White*, 100 Ind. 206.

The destruction of fences, removal of fruit and ornamental trees, and entry upon land, by a road overseer for the purpose of laying out a public road under an order of the county court, without any tender of compensation or assessment of damages, when required by law and not waived by the party, afford good ground for injunctive relief. *Carpenter v. Grisham*, 59 Mo. 247.

So, commissioners of highways who have failed to adjust the damages incident to the opening of a road through inclosed and cultivated lands as required by statute will be restrained by injunction from entering thereon and removing the fences. *Highway Comrs. v. Durham*, 43 Ill. 86. The court said: By attempting to open the road in the absence of this adjustment, the commissioners might inflict an injury upon the landowner of the most serious character, which the tardy process of the law could but poorly remedy, and which demanded the instant appeal to the restraining arm of a court of chancery. His remedy was not adequate at law; it was not prompt, such as the emergency required; and in that court he could obtain no adequate relief. By delays there his fence and his crops might be destroyed and his peace violated to such an extent that pecuniary compensation would not relieve.

Injunctive relief is also appropriate where the statute fails to provide for compensation. Thus, a property owner is entitled to enjoin a township officer from taking down his fence for the purpose of opening

a highway, and leaving his crops exposed without protection, where the statute under which the road was sought to be established made no provision for compensation to the owners through whose premises roads established thereunder were located, and no compensation has been paid or tendered. *Carbon Coal & Min. Co. v. Drake*, 26 Kan. 345.

But one who has torn down the fences of another and threatened to continue to do so should not be enjoined where, acting under color of authority of the board of supervisors, he entered on the land, which had been duly condemned to public use for the purpose of opening a public highway, and the compensation to which the owner was entitled had been duly ascertained and tendered to him, but had been refused. In such a case neither great nor irreparable injury is shown, nor any injury whatever. *Creanor v. Nelson*, 23 Cal. 464.

In *Bolster v. Catterlin*, 10 Ind. 117, it was decided that a landowner alleging that the defendant, as supervisor of the district, had commenced tearing down and removing his fences, and threatened and intended to move the road which had been established for more than twenty years some 20 feet east of its present location, and that plaintiff had made improvements, built his house, and planted ornamental trees, with a view to the road as originally opened, is not entitled to injunctive relief where it does not appear that the proposed change will impair the value or enjoyment of the plaintiff's farm, since an intent to commit a naked trespass is simply averred,—one not irreparable, but the subject of full recompense in damages.

And in a subsequent case in the same state it was laid down that an allegation that public officers under a void order of the county commissioners threatened to remove the fences of the plaintiff for the purpose of opening a highway through his cultivated lands avers simply an intent to commit a trespass, which may be recompensed in damages, and does not authorize injunctive relief. *Lewis v. Rough*, 26 Ind. 398. The reason for this decision is thus expressed by the court: The real difficulty in these cases is to determine what is irreparable mischief. It is not, however, difficult to determine that the threatened injury is not an irreparable one. The act threatened is the removal of fences for the purpose of opening a pretended highway through the lands of the plaintiff.

But a more liberal view was taken in *Erwin v. Fulk*, 94 Ind. 235, where an injunction was granted to restrain the execution of a void order of a board of commissioners directing a change in a highway where the proposed change would divide the plaintiff's farm into two parcels of irregular shape, requiring great changes in his fencing, would divide into separate parcels a large bearing orchard, would pass on the side or end instead of the front of his buildings, and would destroy his pastures and

growing crops. The injury was considered not only a continuous one, but one that could not be fully measured in damages.

And in *Morgan v. Miller*, 59 Iowa, 481, 13 N. W. 643, it was determined that equity ought to take cognizance of a threatened injury of this nature. An injunction to restrain a road supervisor, who had been ordered by the board of supervisors to open a road, was awarded at the suit of a property owner whose lands were affected thereby, and who claimed that the action of the board was void, where notice had been given to some of the landowners along the route to remove their fences. It was said that the complainant was not bound to wait until his fences had been torn down, his fields thrown open, and a right of action had accrued to him at law, but that he might invoke the aid of equity to prevent the threatened invasion of his rights.

Relief may also be accorded by injunction to prevent oppressive and ruinous litigation. In *Mason City Salt & Min. Co. v. Mason*, 23 W. Va. 211, it was held that a lot owner is entitled to an injunction restraining municipal officers from removing his fences and building for the purpose of opening streets and alleys through his property, against his consent and without lawfully condemning the property or making compensation therefor, on the ground that the plaintiff had no adequate remedy at law for the wrong complained of. Said the court: Actions of trespass, brought against the persons passing over or using said streets and alleys after the defendant had taken them for public use would have been almost infinite in number, and practically endless and ruinous to the plaintiff. Such a case is one clearly appropriate for the interposition of a court of chancery, which, only, is capable of affording adequate relief.

But in *Highway Comrs. v. Green*, 156 Ill. 504, 41 N. E. 154, the court refused to enjoin commissioners of highways, at the suit of a landowner, from tearing down and removing fences and opening a highway through his farm, on the ground that a multiplicity of suits would be thereby prevented. This decision is based on the principle that equity will not interfere to prevent continued suits between two single individuals, arising from the separate repetition of trespasses, where the right has not been established at law.

Injunctive relief will be denied on the ground that there is a complete remedy at law, where the insolvency of the defendant is not shown.

The tearing down and removal of fences by commissioners of highways for the purpose of opening a highway through complainant's farm will not be enjoined where it is not alleged that the commissioners are insolvent. *Highway Comrs. v. Green*, supra.

But in Missouri, where it is not essential that the injury threatened shall be irreparable to warrant a resort to equity, an injunction may properly issue to prevent a town from appropriating plaintiff's land,

tearing down his fences, and destroying his crops for the purpose of opening a road, although there is no allegation or proof of the insolvency of the defendants, or of the irreparable nature of the threatened injury. *Harris v. Gomer Twp.* 22 Mo. App. 462.

Similarly, in *McPike v. West*, 71 Mo. 199, where an injunction was granted to prevent the unlawful opening of a road by road overseers, and the removal of hedges and fences for that purpose, whereby crops would be exposed to the depredations of all kinds of stock, it was held that the insolvency of the defendants need not be averred.

The removal of fences by an insolvent official may be restrained.

Thus, in *Grisby v. Burnett*, 31 Cal. 406, an injunction was granted restraining an insolvent person, acting under the authority of a board of supervisors, from removing the plaintiff's fences crossing the line of a public road laid out over his land by such board, where an action to ascertain the plaintiff's damages was pending and undetermined, and by removing the fences the plaintiff's crops of grain and grass, and his orchard and vineyard, which were of great value, would be destroyed. The court said: "There is no question raised in respect to the case falling properly within the equitable cognizance of the court."

An injunction will issue against the supervisors of a county and the road overseer of the district, who is insolvent, restraining repeated and continued trespasses by breaking down the inclosure about plaintiff's tract of land and entering thereon to dig up and remove soil, trample down and destroy the grass and other crops, and cut down trees, with the avowed intention of constructing a public road, established by a decree of the court in a partition action covering the premises, and rendered nearly fourteen years previous, but which had never been opened or used, where, by statute, a road not worked or used for five years ceases to be a highway for any purpose whatever. *Myers v. Daubenbiss*, 84 Cal. 1, 23 Pac. 1027.

An insolvent road overseer will be enjoined from tearing down and removing a fence for the purpose of opening a road, where the order of the county court under which he acted was made without notice to the parties, and was absolutely void. *Monroe v. Crawford*, 163 Mo. 178, 63 S. W. 373.

And even a solvent officer will be enjoined where he threatens to inflict irreparable injury.

A public officer, although solvent, will be restrained from tearing down a landowner's fence for the purpose of opening a public highway through the land, where in fact no highway has ever been established, since the trespass is one which disturbs the owner's possession, and will, if permitted to continue, ripen into an easement. The threatened loss of the land constitutes irreparable injury. *Poirier v. Fetter*, 20 Kan. 27.

Equity will restrain a continuing trespass by public officers who wrongfully break
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down fences and seek to appropriate land for highway purposes. The character of the impending injury affords ample ground for the interposition of a court of equity, if the landowner's right has not been legally devastated for the public benefit. A permanent appropriation of a portion of his inheritance is threatened; a complete and entire divestiture of all his rights in and control over it. No injury to land could be more irreparable, for it is the extinguishment of the estate itself.

Public officers who attempt, in excess of their statutory authority, to lay out a highway through the buildings, yard, or inclosure of the plaintiff, will be enjoined from removing his fence or opening the highway through his inclosure or buildings. The court remarks: It is well settled that when public officers threaten to take possession of private property and appropriate it permanently to a public use, in violation of law, a court of equity will interfere to prevent such appropriation. *Smart v. Hart*, 75 Wis. 471, 44 N. W. 514.

The jurisdiction of a court of equity to afford preventive relief by injunction is clear and undoubted where commissioners of highways are threatening to break down and remove fences, and to appropriate complainant's land to the use of the public for a highway, at a place where there is no highway of right. Proposed acts of this kind would constitute a continuing trespass, and might cause irreparable injury. *Willett v. Woodhams*, 1 Ill. App. 411.

A court of equity may intervene to restrain township officers from continuing to tear down the fences of the complainant under pretense of opening a highway, since such acts, if wrongful, would constitute a continuing trespass, might cause irreparable mischief, perhaps lead to continuing strife in the assertion and maintenance of what the parties may deem their respective rights, and ultimately produce serious breaches of the peace and acts of violence. *McIntyre v. Storey*, 80 Ill. 127.

One who has built a fence near the line of his land, allowing 14 feet for his portion of the road, is entitled, on the ground of irreparable injury, to a perpetual injunction restraining township trustees from tearing down the fence and taking possession of a strip of land 33 feet in width. *Troy Twp. Trustees v. Shauck*, 33 Ohio L. J. 251.

It is within the jurisdiction of equity to restrain highway officers from trespassing upon the lands of a private person under the claim that it is a public highway, where they threaten forcibly to enter and destroy his fences and plow up and grade his land. *Lawrence v. Kirby* (Mich.) 13 Det. L. N. 580, 108 N. W. 770.

The act of a road overseer who wrongfully tears away a fence with the intent of taking land for highway purposes constitutes an irreparable injury amounting to an extinguishment of the estate itself, and calls for the interference of a court of equity by

writ of injunction. *Rosenberger v. Miller*, 61 Mo. App. 422.

And an injunction will lie to restrain a road overseer from tearing down fences, destroying fruit and ornamental trees, and entering upon land for the purpose of laying out a public road, although the order of the county court appointing him is sufficient to protect him, as to acts done in good faith, from liability as a trespasser. The fact that he could not be sued at law would be a good reason for affording this remedy to prevent the unlawful commission of injuries of a permanent and irreparable character constituting an extinguishment of the estate itself, and for which there would otherwise be no redress. *Carpenter v. Grisham*, 59 Mo. 247.

An injunction will be granted to restrain the removal of a fence by a road overseer, and the opening of a highway across the plaintiff's lands, since such acts would deprive the owner of the use of his property in the character in which he has been holding and enjoying it. *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451.

One who, with her grantors, has been in the actual, exclusive, and continued possession of lots for over fifty years, during which time the city has never opened, or attempted to open, an alleged street through the premises, which have been long inclosed and cultivated, is entitled to enjoin the city, which has thrown down the fences and opened the land to public use, from molesting or obstructing her in the enjoyment of the property. *Forsyth v. Wheeling*, 19 W. Va. 318. The court said: "While a person or corporation will not be enjoined from committing a mere trespass, the remedy at law being complete and adequate, yet, where any act is about to be done, permanent in its nature and affecting the very substance and value of the plaintiff's estate, a court of equity will interpose by injunction to prevent the act."

So, injunction is a proper remedy to restrain a city seeking, under color of its chartered powers, to take possession of a strip of land to which it has no right, forming part of an inclosure of a lot owner, with intent to make it a part of the street, thereby inflicting a continuous and permanent injury upon the complainant. *Peoria v. Johnston*, 56 Ill. 45.

A court of equity has jurisdiction to enjoin a municipal corporation from pulling down a fence and opening up and using a strip of land as a public street without the owner's consent, where the property has never been condemned, dedicated, or used as a street. *Baya v. Lake City*, 44 Fla. 401, 33 So. 400.

Where proceedings taken to acquire land for highway purposes are invalid, the removal of fences to construct the alleged highway will be enjoined.

Injunction is the proper remedy to prevent the tearing down of fences and the cutting down of trees by a road overseer for the purpose of establishing a public road 7 L.R.A. (N.S.)

under invalid condemnation proceedings. *Rosenberger v. Miller*, supra; *Jones v. Zink*, 65 Mo. App. 409.

In *Floyd v. Turner*, 23 Tex. 292, an injunction was granted to restrain a road overseer from throwing down and removing buildings and fences and constructing a road over the plaintiff's premises, where it was alleged that none had been established according to law. On this state of facts, the supreme court held that a motion to dissolve the injunction was improperly sustained.

Nor is it necessary that the party threatened with injury establish his right to redress by an action at law before bringing his bill to restrain by injunction a road overseer, acting under an invalid order of the county court directing him to open a road, from tearing down fences and committing other injuries to the land. *Carpenter v. Grisham*, 59 Mo. 247.

It seems that an injunction will not lie unless the proceedings are totally void,—that is, so defective as to be a mere nullity; nor where the party has an adequate remedy by appeal or at law.

That there are some variances between the description of the route embraced in the petition to the board of commissioners for the laying out of a highway and the one reported as having been marked and staked out by the viewers does not justify injunctive relief against township officers alleged to be insolvent, who threatened to break into plaintiff's inclosures and to destroy sheds and barns in constructing the road, where both descriptions were evidently intended to describe substantially the same route; since the proceedings are not totally void, and the party has an adequate remedy by appeal. *Adams v. Harrington*, 114 Ind. 66, 14 N. E. 603.

A judgment awarding an injunction restraining the opening of a public road through the land of the plaintiff will be reversed, although it is alleged that the defendant road overseer is threatening to tear down and remove the plaintiff's fences, and to cut down his hedge, and to destroy his growing crops, and to take possession of a portion of his land for highway purposes, where no evidence is given in support of these allegations, which were not admitted by the answer; but the case appears to be one where plaintiff is seeking to enjoin a bare trespass on his land, about to take place in the execution of a judgment or order of the county court, void on its face, establishing the road, without showing special circumstances calling for equitable interposition, because in such cases the complainant has generally an adequate remedy at law. *Taylor v. Todd*, 48 Mo. App. 550.

(2.) To remove encroachments or obstructions.

An injunction to restrain public officers from removing alleged encroachments or obstructions from a highway will be refused

where the remedy at law by action or appeal is adequate.

Entry on lands by road commissioners, who throw down fences for the purpose of reopening a road, is a trespass which does not come within the class of injuries that the law considers as irreparable, nor authorize injunctive relief. There is an adequate remedy at law. *Nichols v. Sutton*, 22 Ga. 369.

Nor will the threatened removal of a fence by highway commissioners be enjoined, where the suit relates only to one single act of trespass, and irreparable damage is not alleged or proved; since in such case there is an adequate remedy at law. *Mapes v. Charles*, 30 N. Y. S. R. 373, 8 N. Y. Supp. 665.

One who has fenced in an alley running across his premises, and claims that it was temporarily opened under an agreement with the owners of adjoining land that its use was to terminate when another alley was opened, which has since been done, is not entitled to an injunction restraining the city from interfering with the fence. There is no element of equitable jurisdiction. An action of ejectment would settle the question; or an action of trespass for tearing down the fence would be equally effective. *O'Neil v. McKeesport*, 201 Pa. 386, 50 Atl. 920.

An injunction will not issue to prevent the removal, by commissioners of highways, of a fence found by a jury of freeholders to be an encroachment upon the highway, even though the proceedings to procure the removal of the fence were without jurisdiction and void; since the plaintiff has a perfect remedy at law, by an action for trespass against the wrongdoer for all damages he may have sustained. *Hyatt v. Bates*, 40 N. Y. 164.

A lot owner who has improved his lot with reference to the line of the street as it has been recognized for more than twenty years, by the erection of a valuable fence, is not entitled to injunctive relief to restrain the city from taking possession of a strip of land from the front of the lot under a claim that it forms part of the street, where he has a plain and adequate remedy by appeal. *Sims v. Frankfort*, 79 Ind. 446.

But equity will intervene where the trespassing officer is not peculiarly responsible.

An insolvent road commissioner who has repeatedly removed fences from both sides of a field under a claim that the road enters and passes through the field, and who threatens to remove them as often as replaced, will be enjoined on the ground that there is not an adequate remedy at law where it is not proved that a road was ever located or existed at that point. *Owens v. Crossett*, 105 Ill. 354.

And corporate officers, although solvent, may be restrained from trespassing on private property and wrongfully removing a fence inclosing the grounds of a citizen under a claim that it constitutes an obstruction of the street. *Dudley v. Frankfort*, 127 L.R.A. (N.S.)

B. Mon. 610. The court observed: It seems that equitable interposition in this and similar cases would be peculiarly appropriate; because it appears from the evidence in this cause, if the trustees and their marshal are permitted to exercise the power and authority claimed by them to tear down inclosures, because they may form an *ex parte* decision that they obstruct the streets and alleys of the town, they may, upon the same pretext and upon the same reason and ground of authority, tear down the dwellings of the people, and valuable private edifices belonging to the citizens.

It is well settled that equity will intervene where the injuries threatened would be irreparable.

In *Wetherell v. Newington*, 54 Conn. 67, 5 Atl. 858, an injunction was granted on the ground of irreparable injury, to restrain the selectmen of a town from entering upon private property, cutting down ornamental trees, carrying away fences, digging up the ground, and appropriating a portion of the premises for a road, under an unfounded claim that the strip of land was a part of the public highway. The court observed: It is every day's practice to grant injunctions to restrain the commission of injuries to real estate in cases where the injuries would be irreparable if committed."

So, the use of a road the line of which is diverted by mistake from the true location is permissive, and the removal by a road overseer, as an obstruction, of a fence erected along it, may be enjoined. The threatened act involves a taking of the land for public use, and would inflict irreparable injury. *Rosenberger v. Miller*, 61 Mo. App. 422.

And in *Huffman v. Hall*, 102 Cal. 26, 36 Pac. 417, a road overseer was restrained from interfering with a fence claimed by him to obstruct a public road which, it was alleged, had become such by statute by reason of five years' user, where the owner had for more than ten years kept the premises inclosed with a good, substantial fence, thereby showing that any use of it by the public was permissive.

And fence commissioners who have properly taken within the stock-law fence the lands of owners adjoining the stock-law territory at the request of the latter, and have erected gates across the roads where their outside boundaries came, instead of where the boundaries of the stock-law territory would have crossed, are entitled to a restraining order until the hearing, to prevent the road supervisors from tearing down the gates, which it is alleged would result in irreparable injury to the crops in the stock-law territory. *Edwards v. Manning Twp.* 127 N. C. 62, 37 S. E. 73.

A city will be enjoined from destroying the fences of a lot owner and the fruit and ornamental trees and shrubbery upon the lot, which is occupied by him as a residence, where the pretense for so doing is an unfounded claim that the fences, trees, and shrubbery are within the limits of public streets. These threatened injuries would

if inflicted, be irreparable in the legal acceptance of that term. *Wilson v. Mineral Point*, 39 Wis. 160.

But equity will not interfere to prevent the threatened removal of a fence and storm door by city officers under a claim that they encroach upon a public street, where the threatened damages are trifling and can be easily compensated in money,—especially where the rights of the parties are doubtful and have not been determined at law. *Smith v. Oconomowoc*, 49 Wis. 694, 6 N. W. 329. This case discloses nothing but a threat on the part of the city under a claim of right, in order to protect its streets from illegal obstructions and encroachments, to do an act which, if not authorized, would be a trespass upon the plaintiff's realty resulting in but slight damages, and not in any way doing what in the law is termed an irreparable injury to his property. The preceding case may be distinguished on the ground that, although the damage threatened in that case might be compensated in money, yet it would involve a destruction of property which could not be restored to its former condition by the labor of man alone, nor with his labor aided by the forces of nature, except after the lapse of many years.

If the threatened injury would be permanent and continuing, equity will intervene.

Injunction is a proper remedy where a city or public officers, under an unfounded claim that a street exists at that point, enter a landowner's inclosure, tear down his fence, prevent him by force from repairing it, and deposit lumber upon the ground for the purpose of constructing a sidewalk across the premises, which would inflict a permanent and continuing injury. *Bryan v. East St. Louis*, 12 Ill. App. 390.

And one who has maintained his fences in the same place for over forty years is entitled, for the prevention of further mischief, to an injunction restraining township officers, who, in order to widen the highway, and under an unfounded claim of authority, have entered upon his property, removed a part of the fence, dug away the soil, and threatened to remove the buildings and fences, and cut down growing trees. *Winslow v. Nayson*, 113 Mass. 411.

But an injunction restraining borough authorities from removing as a nuisance a stone wall erected in front of plaintiff's premises should be dissolved where it appears that the wall encroaches upon the street, although its removal would damage plaintiff's property. *Walsh v. Olyphant*, 7 Pa. Co. Ct. 124.

The irreparable nature of the injury complained of must be shown.

An injunction to restrain highway commissioners from removing a fence which had been in the same place for more than twenty years, on the claim that it obstructs a highway, should not be granted in the absence of a showing of irreparable injury. *Taylor v. 7 L.R.A. (N.S.)*

Pearce, 71 Ill. App. 525, Reversed in 174 Ill. 9, 50 N. E. 1109, on another ground.

Nor will an injunction be issued to restrain the execution of an illegal order of the board of county commissioners directing the supervisor to remove all obstructions from a road, which, if complied with, will bring the road close to the dwelling house of the plaintiff and cut off his front yard, including part of his grapevines and flowers, where, although the supervisor has notified the plaintiff to remove all obstructions, it does not appear that, in obedience to such order, he is about to commit a trespass by tearing down the inclosure or digging up the grapevines and flowers for the purpose of opening the road, and that, if not restrained, his acts will result in the destruction of the estate in the character in which it has been enjoyed. *Weiss v. Jackson County*, 9 Or. 470.

But in Iowa an injunction will issue to restrain a supervisor of highways from removing a fence along the line of the highway which has been maintained for many years, pending a judicial settlement of the controversy. Relief in such cases is said not to be based upon the grounds of the irreparable character of the injury in opening plaintiff's inclosure and exposing to waste his crops, shrubs, and trees, nor upon the insolvency of the defendant, but upon a sound public policy which demands that, for the protection of both landowner and supervisor, the question of the legality of the supervisor's proposed act should be determined before the injury is done to the farm, or any liability incurred. *Bolton v. McShane*, 67 Iowa, 207, 25 N. W. 135.

Equity may intervene to prevent a multiplicity of suits.

Injunction is properly granted to restrain a road overseer from entering upon improved land under the direction of the town supervisors, and tearing down fences, cutting down trees, and doing other injuries to the land in accordance with their instructions to keep an alleged highway open at that point, where it has been adjudged that none existed of right, when, in the discharge of his supposed official duty to keep the alleged highway open, it is probable that he will continue to do whatever may be necessary to that end. *Chadbourne v. Zilsdorf*, 34 Minn. 43, 24 N. W. 308.

To prevent a multiplicity of suits, a road commissioner, who has repeatedly removed fences from both sides of a field under an unsubstantiated claim that the highway enters and passes through it, and who threatens to remove the fences as often as they are replaced, will be restrained by injunction. *Owens v. Crossett*, 105 Ill. 354.

So, a road overseer who has several times removed gates erected by a landowner to prevent travel over a portion of his premises on which no highway has been legally established may, to avoid a multiplicity of actions for damages, and perhaps breaches of the peace, be enjoined from taking down or removing the gates, where it appears that

the trespasses already committed will probably be repeated indefinitely. *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935.

But highway commissioners will not be restrained from removing, as an obstruction of the highway, a fence which had been in the same place for more than twenty years, on the ground of restraining a multiplicity of suits, where a mere repetition of the same trespass by the same person is sought to be avoided, and complainant's rights have not been established at law. *Taylor v. Pearce*, 71 Ill. App. 525, Reversed in 174 Ill. 9, 50 N. E. 1109, on another ground. The distinction between this and the three preceding cases is that in them the complainant's right had been established.

Equity will not, on the one hand, tolerate a continuing menace to the rights and property of a landowner; nor, on the other, uphold by injunction one who has wrongfully inclosed property over which the public has rights of way.

A municipal corporation which threatens, in pursuance of an invalid ordinance, to remove as an obstruction a fence placed by plaintiff in an alley, may be enjoined, since there is a continuing menace to the rights of the plaintiff, affording a basis for equitable relief. *Riley v. Greenwood*, 72 S. C. 90, 110 Am. St. Rep. 592, 51 S. E. 532.

But an action to enjoin city officers from removing a fence erected across a piece of ground claimed by the plaintiff as his property, but which the city officers allege is a public street, will be dismissed, although there has never been an acceptance by the city council of the dedication of the property to street purposes as required by statute in order to render the land a public street, where the dedication has become irrevocable, and the city can accept it at any time, and the public has rights of way over the premises of which plaintiff has wrongfully taken possession. *Brewer v. Pine Bluff* (Ark.) 97 S. W. 1034.

Injunction is an appropriate remedy to protect fences where their removal is threatened, on the ground that they obstruct a highway, by public officers who have not first condemned the property which they seek to appropriate to public use.

One who, after the discontinuance of a road, has inclosed his land and fenced in the road so as to shut off travel over it, and maintained such an obstruction for several years, is entitled to an injunction restraining the town authorities from reopening the road without first condemning the property according to law. In such case injunction is the proper mode of proceeding. *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8.

Where a public road has been laid out, worked, and used of the width of 40 feet, the rights of an adjacent landowner become fixed by that opening, working, and using, and he is entitled to enjoin the commissioners of highways from enlarging the width at a subsequent period, whereby valuable hedge fences will be swept away without compensation. *Highway Comrs. v. Harrison*, 108 7 L.R.A. (N.S.)

Ill. 398. The court said: This property could be taken only under some authorized mode of condemning private property for public use.

Adverse user and possession will not, alone, entitle a party to injunctive relief. Other grounds for equitable interference must exist.

An injunction to restrain city authorities from taking for street purposes a strip of land under a claim that it forms part of the street will not be granted at the suit of a lot owner who had improved his lot with reference to the line of the street as it had been recognized for twenty years, by the erection of a valuable fence which the municipal officers permitted to be erected without objection, where it appears that proceedings for the improvement of the street were duly had, and, on survey, the strip of land in question was ascertained to form part of the street as originally applied and dedicated. *Sims v. Frankfort*, 79 Ind. 446. The court observed: The plaintiff cannot, by such an improvement as shown, acquire title to a public street. Whatever may be the rule where it appears that great expenditures have been made and acts done for which compensation cannot readily be fully made, it is plain that where there has been a small expenditure of money for which full compensation can readily be made title cannot be acquired in a public highway by estoppel.

But in Illinois a city will be enjoined from changing the line of a sidewalk and removing fences as an alleged encroachment, so as to take in a part of the property of a lot owner, and lying within his inclosure, where the location of the street as originally made has been kept for more than forty years, and the city has accepted such location by many acts of recognition, such as building a culvert and graveling the walks. This was considered an appropriate case for injunctive relief by reason of the long possession of the complainant, and the positive acts of the city which were held to estop it from attempting to change the present location of the walk. *Joliet v. Werner*, 166 Ill. 34, 46 N. E. 780.

The last-cited case was followed in *Itasca v. Schroeder*, 182 Ill. 192, 55 N. E. 50, in which an injunction was granted to restrain village authorities engaged in changing the roadbed of a street from entering upon complainant's property under a claim that he had encroached upon the highway, from removing his fence, plowing up his land, and cutting his standing trees, where the street as located had been used for over forty years.

In New Jersey, however, an abutting owner is not entitled to injunctive relief against municipal authorities who, for the purpose of opening a street to its lawful width, are about to remove a fence and destroy a hedge of arbor vitae, and cut down evergreen and elm trees, where the street as claimed was legally laid out, and its boundaries are readily ascertainable by survey, although

the complainant has for thirty-seven years adversely occupied the premises. *Tainter v. Morristown*, 19 N. J. Eq. 46. The court said: The possession for over twenty years can avail the complainant nothing. It is well settled that time does not run against the state, or the public, by analogy to the statute of limitations against individuals, but only where the state or public are expressly included. This is a wise and wholesome principle that I feel no inclination to disregard or to narrow. To protect highways from encroachments that it is the business of one to resist requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated and erected improvements on the public domain, or to the more innocent purchasers from them.

In *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818, an injunction obtained by a lot owner to prevent municipal authorities from removing his fence was dissolved where it appeared that it constituted a nuisance by encroaching upon a dedicated street. It was held that such encroachment was not helped or aided by the lapse of time.

But where the true boundaries of a street are open to serious controversy the municipal authorities are not justified, for the purpose of widening the street, in removing as a public nuisance the fences of an abutting owner prior to an enactment of the proper ordinances sanctioning the improvement. *Cross v. Morristown*, 18 N. J. Eq. 305. The court said: By the law of this state the complainant cannot set up any claim, derived from a possession continued for over twenty years, to occupy any portion of the public street in question. But, as the true boundaries of this street are open to serious controversy, and as the possession of the complainant has been of such long continuance, it seems to me that the officers of the town, unauthorized to pursue such a course by any ordinance, would not be justified in entering upon the premises of the complainant and removing his fence as a public nuisance. If such was originally the intention of the town officers, the injunction in this respect was proper, and should now be continued.

And one who has for over thirty years been in the undisputed possession of land which has never been used as a street is entitled to an injunction restraining the municipal authorities, who have notified him to remove a fence thereon, and that it he does not do so within a specified time they will proceed to remove the same as an encroachment upon the street. *Shields v. Savannah*, 55 Ga. 150. In Georgia thirty years' possession is sufficient to give an occupant a perfect title to land; and equitable relief was granted on the ground that to exercise such an act of ownership over the property would cloud the complainant's title.

Equity will not intervene where the adverse occupancy falls short of the statutory period, or where it has never been adverse. 7 L.R.A. (N.S.)

A person who, in fencing his lot, unintentionally encroached on the street, is not entitled to an injunction restraining the municipal authorities from interfering with his fences, trees, and sidewalk, where he has not occupied the premises for a sufficient period to obtain title by adverse possession. *Wyman v. St. Johns*, 100 Mich. 571, 59 N. W. 241.

One who, in inclosing her lots with a fence, incloses an alley and remains in actual possession of the premises for the statutory limit of ten years, is not entitled to enjoin the municipal authorities from thereafter opening the alley, where her possession was not hostile or adverse, but she had led the authorities to believe that they would meet with no opposition from her in opening the alley whenever they might desire at a time when she would have no crop upon it. *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178.

One in possession will be protected by injunction from forcible entry until those disturbing his possession have established a right at law.

City officials who threaten, for the purpose of widening a street in conformity with a plat, to proceed summarily to pull down fences and remove buildings which have been in place for nearly thirty years, will be restrained from so doing until the city establishes its right at law, where the land in question has never been used as a street. *Devaux v. Detroit*, Harr. Ch. (Mich.) 98.

In *Sheldon v. Kalamazoo*, 24 Mich. 383, where the marshal of a village, in pursuance of an order of the village board, entered upon the premises of a property owner and threw down his fences on the claim that they occupied part of the street, the court said: Where a person has been in peaceable possession of lands under color and claim of right, it is not consistent with legal policy to allow him to be forcibly ejected without legal process. The courts have interfered to protect continued possession, by the writ of injunction, until the right should be tried at law. And we cannot believe that, under the power to pass ordinances to prevent encroachments and compel their removal, it was designed that corporations, any more than individuals, should violate the public peace.

So, where the plaintiff and those under whom he claims have been in the quiet and uninterrupted possession of a lot of land for twenty-five years and upwards, a city cannot, under pretense that the buildings or fences on such lot stand or encroach on a part of the public street or highway, enter upon or disturb the plaintiff in the enjoyment of the property. An injunction issued to restrain the city from entering upon, digging, throwing down, or destroying, the ground so possessed by the plaintiff, should be made perpetual until the corporation has established, by due course of law, its right to the ground in question. *Varick v. New York*, 4 Johns. Ch. 55.

If, after land has been surveyed, and before any streets have ever been opened up, a

citizen enters into adverse possession of the land, it must be recovered by the municipality in some of the ways known to the law before it can be opened up as a street.

Municipal authorities should be enjoined from removing a fence as an alleged encroachment on a street which has never been actually opened, worked, or used by the public, but exists only on a map of the town as originally laid out, and has been in private occupation for forty years, although the town owns in fee simple the land designated on the map as the place where the street is to be located. *Robins v. McGehee* (Ga.) 56 S. E. 461.

Nor will a court of equity permit public officers to remove fences where the fact of encroachment is not clear.

The threatened removal of a fence by a board of commissioners as an alleged encroachment upon the street will be restrained, where no resolution or ordinance has been passed directing the removal of the fence as an obstruction, and it does not appear that the board has taken any steps to ascertain whether the alleged encroachment in fact exists. *Doughty v. Somerville*, 33 N. J. Eq. 1.

A city will be enjoined from changing the line of a street which has been recognized and worked for thirty-five years, when the change involves great expense to the abutting property owners, changes in their property, and a destruction of shade trees and fences, where the evidence is not clear that the street as it exists substantially varies from the legally established line. *Delashmut v. Oskaloosa*, 94 Iowa, 722, Appx., 62 N. W. 16.

But the refusal of an interlocutory injunction to restrain road commissioners from removing or interfering with gates placed by a landowner across a way is not erroneous, or, at least, is not an abuse of discretion, where a public highway had once existed at that point, and the evidence as to its abandonment is conflicting. *Glaze v. Bogle*, 97 Ga. 340, 22 S. E. 969.

Nor is it an abuse of discretion to dissolve a temporary injunction restraining town officers, pending the action, from removing fences out of the *locus in quo* which they claim to be a public highway, where the evidence is conflicting. It requires a very clear case to justify the closing of an alleged highway by an injunction pending a suit to determine whether it is or is not a public highway. *Meyer v. Petersburg*, 96 Minn. 314, 104 N. W. 899.

(b) By private persons.

Where the legal remedy is adequate equity will not intervene.

That defendants have torn down plaintiff's fences or gate, under a claim that they obstructed a public highway, and have driven a team across his meadow, whereby the grass has been trampled down and destroyed, do not entitle him to injunctive relief, since the injury is susceptible of pecuniary compensation, for which the law affords a prompt, adequate, and complete remedy. *Smith v. Gardner*, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771.

A court of equity will not grant injunctive relief where the bill contains a charge of trespass by entering repeatedly upon the lands of the plaintiff and throwing down his fences under a claim that a highway existed at that point, so that stock of all kinds had access to the fields and destroyed the growing crops thereon, although that part of the plantation which is more immediately exposed is sown down in wheat for the purpose of raising food for the support of the plaintiff's family, and the loss of which, it is alleged, will subject him to great inconvenience and irreparable injury; since, where the defendant is able to respond in damages, the legal remedy is adequate. *Catching v. Terrell*, 10 Ga. 576. This case cites and follows that of *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484, referred to in II., a, supra. The court remarked: Believing, as we do, that the peculiar circumstances disclosed do not warrant, much less imperatively demand, the conservative remedy invoked, we cannot sustain the injunction. Suppose the plaintiff be prevented entirely from making a crop, the worst that can befall him, it is not pretended but that defendant is abundantly able to respond in money for this deprivation. Even if plaintiff were compelled to employ hands to watch the road fence continually, to put it up as fast as it is pulled down, the hire of these hands, together with smart money might be sufficiently secured by the verdict of a jury. Had it been stated that there was an orchard of fruit trees, or of mulberries for the feeding of the silk worm, which was exposed to the depredation of the stock let into this plantation by reason of the trespass complained of, our conclusion might have been different.

Parties will not be enjoined from breaking down fences erected at the end of an alley to prevent its use by them, under a claim that it is a common alley, where the title to the alley has not been determined at law. The plaintiff's remedy is an action at law. *Quinn's Appeal*, 9 Sadler (Pa.) 82, 11 Atl. 647.

To entitle a party to invoke the powers of a court of equity, he must show that the remedy at law is inadequate.

An injunction should be dissolved which restrains the defendant from taking down a fence and passing over land, although the plaintiff's title is not in dispute, where it is claimed that a public highway exists at that point, and neither insolvency of the defendant, nor irreparable injury not susceptible of complete pecuniary compensation, is shown. *Lazzell v. Garlow*, 44 W. Va. 466, 30 S. E. 171.

A lot owner who complains of the removal of posts erected by him across an alleged street running through his land, and the passing and repassing over the same of vehicles, is not entitled to injunctive relief in

the absence of an averment of irreparable injury, and when the defendant denies the allegation that she is insolvent, but avers that she has property amply sufficient to meet any damage which may be awarded against her. *Frink v. Stewart*, 94 N. C. 484.

But a grantor alleged to be insolvent, who repeatedly tears down a fence inclosing the land as described in a deed executed by him for the purpose of opening up a street, and begins to grade and plow the land for that purpose, claiming that a strip 30 feet wide for a road was reserved from the land sold, but not excepted in the conveyance by reason of mistake, will be restrained from further trespassing unless he gives bonds to pay all damages which the grantee may sustain, to be determined in an action therefor. *Rubsam v. Cobb*, 84 Ga. 552, 11 S. E. 138.

An injunction to restrain the removal by the defendant of a pair of bars opening into a lane, and which he claims obstruct a highway, whereby the plaintiff's fields are left unprotected and his cattle permitted to escape, will not be granted, although the defendant is insolvent, since the injury apprehended is not serious nor in its nature irreparable,—and especially where the main object of the suit is to settle the title. *Morgan v. Palmer*, 48 N. H. 336.

But the lawful owner in possession of land which he has cleared and inclosed and cultivated is entitled to injunctive relief against a trespasser who, falsely pretending there is a public highway over said land, has pulled out gate posts, cut the wire of the fence, passed over the land, and threatened to kill the complainant if he does not keep out of his way, and to cut down the fence every time it is repaired. *Stroup v. Chalcraft*, 52 Ill. App. 608. The court observed: A stronger case is seldom shown requiring the aid of a court of equity to prevent irreparable injury and a multiplicity of suits. It would be unjust to withhold equitable aid and compel complainant to prosecute repeated suits to recover damages for the threatened trespass. Irreparable injury authorizing the interference of a court of chancery by injunction need not always be such injury as is beyond the possibility of repairs, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and is of constant and frequent recurrence, so that no fair or reasonable redress can be had therefor in a court of law. The law may afford a remedy in a given case; but, if, as in this case, it is not an adequate remedy, equity will interfere, and in one proceeding, by its decree, grant full relief, and furnish a more complete and efficient remedy than the injured party could obtain by resort to vexatious and protracted litigation and prosecuting a multiplicity of suits at great expense.

And one whose fences have been repeatedly torn down and cut by another, claiming

that there is a public highway across the premises, and who threatens to continue to do so, is entitled to relief in equity by an injunction for the avoidance of a multiplicity of suits, regardless of whether the defendant is solvent or insolvent. *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235.

So, an injunction will lie to restrain the tearing down of a fence by private persons under a claim that it obstructs a highway, when it has been repeatedly done, and a repetition of the wrongful acts is threatened. *Shaffer v. Stull*, 32 Neb. 94, 48 N. W. 882. The court said that to require the plaintiff to bring an action at law every time the injury was repeated would not be an adequate remedy. He is entitled to relief in equity by injunction in order to prevent a multiplicity of suits.

Equity will entertain an action brought to stay by injunction the commission of repeated trespasses by the defendant in removing a fence upon the plaintiff's land, where the latter's title is undisputed, and the only question is upon the right of the defendant to commit the acts complained of under a claim that the land has been dedicated to highway purposes. *Carpenter v. Gwynn*, 35 Barb. 395.

But where the evidence as to the existence of the highway is irreconcilable and antagonistic, equity will not restrain defendants from destroying fences and trespassing upon the lands of the plaintiff under a claim that a highway exists at that place. *Smith v. Gardner*, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771.

One who has opened a private court to furnish access to his buildings and factories is entitled to enjoin its use by others who have forcibly destroyed a fence erected by him, and claimed the right to use the court for access to the rear of their factory with horses and wagons, on the ground that it is a public highway. In the absence of a substantial dispute as to the rights of the parties, injunctive relief may be granted without first requiring complainant's title to be established at law. *Robertson v. Meyer*, 50 N. J. Eq. 366, 45 Atl. 983.

But a threatened trespass will not be enjoined where the plaintiff fails to show title in himself to the property affected.

One who has made out, acknowledged, and filed a map of a town site by which streets and alleys designated thereon are dedicated to public use can no longer claim title to the strips of land so dedicated, and is not entitled to the aid of a court of equity to enjoin, from further trespassing upon the land, one who has proceeded to cut down and remove a hedge and wire fence which extended across one of the designated streets for the purpose of opening the road for travel; since the plaintiff is not threatened with anything but the loss of possession, to which he is not entitled. *Harden v. Metz*, 10 Kan. App. 341, 58 Pac. 281, Affirmed in 62 Kan. 867, 63 Pac. 1126.

A property owner will not be enjoined from maintaining a gate by means of which

he obtains access to an alley, at the suit of one who claims that he has no right to use the same as a passageway, where the plaintiff's right has not been established at law, or is not clear, or is questioned on every ground on which he puts it. *Kelly v. Long*, 7 Phila. 455.

It is not the province of a court of equity to protect an individual in the violation of law. One who erects a fence within the lines of a public highway is not entitled to an injunction restraining persons having a right to use the highway for the purposes or travel from tearing down and removing the fence. *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071.

3. Private road.

An injunction will issue to restrain one acting under the authority of a board of supervisors which made a void order establishing a private road over plaintiff's land from destroying fences and valuable fruit trees. Such a trespass constitutes an injury to the inheritance, and is clearly a matter for equitable interference. *Silva v. Garcia*, 65 Cal. 591, 4 Pac. 628.

But an injunction will not issue to restrain one acting under the authority of the board of supervisors of a county, who has entered upon the plaintiff's lands and laid out a private road, from tearing down fences obstructing the way, where no reasons are given why plaintiff has not an adequate remedy at law. *Leach v. Day*, 27 Cal. 643.

4. Private way.

As to injunctive relief to prevent the obstruction of private ways by fences or gates, see III., c. infra.

In *Washburn v. Miller*, 117 Mass. 376, an injunction to restrain one who had taken down the fence along a private way and committed various trespasses thereon was denied in the absence of an averment of irreparable damage, or of any facts indicating that damages would not adequately compensate the plaintiff, and when no suit at law had been brought by the plaintiff to establish his right to the way, but the defendant had brought an action against the plaintiff for interference with him in the use of the way.

And in *Hacker v. Barton*, 84 Ill. 313, a bill, although alleging that defendants have committed trespasses and removed the inclosure of the plaintiff's lot, thereby inflicting irreparable mischief, was dismissed, but without prejudice, so that the plaintiff might assert his rights at law, where the defendants claimed the right to use a private way over the lot which it was alleged the plaintiff wrongfully inclosed, and the evidence was conflicting.

But an injunction restraining one who has destroyed a portion of a fence inclosing a lot, and who threatens to destroy it as often

as it is rebuilt, should be granted in order that the issue as to the private way may be determined by a jury, where the defendant claims a right of way over the property, which is denied by the plaintiffs, and the evidence is conflicting. *English v. Jones*, 108 Ga. 123, 34 S. E. 122.

Injunction to compel closing of gates.

In an action by a railroad company to enjoin the owner of a farm intersected by a railroad from leaving open the gates of a private railway crossing, the court held that the defendant should be required to keep the gates closed at all times except when the crossing was being actually used in good faith by persons who were passing over it or driving stock over it, where stock on the farm would otherwise have free access to the crossing. *Truesdale v. Jensen*, 91 Iowa, 312, 59 N. W. 47. The reason for the decision is thus stated: The stock frequently stops on the crossing and interferes with the running of trains. Serious accidents have been threatened from that cause, and barely avoided on several occasions. While to permit the gates to remain open, and thus to allow his stock to have an unobstructed passageway from his yards to the fields and from the fields to water would save him some care and labor, yet the interests jeopardized by such a course are so great that we think it should not be permitted.

And a railway company is entitled to an injunction restraining a property owner from destroying, injuring, or leaving open gates erected at a farm crossing over the company's track. The company need not wait until it has suffered great injury before attempting to vindicate its right. *Axthelm v. Chicago, R. I. & P. R. Co.* 2 Neb. (Unof.) 444, 89 N. W. 313. The court, in its opinion, refers to the preceding case, and says: The company need not wait until it has suffered great injury before attempting to vindicate its right. It is held in *Truesdale v. Jensen*, supra, that it is sufficient that it is charged that defendant persisted in leaving the gates open. The company and defendant are joint occupiers of the premises, and jointly in charge of the gates, and the use of the writ of injunction to prevent a wrongful use by the defendant, in view of the important interests concerned, seems eminently proper. The claim of error in this particular cannot be sustained.

The owner of a lot subject to a right of way, but who has the right to maintain gates at the points of ingress and egress, is entitled to an injunction restraining the use of the right of way except on condition that the party using the way properly and securely closes and fastens the gates immediately after passing through them, where an intention is shown to continue the injurious acts. *Mendelson v. McCabe*, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915. The court said the right to injunctive relief is not defeated by the mere absence of substantial damage, but may be based upon the invasion

of the right to maintain the gates and the necessity of an injunction to prevent a total destruction of the right, since the acts of plaintiff in leaving the gates open, if persisted in for a sufficient length of time, would ripen into a right by prescription.

In *Brandis v. Grissom*, 26 Ind. App. 661, 60 N. E. 455, an injunction was granted restraining one from leaving open, during certain months of the year, gates erected across a right of way, and who threatened to continue the acts complained of.

So, one entitled to maintain gates at the points of ingress and egress to a private way may, for the purpose of preventing a multiplicity of actions, enjoin its use except on condition that the gates be securely closed and fastened immediately after passing through them. *Mendelson v. McCabe*, supra. The court said: The only remedy, other than that of an injunction, for the injury arising from such continued trespass, would be an action against the person using the way for damages upon each occasion when he left the gates open. The damages in each case would be very small, probably insufficient to defray the expenses of maintaining the action, not recoverable as costs. Such remedy is inadequate, and would require numerous petty suits, which it is not the policy of the law to encourage.

In *Bean v. Coleman*, 44 N. H. 539, a suit to enjoin one having a right of way reserved in general terms over land from leaving open gates, the court intimated that it was incumbent on the defendant to keep the gate on the dividing line between the land of the parties shut, except when passing through it, as much as it was his duty to keep the remainder of his half of the fence in repair; that his having a right of way over the plaintiff's land would not justify him in leaving this gate open except when he was passing through it, any more than it would in leaving any other part of his fence down; that this gate was there like any other part of the division fence in all respects, except that the defendant might open it and pass through as he had occasion, into the path on the plaintiff's lands, without becoming a trespasser, as he would be if he opened any other part of the plaintiff's fence and passed through there: but an injunction was refused to compel him to close, between August 1 and December 1, a gate erected by plaintiff across the right of way, where the right to maintain it was disputed, and had not been established at law, and when no irreparable damage or mischief was threatened.

e. Extent or form of relief.

See also III., e, *infra*.

An injunction may issue to compel the restoration of fences or hedges.

In *Bidwell v. Holden*, 63 L. F. N. S. 104, a lessee, who had filled in ditches and broken down a hedge which the lessor was under obligation to maintain, was directed by mandatory injunction to restore and replace the ditches, with their banks and hedges.
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And, on the dissolution of an injunction restraining interference with plaintiff's possession of disputed lands, and from building a fence inclosing them, where he has, pending the suit, torn down fences previously erected by the defendant, and erected another inclosing such lands with other land of his own, he should be required to restore things to the same condition, as nearly as possible, as they were when the order for the injunction was made. *Lake Shore & M. S. R. Co. v. Taylor*, 134 Ill. 603, 25 N. E. 588. The court said: To allow one party to obtain any advantage by acting when the hands of the adverse party are thus tied by the writ or the order for it is an abuse of legal process which cannot be tolerated. It is immaterial in whom is the legal title, or whether, when appellant built its fence, it was a trespasser or lawfully in possession.

But a mandatory injunction to compel the restoration of a fence should be refused where its effect would be to give a party an undue advantage. Thus, a preliminary injunction against interference by the authorities of a city with the possession by a railroad company of a wharf claimed to be part of a public street cannot require such authorities to replace the tracks which they have torn up, and restore a fence torn down by them, where the effect of such restoration will be to give the railroad company an exclusive possession which it did not have at the commencement of the suit. The sole object of an interlocutory injunction is to preserve the subject of controversy in the condition in which it is when the order is made. If it takes, or permits the taking, from a defendant anything he has, it would anticipate and forejudge the merits of the controversy, and transcend the purpose of a preliminary injunction. It would exert, as was said in *Murdock's Case*, 2 Bland, Ch. 469, 20 Am. Dec. 381, *infra*, before final hearing, the remedial as well as conservative powers of the court. *Southern P. R. Co. v. Oakland*, 58 Fed. 50.

The only function of a preliminary injunction is to stay threatened action and suspend the conflicting claims of the respective parties until they can be properly adjudicated.

Hence, in *Murdock's Case*, 2 Bland, Ch. 469, 20 Am. Dec. 381, where an injunction prohibiting a trespasser from continuing the erecting of a fence upon plaintiff's land, and enjoining him to remove the fence already erected, was asked, the court refused to require, by preliminary injunction, the removal of that part of the fence which had been built. The court said: We are asked by the plaintiff at once to put forth in his behalf the remedial as well as the conservative powers of this court. To order a defendant to pull down or remove any erection would be obviously and directly to deprive him of a portion of that which then, at least, appeared to be his property, and was so claimed by him; and that, too, at once and without a hearing; for a house, a fence, or the like has a value, as such, which

would be totally destroyed by its being pulled down, and which does not belong to the materials of which it was composed, however carefully they may be preserved. The only object of the conservative power of the court, as expressed in an injunction of this kind, is not to determine any controverted right, but merely to prevent a threatened wrong, or any further perpetration of injury, or the doing of any act thereafter whereby the right to a thing may be embarrassed, or endangered, or whereby its value may be materially lessened, or the thing itself may be totally lost. The principal object of an injunction, in cases of this kind, is to prevent irreparable injury by preserving things in their present state; but, if the injunction were to order anything to be pulled down or undone, it is obvious that it might be itself used as a means of producing that very kind of irreparable injury to the defendant which the bill charged him with being about to perpetrate against the plaintiff.

One from whom a railroad company had purchased land for the erection of a depot, but who had never executed a deed of the property, and claims that the purchase price has never been paid, and who is in possession, should not, until the question of title is adjudicated, be permanently enjoined from interfering with or interrupting the company in the full and free enjoyment of the use and possession of the premises, nor should the writ confer upon the latter the right to remove fences now or hereafter placed on the premises by the vendor, who had erected a fence inclosing the land in dispute. The office of an injunction, under the Code, is merely to restrain, and not to compel the performance of an act. *Beacham v. Wrightsville & T. R. Co.* 125 Ga. 362, 54 S. E. 157.

In an action under the "burnt records act" to determine in whom the title to lands is vested, the court, for the purpose of preserving the property in tact, may, by preliminary injunction, restrain the building of houses and fences on the lands in controversy. *Harding v. Fuller*, 40 Ill. App. 643.

A preliminary injunction will not lie to redress an injury already done by a removal of a boundary fence and hydrant, or the erection of a wall. *Whitman v. Shoemaker*, 2 Pearson (Pa.) 320. The reason for the decision is thus expressed: An injunction will not lie to redress an injury already done. The office of a preliminary injunction is to restrain. It is not mandatory in its character, and cannot command things to be undone which have already been done and completed. It will, therefore, not enable the court to order the fence and hydrant to be restored, or the wall, if wrongfully erected, to be pulled down. It can restrain all further acts of injury from being committed.

A preliminary injunction restraining a person from building a fence inclosing a strip of land as to which the title is in dispute is improvidently granted, where the fence had been built before the bill was 7 L.R.A. (N.S.)

filled; and the writ should be dissolved on the hearing. *Lake Shore & M. S. R. Co. v. Taylor*, 134 Ill. 503, 25 N. E. 588.

Where a fence had been pulled down before the filing of a bill, an injunction should not issue. *Shell v. Kemmerer*, 13 Phila. 502.

A suit in equity to restrain wrongful interference with the plaintiff's use of her estate cannot be maintained for past trespasses, which consisted in part in the removal of a fence from an alleged right of way. *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700.

So, an injunction will not issue against one who has broken the plaintiff's inclosure, seized his crops, torn down his buildings, and permitted his cattle to run upon the place, where the acts have already been done, and the damages have been incurred and are ascertainable. *Ewing v. Rourke*, 14 Or. 514, 13 Pac. 483.

But that one who entered upon premises in the peaceable possession of another had inclosed a portion of the lot with a fence and turned thereon a number of hogs before the injunction restraining him was actually issued does not render the remedy unavailing, since no one can found possession on a tortious trespass alone; nor can anyone acquire a right by the commission of a wrong. *Carter v. Warner*, 2 Neb. (Unof.) 688, 89 N. W. 747.

In a proper case chancery will award a perpetual, instead of a preliminary, injunction.

A city which seeks without right to take possession of the inclosure of a lot owner for the purpose of making it a part of the street need not merely be enjoined until the rights of the parties can be settled at law, but chancery, having acquired jurisdiction, may properly administer relief by perpetually enjoining the acts complained of. *Peoria v. Johnston*, 56 Ill. 45.

And a road overseer acting under an order of the county court, invalid for failure to comply with the statutory requirements as to the assessment and tender of damages, is properly perpetually enjoined from entering upon land for the purpose of laying out a public road, and from tearing down fences, destroying fruit and ornamental trees, where it is too late to assess damages in the proceeding so as to give validity to the action of the county court. *Carpenter v. Grisham*, 59 Mo. 247.

But to entitle a party to relief it must be prayed for.

A temporary injunction cannot be granted to restrain a tenant in possession of a house and dooryard from interfering with the crops, fences, or buildings upon the adjoining farming lands, where the only relief prayed is for the possession of the house and yard, since a temporary injunction cannot be granted to restrain the doing of acts in relation to property, in respect to which acts or property no final judgment is prayed. *Hulce v. Thompson*, 8 How. Pr. 475.

III. Injunctive relief on ground of nuisance.

a. Introductory.

Injunctive relief was earlier accorded to restrain a nuisance than to prevent a trespass; perhaps because in the former case the injury is often of a public character, aggravated in its nature, and continuous in its harmful results. Lord Chancellor Eldon said, in *Hanson v. Gardiner*, 7 Ves. Jr. 306: "I remember when, in a case of trespass, unless it grew to a nuisance, an injunction would have been refused."

This ancient jurisdiction of courts of chancery to enjoin and abate nuisances is exercised upon grounds similar to those upon which relief is afforded in cases of trespass. In fact, a nuisance is but an aggravated and continuous trespass, although it may arise from an act permissible in itself, but which inflicts consequential injury upon another, while in trespass "the infringement of property rights is direct and the injury immediate." The underlying principle governing equitable relief in cases of nuisance is that the injury must be of such a nature that the party cannot have an adequate remedy at law. It is afforded where the injury would otherwise be irreparable, and to prevent a multiplicity of suits, or to suppress interminable and vexatious litigation. It is thus apparent that the jurisdiction of courts of equity over the subject of nuisances is not an original jurisdiction. It does not arise from the mere fact that a nuisance exists, but results from circumstances which call the jurisdiction into exercise upon other grounds.

The power was formerly exercised very sparingly and only in extreme cases,—at least until after the right and question of nuisance had been first settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that, to entitle a party to equitable relief before resorting to a court of law, his case must be clear, so as to be free from all substantial doubt as to his right to relief. In doubtful cases the party will be turned over to his legal remedy.

b. Obstruction of highways, streets, or alleys.

1. In general.

As to injunction by municipality against maintenance of building, fences, or other structures as a nuisance, see note to *Drew v. Geneva*, 42 L.R.A. 882.

The powers of a court of equity may be invoked to enjoin as a nuisance the maintenance of fences obstructing public streets or common ways.

In *Hoole v. Atty. Gen.* 22 Ala. 190, which was a bill filed by the attorney general to enjoin and abate an alleged public nuisance, consisting of a fence obstructing a public street or road, the court said: Any 7 L.R.A. (N.S.)

obstruction of a public road or highway, which renders its passage less commodious, is a nuisance; and, whatever doubts may formerly have existed as to the powers of a court of chancery to enjoin and abate a public nuisance, the jurisdiction of that court for this purpose is at the present day well settled.

The erection of a wire fence in the middle of a street which has been dedicated and accepted as a street of a borough constitutes a purpresture, the maintenance of which equity will restrain. *Lansdowne v. McEwen*, 7 Del. Co. Rep. 311.

An obstruction of a street for the length of 85 feet and the width of 5 feet by a stone wall surrounded by an iron railing and inclosing an areaway to a basement is a purpresture which is a public nuisance *per se*, beyond the power of municipal authorities to license without express authority; and an injunction to prevent the continuance or creation of the nuisance may be granted at the suit of the proper officers. *Smith v. McDowell*, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141.

The construction of a fence upon a public street is a public nuisance which might probably be restrained by a court of chancery. *Langdale v. Bonton*, 12 Ind. 467. The court adds: But, as the point is not made, we shall not elaborate it.

In *Marengo v. Great Northern R. Co.* 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117, it is intimated that a railroad company would have no right to obstruct, with fences, avenues crossing its tracks which have been platted, but not opened; and that, if it did, it might be restrained by injunction.

It is well settled that a fence erected across a street is a public nuisance, although constructed by one claiming title to the soil, and its maintenance will be enjoined by a court of chancery. *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408.

An injunction is the proper remedy to compel the removal of a fence obstructing a common way or passage, so as to prevent the petitioner from having any ingress to or egress from the buildings on the passage, on which his property fronts; and the court has power to order the obstruction to be removed and the way opened before a hearing upon the merits. *McDonogh v. Calloway*, 7 Rob. (La.) 444. The court said: "It is notorious . . . that there are many small streets for public use, and alleys or passages common to the proprietors or occupants of many adjoining tenements, and that the use of such ways or passages is indispensable to the enjoyment of the houses and tenements; and can it, with any propriety, be said that a single person may, at pleasure, stop up such a street or alley, and prevent the people from getting in or out of their houses, and that a court has no power to order the obstructions to be removed or the way opened until a trial can be had at the end of a year or more, upon the merits of the case? The law has not

left parties remediless in such cases, nor the courts powerless for the correction of such evils."

The unlawful nature of the threatened obstruction should be shown.

An injunction to restrain as a nuisance the threatened obstruction of a public highway by the erection of a fence therein should not be granted in the absence of an allegation that the proposed obstruction would be in violation of law. *Ett v. Snyder*, 5 Ohio Dec. Reprint, 523.

Therefore, a property owner will not be required to remove fences erected along the line of a highway existing by prescription or dedication, where it is not shown that the fence which was complained of as an encroachment was not wholly on the lands of the defendant and outside the boundaries of the highway. Existing or threatened obstruction of easements will be restrained with much favor where the fact of the existence of the obstruction or the right of the complainant is undoubted. *Wakeman v. Wilbur*, 21 N. Y. S. R. 556, 4 N. Y. Supp. 938.

A decree enjoining the fencing of a street cannot be upheld in the absence of any evidence tending to show that the defendants have obstructed, or threatened to obstruct, the street. *McLemore v. McNeley*, 56 Mo. App. 556.

The alleged obstruction of an alley by a fence will not be enjoined where the evidence as to the fact of obstruction is contradictory, because a court of equity does not grant injunctive relief except in a very plain case. *Carlin v. Wolff*, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441.

One who has not been compensated for lands taken in laying out a road leading to a ferry is not entitled to obstruct the road with a fence, but should resort to legal means to have it vacated; and he may be enjoined from maintaining the obstruction. *Draper v. Mackey*, 35 Ark. 497.

But the aid of equity must be sought within a reasonable time. Delay for almost thirty years to complain of the obstruction of a street by fences will deprive an abutting owner of injunctive relief. The doors of equity are closed against a suitor where laches has been so long continued. *Cox's Appeal*, 11 W. N. C. 571, Affirming 10 W. N. C. 552.

Equitable intervention to relieve against the obstruction of a road or alley is often influenced by the prior conduct of the parties.

That one entitled to the use of an alley made no objection to the erection of a massive stone wall which obstructs it does not estop him from thereafter maintaining a suit in equity to compel the removal of the obstruction; since the doctrine of estoppel does not apply to an act of encroachment on land the title to which is equally well known, or equally open to the notice of both parties. *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 689.

One who has obstructed a road with a

fence is not thereby estopped from maintaining an action to enjoin another person from obstructing the road by building fences across it, where the portion cut off by plaintiff had been permitted to fall into such a condition that it could not be used, and the traveled portion of the highway could be used. Here the elements necessary to constitute an estoppel were lacking. It was not shown that defendant in any manner altered his condition, or acquired any rights, by virtue of the obstructing of the road by plaintiff. *Miller v. Schenck*, 78 Iowa, 372, 43 N. W. 225.

Nor does the fact that the complainant had himself made a considerable encroachment on an alley estop him from maintaining a suit to enjoin its obstruction by another by the erection of a building and a massive stone wall. *Schaidt v. Blaul*, supra. The court said: The complainant is answerable for whatever injury he may have done under the defendant's rights of property, but we cannot hold that an encroachment made by him will forfeit his easement, or take away any of his means of redress for an interference with it.

But one maintaining a fence which obstructs a highway is not entitled to invoke the jurisdiction of a court of equity to restrain another person from obstructing the highway with a fence. *Brutsche v. Bowers*, 122 Iowa, 226, 97 N. W. 1076. The court said: He is also maintaining a fence on the north side of the highway, which he claims defendants are obstructing on the south side. This being true, he is in no position to complain. He comes into court with unclean hands, and is not entitled to invoke the jurisdiction of a court of equity.

The closing of a private alley will not be enjoined where the complainant forcibly destroyed a fence which the defendant had erected for the purpose of closing the alley while in peaceable possession of the premises, whether such possession was lawful or unlawful. Equity will not interfere to assist a party who has obtained possession by force. *DeSale v. Millard*, 108 Mich. 581, 66 N. W. 481.

An injunction is a proper remedy to prevent the closing of a highway against abutting owners who had no notice of the proceedings by the supervisors to vacate it. *Moffitt v. Brainard*, 92 Iowa, 122, 26 L.R.A. 521, 60 N. W. 226.

2. Special interest or damage.

The obstruction of a public highway by fences or gates is a public nuisance of which a private individual cannot complain, unless he has thereby sustained some private, direct, and material damage beyond that suffered by the public at large. A court of equity will not interfere to prevent a public nuisance, or to abate one already existing, at the instance of a private party unless he shows a special injury distinct from the public, actually sustained or justly apprehended. Private persons accustomed to use

highways are interested, as well as the public, in the prevention and removal of obstructions. The remedy by injunction is perfect, and, while it protects one from the injury, all are alike benefited without the expense, delay, and multiplicity of actions incident to redress at common law; and, where the facts are easy of ascertainment, and the rights resulting therefrom free from difficulty, equity will grant relief at the suit of a citizen having an immediate interest therein.

To entitle a private individual to invoke the interposition of a court of equity to restrain a public nuisance arising from a threatened obstruction of a public highway by a fence, he must show special damages apprehended or sustained peculiar to himself and distinct from those suffered by the public at large. *Ett v. Snyder*, 5 Ohio Dec. Reprint, 523.

Equity will afford relief to one specially injured by the erection of gates and fences across a highway, by directing and requiring their removal and enjoining their continuance. Such obstructions are public nuisances, and will be abated and enjoined by courts of equity at the suit of a party aggrieved thereby. *Hougham v. Harvey*, 33 Iowa, 203.

A bill to enjoin the obstruction of a street by a fence may be maintained by an abutting property owner who is specially injured thereby. Where there is a special trust in favor of an adjoining property holder, or a special injury, a suit may be maintained by an individual in respect to a public street or highway. *Earll v. Chicago*, 136 Ill. 277, 26 N. E. 370.

So, an owner and occupant of lands adjoining a public highway, the free use of which is necessary to the enjoyment and use of the property, is entitled to injunctive relief to prevent an obstruction of the road by fences and gates, where the facts are easy of ascertainment and his rights resulting therefrom are free from difficulty. *Green v. Oakes*, 17 Ill. 249.

An owner of real estate abutting on a street or alley, who sustains a special injury not common to the public generally from the threatened obstruction of the street or alley by a building, may maintain an action to enjoin the threatened obstruction and to compel the removal of a fence placed across the street or alley; but he cannot avail himself of merely public rights. *Mondle v. Toledo Plow Co.* 6 Ohio N. P. 294.

So, a lot owner may enjoin one who maintains fences and hedges within the lines of streets, as dedicated by their common predecessors in title, in which the plaintiff has an easement and of the existence and width of which the defendant had constructive notice, where the plaintiff demanded the removal of the obstructions as soon as he learned they encroached on the streets, which was not until nine years after their erection; nor should relief be denied him because, as an act of neighborly courtesy, he aided in setting out another hedge on the same line. 7 L.R.A. (N.S.)

The right being clear, the remedy in equity by injunction is the proper one for its enforcement. *Wickham v. Twaddell*, 25 Pa. Super. Ct. 188.

And a bill will lie to enjoin the erection of a gate across an alley in which the plaintiff has a right of way, where his right is clear. *Ensign v. Lyon*, 1 Lack. Jur. 102, as cited in *Pepper & Lewis's Digest*, Injunction, col. 14, 206.

Where the remedy by injunction is sought for an injury to an individual, and not a public right, by reason of the inclosure of a public highway, it is necessary that the right to raise the obstruction should not be in controversy or should have been settled at law, otherwise an injunction is not the appropriate remedy. Until the rights of the parties are settled by a trial at law, a temporary injunction only is issued to prevent an irredeemable injury. *Irwin v. Dixon*, 9 How. 10, 13 L. ed. 25.

But an individual claiming under the public right is not entitled to enjoin the obstruction of a public highway by a fence, unless he has suffered some private, direct, and material damage beyond the public at large. *Ibid.*

One who will suffer no special injury distinct from that sustained by the public generally is not entitled to enjoin the fencing up of streets by public authority. *Prince v. McCoy*, 40 Iowa, 533.

One who has occasion to use a highway in common with the public generally is not entitled to maintain a suit to enjoin its obstruction by a fence, where the injury which he thereby sustains is not peculiar, and does not differ in any respect from that suffered by the public generally, except in degree only. *Currier v. Davis*, 68 N. H. 596, 41 Atl. 239.

Special or peculiar damages, differing not merely in degree, but in kind, from those which are deemed common to all, must be suffered in order to give a private party a right of action to enjoin as a public nuisance the obstruction of an alleged highway by a fence. *Mahler v. Brumder*, 92 Wis. 477, 31 L.R.A. 695, 66 N. W. 502.

A lot owner is not entitled to enjoin the maintenance of fences across the street, where the injury suffered by him does not differ in kind from that which the public have suffered. *Cox's Appeal*, 11 W. N. C. 571, Affirming 10 W. N. C. 552.

But an action to enjoin the obstruction of a highway by a fence may be maintained by one whose land abuts on the obstructed highway, although the obstruction injures others in like manner and degree so long as he suffers peculiar injury which does not embarrass the public in general. *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249.

So, an abutting owner can enjoin the occupation of a street by a steam railroad company, and the erection of a fence or wall lengthwise therein, to the practical exclusion of the public from so much of the street as is so occupied, when no compensation to the owner has been ascertained or made, al-

though the company is acting under the authority of a municipal ordinance. Equity will prevent the threatened appropriation of property without compensation until the right to make entry has been perfected by a full compliance with the Constitution and the laws. *Pennsylvania Co. v. Bond*, 99 Ill. App. 535.

The obstruction, by a fence, of a public road leading to a ferry, is a public nuisance and an injury to the owner of the ferry specially; and his right to an injunction against the continuance of such a nuisance is unquestionable. *Draper v. Mackey*, 35 Ark. 497.

But one who has occasion to pass over a highway more frequently than others does not sustain special damage peculiar to himself, beyond that of the general public, entitling him to injunctive relief, from the fact that fences which have been built in the highway caused the snow to drift into the road more than it would otherwise have done, delaying his passage over it and requiring him to shovel it out. *Wakeman v. Wilbur*, 21 N. Y. S. R. 556, 4 N. Y. Supp. 938.

So, the inconvenience resulting to a physician in visiting his patients, from the obstruction of a public road by fences, is not a special injury differing from that which every citizen suffers whose business or pleasure may call him to travel the road. It is of the same character, only perhaps different in degree from that which others suffer who have other business and live far away. This will not sustain his right of action to enjoin the obstruction. *Wellborn v. Davies*, 40 Ark. 83.

In an action to enjoin the fencing up of a street lying between complainant's property and a dock, an averment that the obstruction works great injury, and is a manifest violation of the obligations of the defendant, is insufficient, unless the facts stated in the bill show the truth of the averments. Use of the complainant's property and the wharf should be alleged, and that such use has been interfered with. *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668.

An owner of land abutting upon a highway sustains such a peculiar injury from the closing up of the highway by a fence as entitles him to maintain an action to enjoin its obstruction, where he is thereby practically deprived of all access to his premises. *Dyche v. Weichselbaum*, 9 Kan. App. 360, 58 Pac. 126.

One having a right of way over the lands of another by prescription, which way is necessary to ingress to and egress from his land, has a private easement in the public highway, and may maintain an action to enjoin its obstruction by fences or gates. *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799.

So, the owner of land abutting upon a highway which furnishes almost the only way available for entering and leaving his premises has such a special interest therein as entitles him to maintain an action to enjoin an obstruction of the road by a fence. 7 L.R.A. (N.S.)

Miller v. Schenck, 78 Iowa, 372. 43 N. W. 225.

A person sustains a special injury, not suffered by the public, and may maintain a suit to enjoin the obstruction of a public highway, by the construction of wire fences across it, where it constitutes his only means of access to the premises in one direction. *Hayden v. Stewart*, 71 Kan. 11, 80 Pac. 43.

And an owner of land abutting on a street which he uses as a means of access to his property has a special interest in the street, which he may protect by a suit to enjoin as a nuisance its obstruction by a fence and gate. *Smith v. Union Switch & Signal Co.* 31 Pittsb. L. J. N. S. 21.

A person owning real estate abutting upon a highway may maintain an action to enjoin the obstruction of the highway immediately in front of his real estate, even if the obstruction is not upon his property, if it materially impairs or interrupts his access thereto. *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249.

While a county may abandon the road as a public road, and no longer work it, it cannot deprive the abutting owners of their right of ingress and egress afforded thereby. This is a private right which cannot be taken from them without compensation. They may maintain an action to enjoin the obstruction of the road by a fence, although their lands do not abut upon the road at the exact point where the obstruction occurs, when they are thereby deprived of their rightful ingress and egress. *Hill v. Hoffman* (Tenn. Ch. App.) 58 S. W. 929.

Although a person who suffers special damage from the erection and maintenance of a public nuisance consisting of a stone fence or wall, which obstructs his access to the highway, is entitled to injunctive relief if it appears that the injury is distinct from that suffered by the general public, yet relief will not be granted where the damage complained of is the obstruction of a passage way leading from the house to the street, where but a few rods distant there exists another way equally available and in daily use. *Sargent v. George*, 56 Vt. 627.

An abutting owner whose deed describes his property as fronting on a specified street has a property interest in the street entitling him to restrain by injunction its obstruction by a fence, provided he suffers some special and peculiar damage from the obstruction, not experienced in common with other citizens. But, where the street has never been laid off, and the fence is only 9 feet over on the street, and the complainant has no building on her lot, and it is not shown that the right of access is interfered with, there is not a sufficient showing of special damage. *Perkins v. Ross* (Tenn. Ch. App.) 42 S. W. 58.

So, a private person cannot maintain an action to enjoin the obstruction of a public road or street which is a cul-de-sac, by a fence between his property and the end of the road, merely because he purchased his

premises with reference to a plat which indicated the existence of such a road. Special or peculiar damages differing not merely in degree, but in kind, from those common to all, are not shown. *Mahler v. Brumder*, 92 Wis. 477, 31 L.R.A. 695, 66 N. W. 502.

But an abutting property owner prevented from using an alley as a means of egress from and ingress to his premises by reason of its obstruction at both ends by fences thereby suffers special and peculiar injury, and is entitled to an injunction restraining the maintenance of the fences. *Harniss v. Bulpitt*, 1 Cal. App. 140, 81 Pac. 1022.

So, the owner of land abutting upon a street or alley, one end of which is obstructed by gates so that he cannot have egress from his property to other streets in that direction, suffers an injury peculiar to himself by reason of the public nuisance, and is entitled to an injunction compelling the removal of the gates, although they were erected by permission of the city council, which acted in excess of its authority. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288.

One whose ingress to a public road leading to his market town is cut off by the erection of two wire fences across the road for the purpose of obstructing it, and who is the only member of the traveling public completely and exclusively cut off thereby, sustains special damage different from that suffered by the general public, and is entitled to maintain a bill to enjoin the maintenance of the obstruction. *Cabbell v. Williams*, 127 Ala. 320, 28 So. 405.

And one suffers an injury distinct from the public in consequence of the erection of fences across a public highway at a point between two separate tracts of lands which he owns, whereby the road leading to a mill operated by him is obstructed, and which compels him to go by a longer and worse road to the nearest market town, and hinders him in getting his stock to and from pasture, and in passing between his lands; and he is entitled to equitable relief by way of injunction. *Ewell v. Greenwood*, 26 Iowa, 377. The court remarked: Suppose every morning he should find a fence across a public highway leading to his mill, placed there by defendant with the malicious design of injuring him, Would anyone doubt his right to a remedy? Certainly not, and yet that would scarcely be a more patent, flagrant case than the one before us.

Private individuals whose lands abut upon a public road may resort to equity to restrain as a nuisance its obstruction by a wire fence, and by felling timbers across it, where they sustain peculiar injury in that the obstruction compels them to go 2 or 3 miles farther to reach the mill which they patronize and the city on which they depend. *Hill v. Hoffman* (Tenn. Ch. App.) 58 S. W. 929.

In *Hougham v. Harvey*, 33 Iowa, 204, the special injury sustained by the plaintiff, distinct from that suffered by the public, because of the obstruction of a highway,

was that it was the only passable route, at times, from his home to the city and to his timber; and the court held, upon demurrer to the complaint, that the facts stated a case of injury distinct from the public, as a consequence of a public nuisance, and that the plaintiff was entitled to an injunction.

But one accustomed to use a public highway leading to the schoolhouse of the district, and to the store at which he is accustomed to trade, is not entitled to an injunction restraining the obstruction of the road by fences, where it is not apparent that his farm adjoins such road, or that his only means of access to the school or store are over it. *Luhra v. Sturtevant*, 10 Or. 170. In this case and the following one relief was denied because, in the opinion of the court, the facts stated and specifications of injury made did not show that the plaintiff had suffered any special or peculiar injury not common to the public at large.

A private person cannot enjoin the obstruction of a public highway by the building of a fence across it, without showing a special injury to himself not common to the public. It is not sufficient that the highway is his usual, convenient, and necessary route of travel from his house to his market town and usual place of business; that the injury to him is greater in degree than that to others does not entitle him to the relief sought. The court stated that, if the bill had been filed by someone whose lands bordered on the road, and facts had been averred showing an injury to the lands of the plaintiff by reason of the nuisance, then undoubtedly a remedy would have been afforded. *McCowan v. Whitesides*, 31 Ind. 235.

The owner of property the vendibility and value of which will be impaired by the fencing up of streets suffers such injury as will entitle him to injunctive relief. *Prince v. McCoy*, 40 Iowa, 533.

The erection of a fence in the public highway in front of plaintiff's real estate, whereby the annual rental value of the property as well as its market value is impaired, inflicts a peculiar and particular injury upon him different in kind from that which is suffered by the community in general, and entitles him to injunctive relief. *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249.

In an action to restrain the obstruction, by a fence, of an alleged public road, special injury entitling plaintiff to maintain his suit for an injunction is shown by evidence that the closing of the road would injure the salable value of the plaintiff's farm at least \$10 per acre, or about \$1,400 in all, and that it would prevent the securing of as desirable tenants for the property as could otherwise be obtained. *Evans v. Scott* (Tex. Civ. App.) 97 S. W. 116.

But diminution of the market value of his property does not entitle a landowner to enjoin the obstruction, by fences, of roads convenient to him, but which have been actually vacated by the county court, or aban-

doned owing to a change in the population, business, and necessities of the community at large. *Wellborn v. Davies*, 40 Ark. 83.

Nor should injunctive relief be granted to prevent the obstruction of a street by buildings and inclosures, although the complainants alleged that the obstructions caused special, peculiar, and irreparable injury to them by impairing the value and enjoyment of their property, where no facts are averred to show that the allegation is well founded, and, according to the proof, the damage to complainant's property is trivial, and such as might be readily ascertained and compensated in an action at law. *Fort v. Groves*, 29 Md. 193.

In *Van Wagenen v. Cooney*, 45 N. J. Eq. 24, 16 Atl. 689, injunctive relief was denied one who complained that the owner of property on the opposite side of a cul-de-sac, which was a public highway, had extended his fence line so as to include about 4 feet of the public highway, and otherwise obstructed it with a stable and with carts and wagons, on the ground that the complainant did not suffer serious special damage, and that he could obtain full and ample redress at law, where the complainant's lots are unimproved, and it does not appear but that he may have access to them by some other way than through the cul-de-sac, or that there is any present necessity for reaching the lots.

The fencing up by public authorities of streets which have not been and cannot be used for the purpose of their dedication cannot be enjoined by a property owner who will not be injured in the free use and enjoyment of his property by their inclosure,—especially where it is proposed to keep them inclosed only to such time as they may be put in condition for use. *Prince v. McCoy*, 40 Iowa, 533. If we regard the proposed inclosure of the streets as in conflict with the abstract right of the plaintiff and the public, yet equity, recognizing that no loss, no damage, to plaintiff can be sustained by the act, will refuse the relief. The act cannot be called a nuisance, for it works an injury to no one. It cannot, indeed, be considered an obstruction to a public highway, for the highway has only an ideal existence. In short, it is an act that injures no one, and no mischief, public or private, is wrought thereby. In such a case chancery will not interfere.

The threatened obstruction of an alleged street or highway by the erection of a fence and building therein will not be restrained by injunction, unless the existence of the right to the use of the highway as such is admitted, or the right is clear or easy of ascertainment, and free from all reasonable doubt, and the obstruction of it seriously affects the value and substance of the individual's estate. *Walt v. Foster*, 12 Or. 247, 7 Pac. 24.

But when the right of the public to the use of a highway is clear, and the obstruction of it seriously affects the value and substance of an individual's estate, or, in 7 L.R.A. (N.S.)

short, he suffers an injury distinct from the public as a consequence of such obstruction, there is no doubt but that equity will afford relief and abate the nuisance. *Luhrs v. Sturtevant*, 10 Or. 170.

Persons who have cared for a burial ground and kept it in repair, and whose deceased relatives have been buried therein, sustain a special and peculiar injury where the street leading to the cemetery is obstructed with gates and fences, and they may maintain an action to enjoin the obstruction. *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914.

And one who purchases land abutting on a public road which has for seventy-five years been open and in use, and so remains for many years thereafter, has the right, as a member of the public and an adjoining landowner, to maintain a suit to prevent the obstruction of the road by a wire fence, where it was in general use as the main thoroughfare between two neighborhoods and led to an old established graveyard. *Burkitt v. Battle* (Tenn. Ch. App.) 59 S. W. 429.

But the fencing up of a highway which has been replaced by another road will not be enjoined on the ground that it affords access to a public cemetery in which members of the families of the plaintiffs are buried. This does not constitute such a personal or peculiar injury as entitles them to maintain the suit. *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689. The court said: They have not sustained injury that is special or peculiar to them, or different in kind from that sustained by the rest of the community. It is not a case where the obstruction deprives parties of necessary access to or egress from property.

A town has such an interest in a public highway as will entitle it to maintain an action in equity to prevent its obstruction by felling trees and building fences. *Neshkoro v. Nest*, 85 Wis. 126, 55 N. W. 176.

The liability of a town to pay damages in case a person is injured by reason of the erection of a fence across a public highway is a sufficient interest to enable it to appear as plaintiff in a complaint in equity to prevent the threatened obstruction. *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571.

Equity will not refuse relief where the injury would be irreparable.

One entitled to the use of an alley in the conduct of his business may enjoin its obstruction by the erection of a building and a massive stone wall, since the obstruction destroys his estate in the character in which it is enjoyed. *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 689.

In an action to enjoin the closing of an alley, which the complainant alleges that the defendant threatens to close up by a gate or other structure, and that, if he does so, it will result greatly to his injury; and the defendant alleges that at the time of selling the land to plaintiff there was simply an enclosed strip of land which was sold

without regard to the alley. the complainant being expressly notified that the strip was defendant's private property.—the granting of an injunction until the facts can be passed upon by a jury is not an abuse of discretion. *Hugnes v. McIntosh*, 83 Ga. 431, 9 S. E. 1110.

One entitled by grant to the use of an alleyway, and who is not estopped from asserting his right, and has not lost it by non-user, may maintain an action to prevent the maintenance, across the entrance of the alley, of a gate which is kept locked with the intent thereby to exclude him from the enjoyment of the easement. The plaintiff was held not deprived of his right to invoke equitable interference by opening the gate himself as long as his title to the enjoyment of this part of the alleyway was disputed and resisted by the defendant, who, in his testimony, stated that he would exclude from the use of the alley all persons not acting under his authority or license. *Welsh v. Taylor*, 50 Hun, 137, 2 N. Y. Supp. 815.

3. Injury must be irreparable.

Where a right to a public highway is alleged to be violated by the erection of a fence, and a remedy is sought through an injunction, it will not be issued at the instance of either a public officer or a private individual, unless there is danger of great, continued, and irreparable injury. *Irwin v. Dixon*, 9 How. 10, 13 L. ed. 25. The court said: This form of remedy was one much questioned, as permissible either to the public or an individual. in the case of a public right of this kind involved. And when at last deemed allowable it was only where the community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated on account of its great, continued, and irreparable injury; and it was then used as a sort of preventive remedy to a multiplicity of suits, and in cases where an action at law would yield too tardy and imperfect redress. When, however, delay can safely be tolerated, the usual remedy in such cases, by or in behalf of the public, is an indictment rather than an injunction.

In *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571, it is remarked: Were the way merely a private one thus wrongfully fenced in and threatened, we think our courts would not hesitate to enforce the remedy on the ground of preventing a recurring grievance and multiplicity of suits. But its being a public way and the act a public nuisance make the case, in our judgment, vastly stronger; many people are exposed to great annoyance and injury, and may have occasion to bring many suits. Moreover, the act complained of is one that denies the existence and defeats all the purposes of a public highway. Consequently the injury to the highway as such may well be termed irreparable. All remedies other than by injunction would be tardy, uncertain, and imperfect; that would be speedy, complete, and every way effective.

tain, and imperfect; that would be speedy, complete, and every way effective.

A sale of property described in the conveyance as bounded by a designated street implies necessarily a covenant that the purchaser shall have the use of the street, and, in case of its obstruction by fences, he is entitled to injunctive relief on the ground that the trespass works irreparable mischief which destroys the substance and value of his estate in the character in which it is enjoyed. *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668.

But a property owner whose access to a turnpike is obstructed by the maintenance of a fence in front of his land is not entitled to enjoin its maintenance, although it might be removed without endangering the lives, limbs, or property of travelers upon the turnpike, where it does not appear that the injury complained of is irreparable, or that the remedy at law is inadequate. *Frankford & B. Turnp. Co.'s Appeal*, 11 W. N. C. 184.

So, one whose carriage way running diagonally from his premises to the highway intersects the traveled portion of the road opposite the land of another abutting landowner and upon the same side of the highway is not entitled to enjoin its obstruction by the erection of a stone wall or fence by the adjacent proprietor and within the limits of the highway, but in such a manner as not to interfere with any travel except along the carriage way, where the one maintaining the carriage way has another, although less convenient, means of egress from his premises to the highway. Injunctive relief should be granted only in case of necessity, where other remedies may be inadequate, and to redress substantial and serious, rather than technical or fanciful, injuries. *Sargent v. George*, 56 Vt. 627.

The maintenance of a fence across a highway will not be enjoined where it is not shown that the plaintiffs or the public suffer irreparable damage by reason of the existence of the fence in the highway, or that there is such danger of mischief on that account as to bring the case within any rule of equity jurisdiction before the establishment of the plaintiffs' right in a suit at law. It not appearing that the remedy at law is inadequate, equitable relief must be denied. *Newcastle v. Haywood*, 67 N. H. 178, 37 Atl. 1040.

The fact that the fence obstructing a highway is of a temporary character which might be easily removed by a traveler is not a sufficient ground for refusing injunctive relief. *Burlington v. Schwarzman*, supra.

But the erection across an alleged highway of a wall of stone and timber temporary in character and easily removed, and not likely to produce irreparable injury, will not be enjoined where the alleged road was never opened throughout its entire length, and at the place in question was opened many years after the view by private persons, and the road has been disputed many

years. *Bunnell's Appeal*, 69 Pa. 59. In the preceding case the obstruction of the public highway, although by a fence easily removable, was considered an irreparable injury to the highway, as such, while in this case the injunction was temporarily refused until after a trial at law of the disputed facts.

An injunction to restrain the building of a fence across a road will not be granted where the nuisance will not cause an irreparable injury to an individual, such as no damage would compensate; and certainly not until the right has been determined at law. *Lining v. Geddes*, 1 McCord, Eq. 304, 16 Am. Dec. 606.

A city whose right to the user and control of streets is clear may maintain a bill to restrain the inclosure of the streets by private individuals, where the element of irreparable mischief appears and damages at law will be inadequate to redress the injury, and the nuisance is of a continuing nature and presents something of the feature of perpetual injury. If the right of the city is not clear it may be required first to test and settle its right at law. *Briel v. Natchez*, 48 Miss. 423.

In *Montana Twp. v. Ruark*, 39 Kan. 109, 18 Pac. 61, it was held that a township trustee could not maintain an action in the name of the township to enjoin a road overseer from obstructing the highway or from preventing the removal of the obstructions, where the apparent object of the litigation is to determine the legality of the road; since, for the settlement of that question, there is a plain and adequate remedy at law.

But the right of a purchaser of land to have a street kept open as against his grantor may be determined in a suit for an injunction to remove a fence and wall placed therein by the latter, and their removal decreed. *White v. Tide Water Oil Co.* 50 N. J. Eq. 1, 25 Atl. 199. The court observes: If the way be permanently obstructed by the fence and wall in question, the complainant will be without adequate remedy at law. He may repeatedly, by successive suits, recover damages, because of the continuance of the nuisance; but such recoveries will not necessarily suffice to secure him the enjoyment of his right. Incidentally to the award of that relief, the complainant's legal right must, and properly will, be determined and declared in this court.

The mere fact that there is a remedy at law by indictment or action will not, alone, preclude the exercise of the power of chancery to prevent the obstruction of highways; but it is a reason why the jurisdiction should be confined to cases of a very plain character, while the injury is irreparable and cannot await the slow progress of a legal redress. *Bunnell's Appeal*, supra.

That one who obstructs a public road by the erection of fences across it may be prosecuted criminally and the nuisance abated does not afford an adequate remedy at law precluding injunctive relief, since a 7 L.R.A. (N.S.)

repetition of the injury could not be prevented in such a proceeding. *Cabbell v. Williams*, 127 Ala. 320, 28 So. 405.

And a similar ruling was made with reference to indictment and punishment, or a penalty or forfeiture which may be recovered in a civil action, in *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249.

So in *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571.

But where a remedy is provided by statute equity will not interfere.

A suit in equity cannot be maintained by commissioners of highways to compel a property owner to remove so much of a fence as she has replaced, to its former position, and which it is claimed obstructs a highway, or from replacing the rest of the fence, since the statute prescribes the method of procedure on their part in case of encroachment. *Rozell v. Andrews*, 103 N. Y. 150, 8 N. E. 513.

Nor is one accustomed to use a road entitled to maintain a suit to enjoin the maintenance of a fence which it is alleged causes the snow in winter time to drift into the road more than it otherwise would, but he should avail himself of the statutory remedy, which provides a simple, speedy, and inexpensive mode of proceeding to remove obstructions on public highways. *Wakeman v. Wilbur*, 21 N. Y. S. R. 556, 4 N. Y. Supp. 939.

A bill in equity to remove a fence as an encroachment on a highway will not lie in the absence of special circumstances, as an adequate legal remedy is provided by How. Stat. (Mich.) §§ 1371, 1378, authorizing encroachments to be removed by the town commissioner of highways. This remedy, the court said, was devised for the very purpose; made obligatory in terms and better adapted to do justice. *Lebanon Twp. v. Burch*, 78 Mich. 641, 44 N. W. 148.

In an earlier case, one who had for over twenty years used a road which had been recognized as such by the landowners through whose property it ran was held entitled to maintain a bill to prevent its obstruction with fences whether it be a public or a private way. *Nye v. Clark*, 55 Mich. 599, 22 N. W. 57. The court said: No action of damages could give adequate redress to a party who is hemmed in so as to have no peaceable egress from his own farm. The suggestion that he may relieve himself by taking down the fences whenever he wishes to go through does not commend itself to our judgment as likely to secure convenience, or to subserve the public peace.

A bill in equity does not lie in Maine to obtain the removal of fences from a public way or a private way. The statutes of the state provide a full, plain, adequate, and complete remedy for such a wrong by an action at law. Such obstructions are a nuisance, and any person injured thereby in his comfort, property, or the enjoyment of his estate may not only maintain an action against the offender to recover his damages, but he may, in the same action, obtain a

warrant for the abatement or removal of the nuisance, unless the defendant will undertake and enter into a recognizance with surety, to abate or remove it himself. *Davis v. Weymouth*, 80 Me. 307, 14 Atl. 199.

But the fact that a town council have been invested by the legislature with power to abate nuisances within the limits of a corporation does not, without an express provision to that effect, deprive chancery of its jurisdiction to enjoin a public nuisance consisting of a fence obstructing a public street or road. *Hoole v. Atty. Gen.* 22 Ala. 190.

Right to relief does not depend upon the pecuniary responsibility of those creating the obstruction.

An action in equity to enjoin the obstruction of a street by a fence is an appropriate remedy, although there is no averment of the insolvency of the defendants. *Ellison v. Louisville*, 17 Ky. L. Rep. 593, 31 S. W. 723.

The mere fact that it is difficult to determine the damages sustained by lot owners from an intrusion upon the streets is one of the reasons for exercising equitable jurisdiction.

It is no defense to a suit by a property owner to enjoin another from maintaining hedges and fences which encroach upon a public street dedicated by their common predecessors in title, and in which the plaintiff had an easement, that the streets were left of sufficient width to meet the present requirements of public travel in that vicinity, and that property had not been depreciated in value because of the obstruction. *Wickham v. Twaddell*, 25 Pa. Super. Ct. 188.

4. Benefit; balance of inconveniences.

An obstruction of an alleged highway by fences will not be restrained by injunction where the easement, if there is one, is of no practical value to the public or to the complainant, owing to the nature of the ground over which the road runs and the impracticability of making it passable without the expenditure of money largely in excess of any benefit that could be derived from the use of the easement. Equity will not do that which will be of no benefit to the party asking it and only a hardship upon the party coerced; or, as the maxim contained in the old books is, the law does not require anyone to do vain and useless things. *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513, *Affirming* 28 Ill. App. 28.

Equity will not enjoin the fencing up of an alleged highway, where its interference would inflict only injury or damage on the defendant without securing any substantial right or benefit to the plaintiff. *Mahler v. Brumder*, 92 Wis. 477, 31 L.R.A. 695, 66 N. W. 502.

The purchaser of a lot who receives a deed referring to a plat which shows that the premises front on a designated avenue is entitled to enjoin an obstruction of the avenue by a fence or gate; but he is not entitled to a decree ordering the removal of

fences across other avenues delineated on the plat, where it does not appear that he has occasion, or is ever likely to have occasion, to use them, while it would oblige those erecting them to incur a great deal of additional trouble and expense. In such circumstances the plaintiff should be left to his remedy at law. *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639.

A purchaser of land along a portion of the front of which a fence obstructing access to a turnpike has been maintained for over sixty years by a turnpike company is not entitled to enjoin its maintenance as a nuisance where the injury complained of may be compensated in damages, and the balance of inconveniences would preponderate in favor of the defendant. *Frankford & B. Turnp. Co.'s Appeal*, 11 W. N. C. 184.

c. Obstruction of private roads or ways.

1. In general.

Injunction is a proper remedy to prevent the maintenance of a gate which wrongfully obstructs a private way. *Flaherty v. Fleming* (W. Va.) 3 L.R.A.(N.S.) 461, 52 S. E. 857.

And injunction is a proper remedy to prevent the obstruction of a passway by fences or gates.

The maintenance of a rail fence in a straight line along a passway which is of the stipulated width of 16 feet, and the course of which is so crooked that the fence is less than 8 feet from the center of the passway in places, will be enjoined although the available width of the way is 16 feet, since the owner of the easement is entitled to use the old traveled way. *Calvert v. Weddle*, 19 Ky. L. Rep. 1883, 44 S. W. 648.

One who attempts to close, by a fence, a lane which for many years has been maintained along the line between his lands and those of an adjoining owner, and in so doing extends the fencing for from 10 to 20 feet on the land of the latter, will be enjoined from so doing. *Grant v. Crow*, 47 Iowa, 632. The court said: We know of no statutory authority giving the defendant a right to erect and maintain a fence on the plaintiff's land, and certainly none such existed at common law. The erection of such fence is a trespass, which may be enjoined.

So, injunctive relief to prevent the obstruction of a private way by a fence is warranted, where the structure is erected upon ground formerly occupied by a stone wall the center of which formed the northerly boundary of the land of the defendant, who placed the posts of the new fence north of the center line of the old wall. *Dewire v. Hanley* (Conn.) 65 Atl. 573.

A bill to restrain defendant from maintaining a fence across a private way leading from the plaintiff's land, which had been conveyed to him by the defendant, to a highway, shows a continuing interference with the plaintiff's right of passage, and pre-

sents a case for equitable relief. An action at law would not prove as practical and efficient a remedy, and is therefore not adequate. *Driscoll v. Smith*, 184 Mass. 221, 68 N. E. 210.

And, under a statute specifically prohibiting the erection of a barbed-wire fence along the line of a right of way without the consent of both parties to the fence, the court may properly enjoin the maintenance of such a structure along the line of the easement. In this case the defendant admitted the erection of the fence, but denied that it was a nuisance or interfered with plaintiff's right of way. *McKinney v. Thompson*, 27 Ky. L. Rep. 733, 86 S. W. 543.

But equity will not enjoin the maintenance of fences or gates across a right of way, unless they constitute an unreasonable burden precluding its fair enjoyment. *

The owner of pasture land will not be required to remove gates erected by him across the right of way, where they are necessary for his enjoyment of the land over which the way passes, and do not constitute an unreasonable interference with the right of way. *Watson v. Hoke*, 73 S. C. 361, 53 S. E. 537. The court said: The owner of the servient estate in farm lands does not lose the right to inclose his land for agricultural purposes by reason of taking it subject to a private right of way; nor is it his duty to run fences on both sides for the entire length of the way as laid out. He may inclose his lands, using gates, provided they are necessary for the enjoyment of his property and are not so numerous or of such a size and construction as to constitute an unreasonable burden on the right of way.

One entitled to a right of way to his wood lots over the land of another cannot enjoin the maintenance across it of fences built with stakes, with rails to slip between them like bars, or of a "slip gate" so constructed that the rails can be taken out and turned around, affording passage. He cannot require that the way be left open, or that swinging gates be left in the fence. The court observed: The easement granted is a right of passage without defining the manner of its enjoyment with or without bars or gates over the agricultural lands of the defendant. Nothing passes as an incident to such a grant, but what is requisite to its fair enjoyment. That must be the reasonable and usual enjoyment and user of such a privilege. *Bakeman v. Talbot*, 31 N. Y. 366, 38 Am. Dec. 275.

Likewise, the grantee of a right of way may be enjoined from obstructing it to prevent the grantor or his assigns from passing over it, where such right is not inconsistent with the right of passage granted. The court intimated, however, that, if the grantor undertook to exercise this right in such a manner as substantially to impair or abridge the right of way of the grantee, or to annoy her in the use of her right of way, she would be entitled to the same remedy against him which he now invokes against

her. *Campbell v. Kuhlmann*, 39 Mo. App. 632.

One who has enjoyed continuously, uninterruptedly, and adversely a right of way in another's lands for more than thirty years has a right of way by prescription, to prevent the obstruction of which an injunction is the proper remedy. *Sheeks v. Erwin*, 130 Ind. 31, 29 N. E. 11.

And one who has acquired a right of way by prescription is entitled to enjoin its obstruction by a gate which hinders his lawful use and enjoyment of the easement. A right of way thus acquired is commensurate with and measured by the use, and within such limits the owner of the land has no right to obstruct it. *Shivers v. Shivers*, 32 N. J. Eq. 578, Affirmed in 35 N. J. Eq. 562.

But an injunction to restrain one through whose farm a road existed, from building fences across it with gates which he kept locked, is properly refused where it is not shown that the complainants had a legal right to use the road as a private way, either by prescription or otherwise, or that the road has ever been established by the proper authority as a public road, or that it had ever been worked or recognized by the public authorities of the county as a public road, so as to give the complainants a prescriptive right to use it. *Clements v. Logan*, 44 Ga. 30.

And an injunction to compel the removal of a fence obstructing a road running through the farm of the defendant, and to the use of which the complainant, who owns the adjacent farm, claims a prescriptive right, should not be granted, where the right is disputed and is not determined at law, and the plaintiff has another reasonable outlet from his farm to a public highway with the apparent right to the use of the same. *Gulick v. Fisher*, 92 Md. 353, 49 Atl. 375.

So, the obstruction of a road will not be enjoined where it was never dedicated nor accepted as a highway, and has for years been barred by gates or other obstructions, to be opened and closed by parties passing over the land, and when the plaintiff has a good road leading through his own lands to the county road, but which causes him 2 miles additional travel to market. *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746.

The court has jurisdiction to decree injunctive relief where an equity based on indisputable rights is asserted.

The purchaser at private or judicial sale of property on which a continuous and apparent easement or servitude has been imposed by a former owner for the benefit of other lands, in the absence of an express reservation or agreement, takes the property subject to the easement or servitude, and will be enjoined from obstructing it by fences, where the rights of the party claiming the easement are admitted in the pleadings. *Hunter v. Wilcox*, 23 Pa. Co. Ct. 191.

But an injunction to compel the removal of fences erected across a private way will not be decreed where the right of way claimed is doubtful. This would be suffi-

cient reason for refusing relief until the right is established at law. *King v. McCully*, 38 Pa. 76.

One who has obstructed a road for the purpose of diverting public travel to his own ferry, and causing it to pass around the ferry and toll gate of another, is not entitled to enjoin such other person from obstructing, with a fence, a public road from which he had constructed a way leading to his ferry, where such way had not been established by law, and the result of the obstruction was to straighten and improve it. *Hill v. Averett*, 27 Ala. 484. The court remarked: We will not say there is no case where the chancellor can remove an impediment or obstruction in a private way which is not established by law. We confine our opinion to the case before us as disclosed by the record.

It is a well-settled rule of equity that, where an easement or servitude is annexed to a private estate, the due enjoyment of it will be protected by injunction against encroachment or invasion.

A purchaser of an inner lot with a dwelling house thereon is entitled to a right of way by necessity over a road theretofore established by his grantor, and which constitutes the only means of communication by carriage from the dwelling to the public thoroughfares of the city; and his enjoyment of the easement will be protected by injunction until the hearing of the case, where the defendant has obstructed the way with a fence. *Wheeler v. Gilsey*, 35 How. Pr. 139.

Injunction preventing the permanent obstruction of, or interference with, a way established by contract, is a proper mode of enforcing the agreement.

Where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement for the benefit of the abutting lands of each and the common benefit of all, and, in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced in equity, at the suit of a purchaser from one of such proprietors, against a purchaser with notice from another. *Shields v. Titus*, 46 Ohio St. 544, 22 N. E. 717.

A railroad company which has obstructed, with fences placed on either side of its tracks, a footway which crosses the railroad on the level, will be enjoined from maintaining the obstruction at the suit of one entitled to a private right of way at that point by contract, where it proceeds under an act of parliament declaring the footway to be extinguished, but providing no compensation therefor; since the legislature evidently intended to deal with the road only as a public footway. *Wells v. London T. & S. R. Co.* L. R. 5 Ch. Div. 126, 37 L. T. N. S. 302.
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2. Adequacy of remedy at law.

Injunction will lie to prevent the obstruction of a private way by a fence, on the ground that the party has no adequate remedy at law. *Newell v. Sasa*, 142 Ill. 104, 31 N. E. 176; *Dewire v. Hanley* (Conn.) 65 Atl. 573.

An injunction lies in favor of one entitled to the free and uninterrupted use as a way of a strip of land sought to be dedicated as such by his grantor, and which has become an appurtenant of the plaintiff's premises, to restrain a successor in interest of such grantor from permanently closing the same with fences and other obstructions. An action for damages for obstructing the way and thus impairing its usefulness as appurtenant of the plaintiff's premises would not supply an adequate remedy, since all that he could recover in an action at law would be the damages sustained up to the time of the commencement of the action, and the right of way would still remain obstructed. *Haight v. Littlefield*, 71 Hun, 285, 54 N. Y. S. R. 733, 24 N. Y. Supp. 1097.

So, one having the right to the use of a passageway 8 feet wide throughout its entire length is entitled to injunctive relief against one who has obstructed the passageway by making excavations therein and placing stone steps leading to his land, and has erected barriers near these openings, which structures are of a permanent and continuous character. An action at law would not give the plaintiff an equally adequate and complete remedy. *Nash v. New England Mut. L. Ins. Co.* 127 Mass. 91.

In *Cook v. Ferbert*, 145 Mo. 462, 46 S. W. 947, a licensee for an indefinite time of the right to use a strip as a passageway, and who, in consideration of the privilege, erected a fence along the way, was refused relief by injunction to prevent the licensor from obstructing the way with a fence and gate which he kept locked. But the court intimated that, if the fee to the land used as a roadway had been purchased, any interference with its use by fencing or putting a gate across it would have been an injury without adequate remedy at law, and for which injunction would be a proper remedy.

One whose free use of a private road through gates which he has constructed is wrongfully obstructed by posts and wires is entitled to injunctive relief under Mo. Rev. Stat. 1899, § 3649, providing that the remedy of injunction shall exist in all cases where an irreparable injury to real property is threatened, and to prevent the doing of any legal wrong whatever, whenever an adequate remedy cannot be afforded by an action for damages. *Downing v. Corcoran*, 112 Mo. App. 645, 87 S. W. 114.

But in Washington it has been held that the obstruction of a way used by one landowner to reach certain portions of his farm, by an adjoining landowner who had removed the division fence between them, over onto the former's land, and withheld possession

of so much thereof as was thus inclosed, will not be restrained, since there is a remedy at law, under Wash. Terr. Code, chap. 46, for the recovery of interest in real property. *Meeker v. Gilbert*, 3 Wash. Terr. 369, 19 Pac. 18.

An injunction will lie to prevent the obstruction of a private way with gates on the ground that there is no adequate remedy at law, where the case of the complainant is clearly established by the evidence. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486.

An action will lie by the owner of the right of way across another's land to compel the reopening and refencing of the right of way and the removal of obstructions therefrom, by which it was entirely inclosed without the establishment of the easement in an action at law, if its existence is clearly shown. An action for damages is not an adequate remedy. *Mänbeck v. Jones*, 190 Pa. 171, 42 Atl. 536.

But an injunction restraining a grantor, who contends that the cleared portion of a lot was included in the deed by mistake, from obstructing complainant's right of way by fences, and from refusing to allow a right of way over it, to and from a slate quarry on part of the tract, will not be granted at the suit of one claiming under the grantee, until the dispute as to the title to the land is settled by a jury. *Georgia Slate Co. v. Davitte*, 79 Ga. 627, 4 S. E. 873.

One entitled to use a road or way across the premises of another, and which the latter has obstructed, is entitled to equitable relief on the grounds that an estimation of the damages sustained would be difficult, that a denial of the right would be productive of many actions, and because the obstruction is a continuing injury. *Longendyck v. Anderson*, 59 How. Pr. 1.

So, one entitled under a covenant in a deed to the use of a private road leading from his premises to a public highway may enjoin encroachment upon it by fences and other structures, since his remedy would not be complete at law without a multiplicity of actions. *Gawtry v. Leland*, 40 N. J. Eq. 323.

And an action may be brought in equity to maintain a right of way against the encroachments of several persons having distinct interests, who have obstructed it by fences, where the establishment of plaintiff's right at law would require separate suits against the different adjoining owners with a verdict in his favor in all the suits, and a substantial agreement upon the lines of location. *Stockwell v. Fitzgerald*, 70 Vt. 468, 41 Atl. 504.

Injunction is an appropriate remedy to restrain the locking of a gate at the end of an alley which plaintiff has the right to use as an outlet from his premises to the street. *Downing v. Dinwiddie*, 132 Mo. 92, 33 S. W. 470, Rehearing denied in 132 Mo. 101, 33 S. W. 575. The court said: The right to use a passageway affording the only exit to the public highway from out-buildings of a town lot is a species of property the inter-

ference with which is very difficult, if not impossible, adequately to compensate or measure by pecuniary damages. The continued exercise of the right to use a passageway is an important and valuable convenience incident to the ownership of property used for residence purposes.

One whose private right of way acquired by prescription and furnishing the only means of egress from his home to the highway and to the mill, market, and church, is obstructed by the erection of gates which are kept locked, is entitled to an injunction restraining the obstruction of the way and requiring the gates to be unlocked. This is the only plain, adequate, and complete remedy. *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020.

An injunction is the proper remedy to prevent the locking and chaining of a gate constructed across a right of way of necessity. *Jay v. Michael*, 92 Md. 198, 48 Atl. 61. This decision follows the succeeding case of *Shipley v. Caples*, 17 Md. 179, and may be distinguished from *Amelung v. Seekamp*, 9 Gill & J. 468, *infra*, on the ground that there the bill did not aver that the way obstructed was the only way of the plaintiff, while in this case it is charged that the way obstructed is the only means of access, and that the plaintiff's property will be permanently injured and its value destroyed.

One entitled to use a road over the land of another, and which he and those under whom he claims have been accustomed to use from time immemorial, is entitled, on the ground of irreparable injury, to an injunction restraining the fencing up of the road, which is his only outlet to his market town, except by a circuitous and inconvenient route over the lands and by the permission of persons who might at any time withhold such permission. *Shipley v. Caples*, *supra*. The court said: If the party were put to a different form of action, it is difficult to perceive a clear rule for the measure of damages. It is said that the cost of procuring a private road under the law would furnish a standard, but, conceding that principle, if the complainant has a right to the present road it would be unjust to place him in a predicament where he might be obliged to take such other as the commissioners, in their discretion, might think proper to locate for his use. That would not allow him compensation for the injury, but change his rights altogether. If he is entitled to the use of this road, the law will not allow another person so to act as to deprive him of it, and compel him to resort to another.

But an injunction should not issue to restrain the obstruction and inclosure of a private road leading to the mills of the plaintiff, although it is averred that great and irreparable damage will accrue to him, where it is not charged that he has no other reasonably convenient outlet from his mills, or that the obstruction will drive away a valuable portion of his customers, and no facts are stated to show that his apprehen-

sion of damage is well founded,—especially where he has stood by and permitted the defendant to inclose the land affected by the way in question, and to cultivate and improve it for four years. *Amelung v. Seekamp*, supra. Said the court: The bill, so far from exhibiting a case where the continuance of the outrage complained of would work great and irremediable damage, shows one which warrants the inference that the loss or injury resulting would be trivial, and susceptible of adequate compensation in damages at law.

It has been held in Kentucky that, while a court of equity can interpose in behalf of a person whose right to the use of a pass-way already in existence has been obstructed, it has no jurisdiction in a case where the establishment of a pass-way is claimed on the mere ground of necessity. The reason for the ruling is that it is the province of a court of law to establish such a pass-way. *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400.

Equity jurisdiction extends to giving relief against interference by the owner of land with a private right of way over it, constituting the sole means of access to other land. An action for damages could not give adequate redress to one who is so hemmed in as to have no peaceable egress from his own premises. *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791.

So, the grantee of a right of way by an instrument not recorded is entitled to enjoin a subsequent purchaser of the premises crossed by the right of way, and who had at least constructive notice of his claim, from maintaining a fence across the roadway whereby the owner of the right of way was deprived of access to a river which was very important to his farm as he had no living water on his land. In such a case there is no adequate remedy at law. *McCann v. Day*, 57 Ill. 101.

And it is sufficient to entitle a party to relief against the obstruction of a private way that its use is highly convenient and beneficial to him.

An injunction will be granted on the ground that there is no adequate remedy at law to prevent the obstruction of a private alley with gates, although the easement claimed by the complainant is not absolutely necessary for the enjoyment of the estate granted. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486.

But equity will not interfere to prevent the obstruction of a private right of way by a high board fence and gate, where it appears that the easement has been extinguished by an apparently valid tax sale of the servient estate, and the owner of the easement has other and equally convenient means of access to his land, and will suffer no substantial damage by the obstruction of such right of way. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839.

The threatened building of a fence along the center of a lane leading from the plaintiff's premises to the highway does not call

for injunctive relief, where it does not appear but that the plaintiff has other means of ingress to and egress from his premises equally as convenient as the lane. *Young v. Spangler*, 2 Ohio C. C. 549. The court said: There is no permanent injury threatened; no destruction of an easement threatened; nothing but a mere trespass such as, under the allegations of the petition, would not prevent ingress to and egress from the premises by some other route; nothing but such an obstruction as could be easily removed, or damages for the obstruction recovered in an action at law.

Injunction is an appropriate remedy to restrain a purchaser of land from permanently closing, by fence and other obstructions, a right of way, where the persistency of the acts complained of is such as to render the remedy by suit inadequate. *Weidner v. Dauth*, 21 Pa. Co. Ct. 440. The court said: It has been repeatedly and uniformly held that an injunction is the appropriate remedy for the prevention of trespasses and nuisances which, by reason of the persistency with which they are repeated, threaten to become of a permanent nature.

d. Obstruction of public lands or parks.

Public lands.

The government may maintain a suit in equity to compel by mandatory injunction the removal of a fence which the defendant has built partly on his own land and partly on land belonging to the government. *United States v. Brighton Rancho Co.* 26 Fed. 218. The court said: Whether the act of the defendant comes within the technical definition of purpresture or that of a public nuisance, we are of the opinion that the government can come into a court of equity and by its orders have an end put to the trespass on the public rights. We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the inclosed lands from the general body of the public domain. We think full and adequate remedy can be obtained only in a court of equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property. See also *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119, III. e. infra.

So the government may restrain the fencing up and improper use of public land, found in possession of persons under claim or color of title without first resorting to law to determine the latter's rights. *United States v. Cleveland & C. Cattle Co.* 33 Fed. 323. In this case it is said: The govern-

ment has not simply the rights of a property owner in respect to these lands; it has all the powers of sovereignty. As the legal title is in the government, the presentation of that title casts upon the defendant the duty of establishing its equities. Practically, is any hardship done, or any rights of the defendant trespassed upon, if the government, in the first instance, comes into a court of equity and invites the defendant then and there to a full and final determination of its rights?

But an injunction sought under the act of February 25, 1885, entitled, "An Act to Prevent Unlawful Occupancy of Public Lands," to restrain the maintenance of an inclosure of property claimed to be public lands, cannot be granted where, pending the litigation, the land inclosed has passed to the state for the support of the public schools, so that thereafter no right or interest of the United States is affected. *United States v. Elliott*, 74 Fed. 92.

An owner of cattle, who merely desires to exercise the right of pasturing them on public lands, suffers no such special injury by the wrongful fencing in of such lands by a private citizen as will entitle him to equitable relief, even though his land is in close proximity to the lands inclosed. *Anthony Wilkinson Live Stock Co. v. McIlquham (Wyo.)* 3 L.R.A. (N.S.) 733, 83 Pac. 364.

Public parks.

A resident and taxpayer of a corporate town has sufficient interest to maintain an action to enjoin the unauthorized fencing of a public park within the town,—especially if his property abuts thereon. *Davenport v. Buffington*, 1 Ind. Terr. 424, 45 S. W. 128. In this case the court quotes with approval from *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255, which was a suit to enjoin the proprietors who dedicated the land to public use from appropriating to private use a square included in the dedication, and in which it is said: It sufficiently appears that the plaintiff is one of the inhabitants of the town, living and holding property contiguous to the square, the value of which is affected by the dedication. He is therefore not a volunteer, assuming to protect the rights of others, but entitled to this remedy for the protection of both his individual and his common interests.

e. Extent or form of relief.

See also II. e, supra.

In *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632, where an injunction requiring the removal of fences and gates from a way was sought, the court quotes with reference to mandatory injunctions from *Kerr on Injunctions*, p. 49, as follows: "The jurisdiction has been questioned, but its existence must be admitted as beyond all doubt. It must, however, be exercised with caution, and is strictly confined to cases where the 7 L.R.A. (N.S.)

remedy at law is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case." The court further observes: The case under consideration is one to which the remedy is peculiarly adapted.

This form of injunctive relief has been frequently awarded.

A mandatory injunction will issue to compel one who has fenced in a public street to remove the obstruction from the highway. *Clifton v. Weston*, 54 W. Va. 250, 46 S. E. 360.

And a mandatory injunction will lie at the suit of a grantee to compel his grantor to remove a fence and wall placed by him in a street, the existence of which as a highway he is estopped to deny. *White v. Tide Water Oil Co.* 50 N. J. Eq. 1, 25 Atl. 199.

One who has removed a fence protecting a private way, and built another fence behind it with a gateway for the benefit of the tenants of an adjoining estate, who have no rights therein, will be compelled to rebuild the fence as it originally existed, at the suit of lot owners for whose sole benefit the alley was laid out. Equity is the appropriate remedy for the injury sustained. *Greene v. Canny*, 137 Mass. 64.

A purchaser of land from which there is no means of egress to the highway, except by passing over adjoining lands, and who, with the consent of the neighboring owner, has used and enjoyed a right of way over such premises for more than twenty years, is entitled to an injunction restraining the obstruction of the way by a fence and gates, and requiring the removal of all gates, fences, or other obstructions. *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632.

A mandatory injunction will be granted for the removal of fences obstructing a driveway at the instance of one entitled to use the driveway, where he has been found guilty of no laches in bringing the suit or asserting his right, and the fences can be easily removed without great and disproportionate injury and loss to defendant's property. *Boland v. St. John's Schools*, 163 Mass. 229, 39 N. E. 1035.

But an owner of property abutting on a public way cannot maintain an action for a mandatory injunction directing the removal of a fence or bars obstructing the way in that part of it which is not opposite his land for the reason that his damage is not different in kind from that suffered by the public. The fact that the plaintiff is nearer the obstruction than others makes no difference. Proximity gives him no greater right of passage. *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377.

A person may be compelled by mandatory injunction to remove a barbed-wire fence erected partly on the public land and partly on his own, around a large tract of the public domain. *United States v. Brighton Ranch Co.* 26 Fed. 218.

One who has inclosed public school lands of the state may be compelled to remove

the fences, when this can be done without trespassing upon the property of third persons, without reference to the interests of persons who cannot be made parties to the suit. Such portions of the inclosures as are upon the lands of others he cannot be enjoined to remove, although he may have been a party to their erection, unless the owners of the lands are parties to the suit. If he is a part owner of the lands upon which the fences are found, either as partner or cotenant, and has been instrumental in creating the nuisance, he should be compelled to abate it, although his cotenant or partner is not a party to the proceedings, when such cotenant or partner is beyond the reach of the process of the court. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119.

The court has no power by interlocutory injunction to compel the removal of a board fence already existing across a street. An interlocutory injunction cannot be used for the purpose of compelling a person to undo what he has already done. The appropriate function of an injunction is to afford preventive relief, not to restore parties to that of which they have already been deprived. *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128.

A preliminary injunction to restrain the maintenance of a fence across a public way, if not to pull down and destroy it, may be granted in favor of the plaintiff, who made an arrangement with the defendant whereby each dedicated and relinquished lands for a highway leading to the plaintiff's mill, which road the defendant has obstructed with a fence. *Ewell v. Greenwood*, 26 Iowa, 377.

In *Brooks v. South Carolina R. Co.* 8 Rich. Eq. 30, one who sought to require another to open alleged streets and refrain from obstructing them with gates was denied relief, where the dedication of the streets had never been accepted, and the plaintiff did not establish a claim to any private right of way. The court said: He asks for relief, whereas the proper jurisdiction of this court in such cases is to prevent irreparable mischief, rather than to redress a wrong consummated.

And in *Carlin v. Wolff*, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441, it was held that a court of equity will not attempt to restrain the erection of a fence obstructing an alley, where the fence was completed before suit was brought.

But in *Downing v. Corcoran*, 112 Mo. App. 645, 87 S. W. 114, the repeated wrongful obstruction of gates leading into a private road by posts and wires was enjoined, although the acts complained of were at the beginning of the action accomplished facts. In this case it is said: It is suggested that the acts complained of are now, and were at the beginning of this proceeding, accomplished facts, and that equity will not undertake to restrain the doing of things already done. The case of *Carlin v. Wolff*, supra, is cited to sustain the suggestion. That case states the general rule of the powerlessness of courts of equity to restrain acts

committed before the aid of the court is sought. That rule of law was stated in that case to the single and isolated act of obstructing an alley. But this is a different case. Here the pleader has set up not a single accomplished act, but a series of acts continued through a space of time, each of them being a new obstructive measure to thwart a move of avoidance which the plaintiff would make to overcome a preceding wrongful act on the part of defendant. The defendant, according to plaintiff's bill, was engaged in a series of continuous wrongs, and the proof sustained the allegation. Surely, in such state of case, the injured part must have a time when he can complain with certainty of redress. If the defendant should obstruct plaintiff at every successive point where he endeavored to gain access to the road, and with the evident intention to continue the process, it would be a denial of justice to refuse him relief.

That the public highway had already been obstructed by a fence by the defendant before the granting of an injunction restraining him from so doing is no reason why it should be dissolved, where he threatens to continue the obstruction permanently. In such a case a court of equity alone can furnish adequate redress. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

So, injunctive relief will not be denied a private landowner to restrain the fencing up of a right of way which furnishes the only convenient egress from his land to the public highway, on the ground that the act sought to be enjoined has been already committed. The wrong is a continuing one, for which an action for damages does not afford an adequate remedy. *Lakeman v. Hannibal & St. J. R. Co.* 36 Mo. App. 363.

A decree enjoining the threatened obstruction of a private alley with a fence is not erroneous, although it had already been closed by a pair of gates when the bill was filed, as that fact does not prevent the enjoining of the acts threatened and remaining to be done completely to deprive complainant of the use of the alley. *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

It seems that relief should be limited to the interest of the complainant in the estate affected by the obstruction.

An injunction restraining the obstruction of a private alley by nailing boards across it should be coextensive with the duration of the easement. *Yeager v. Manning*, 183 Ill. 275, 55 N. E. 691.

IV. Enjoining interference with fences or gates as waste.

Interference by injunction in restraint of waste was originally founded on privity of title, and courts of equity were for a long time extremely strict in confining their relief to such cases to the exclusion of trespasses by those having no right to the legitimate use of the property injured. The rigor of this rule has now been relaxed to

such an extent that equity will interfere, although there is no privy of title, to restrain waste which would result in great or irreparable mischief, not remediable at law, or lead to a multiplicity of suits and to burdensome litigation.

In *Cooper v. Hamilton*, 8 Blackf. 377, the court refused an injunction in restraint of waste to prevent one alleged to have removed about 700 rails from a fence, from removing the remainder, on the ground that the plaintiff had an adequate remedy at law.

So, the owner of real estate who has been dispossessed by one claiming under a tax deed, and who has instituted an action of forcible entry and detainer for restitution of the property, is not entitled to enjoin the person in possession from removing the fencing about the place, and a dwelling house and other improvements erected by the latter during his occupancy, where, in the action which is still pending, the defendant has given a sufficient bond with ample security, conditioned that he will not commit or suffer waste to be committed on the premises. The plaintiff has an adequate remedy for damages provided he has any remedy. *Campbell v. Coonradt*, 26 Kan. 67.

In *Sapp v. Roberts*, 18 Neb. 299, 25 N. W. 98, defendant was perpetually enjoined from committing equitable waste by cutting down an osage-hedge fence between his farm and that of the plaintiff. The court said: An osage-hedge fence is without value except as it is standing and answering the use for which it was intended. Its destruction would be of manifest injury to the inheritance. It is clear that in cases of this kind there is no adequate remedy at law. All persons are entitled to protection in the use, integrity, and value of their property; and, where courts of law cannot give such protection by reason of the inability of plaintiff to prove his damages, equity will interfere.

Waste which would diminish the complainant's security is always a sufficient ground for an injunction as between mortgagor and mortgagee.

In a suit by a mortgagee to restrain the mortgagor, a mining company, from committing waste and thereby diminishing the complainant's security, an injunction may properly issue to restrain the company from carrying away fixtures, buildings, fences, or other erections, or pulling down any fence except as necessary for the ordinary course of its lawful business. *Capner v. Fleming*, 10 Min. Co. 3 N. J. Eq. 467.

Injunctive relief may be invoked by a landlord to prevent the commission of waste by a tenant. But a lessee of unimproved land, who agreed to pay the taxes thereon and to fence the property for its use, with the privilege of removing the fence unless purchased by the lessor, will not be enjoined from removing it at the suit of a purchaser of the property with knowledge of the lessee's claim to the fence. *Jones v. Cooley*, 106 Iowa. 165, 76 N. W. 652. A. W. R. 7 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

T. M. HOBBS, Appt.,
v.

LONG DISTANCE TELEPHONE & TELEGRAPH COMPANY.

(— Ala. —, 41 So. 1003.)

Telephone—burden on highway.

1. The poles and wires of a long-distance telephone strung along a public road do not constitute an additional burden which will entitle the fee owner to compensation, unless he shows that there will be an actual and substantial injury to his property.

Injunction—telephone wire.

2. An injunction will not be granted at the instance of an abutting owner to restrain a telephone company from cutting trees and shrubs along a public highway in the erection of its poles and wires, since the remedy at law is adequate.

(Tyson and Denson, JJ., dissent.)

(June 5, 1906.)

APPEAL by plaintiff from a decree of the Chancery Court for Limestone County dissolving a preliminary injunction granted to restrain the construction of a telephone line along the highway in front of plaintiff's property. Affirmed.

The facts are stated in the opinion.

Messrs. H. C. Thach, James E. Horton, Jr., and W. R. Walker, for appellant:

A telephone line on a public highway is an additional burden or servitude for which the abutting landowner is entitled to compensation.

Case Note.—Telephone or telegraph as additional servitude on highway:—

This question has already been treated in a case note in 3 L.R.A. (N.S.) 323, as well as in a subject note in 24 L.R.A. 721. Since the writing of the case note a few additional cases have been decided, running through which is found the usual conflict of authority.

Thus, in *Horton v. Long Distance Teleph. & Teleg. Co.* (Ala.) 41 So. 1006 and *Richardson v. Long Distance Teleph. & Teleg. Co.* (Ala.) 41 So. 1006 (decided without opinion on authority of *Hobbs v. Long Distance Teleph. & Teleg. Co.*), and in *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410, it is held that the use of a public road for telephone poles and wires does not constitute an additional servitude.

While in *Cosgriff v. Tri-State Teleph. & Teleg. Co.* (N. D.) 5 L.R.A. (N.S.) 1142, 107 N. W. 525, and in *Burrall v. American Teleph. & Teleg. Co.* (Ill.) 79 N. E. 705, it is held that such a use of a public highway is an additional servitude, for which the abutting owners are entitled to compensation.

27 Am. & Eng. Enc. Law, 2d ed. pp. 1008, 1009; Lewis, Em. Dom. § 131; Elliott, Roads & Streets, p. 534; 1 High, Inj. 4th ed. p. 575; Keasbey, Electric Wires, 2d ed. pp. 119-125; Dill. Mun. Corp. § 698a; Joyce, Electric Law, § 321; Crosswell, Electricity, § 110; Randolph, Em. Dom. § 407; Postal Telegr. Cable Co. v. Eaton, 170 Ill. 513, 39 L.R.A. 722, 62 Am. St. Rep. 390, 49 N. E. 365; Eels v. American Teleph. & Telegr. Co. 143 N. Y. 133, 25 L.R.A. 640, 38 N. E. 202; Stowers v. Postal Telegr. Cable Co. 68 Miss. 559, 12 L.R.A. 864, 24 Am. St. Rep. 290, 9 So. 356; Chesapeake & P. Teleph. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Nicoll v. New York & N. J. Teleph. Co. 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583; American Teleph. & Telegr. Co. v. Smith, 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910; Board of Trade Telegr. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Western U. Telegr. Co. v. Williams, 86 Va. 696, 8 L.R.A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441; Broome v. New York & N. J. Teleph. Co. 42 N. J. Eq. 141, 7 Atl. 851; Dusenbury v. Mutual Union Telegr. Co. 11 Abb. N. C. 440; Smith v. Central Dist. Printing & Telegr. Co. 2 Ohio C. C. 259; Willis v. Erie Telegr. & Teleph. Co. 37 Minn. 347, 34 N. W. 337; Atlantic & P. Telegr. Co. v. Chicago, R. I. & P. R. Co. 6 Biss. 158, Fed. Cas. No. 632; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; Pacific Postal Telegr. Cable Co. v. Irvine, 49 Fed. 113; Keater v. Western U. Telegr. Co. 108 Fed. 926; Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 577, 8 L.R.A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066; Spokane v. Colby, 16 Wash. 610, 48 Pac. 248; Krueger v. Wisconsin Teleph. Co. 106 Wis. 96, 50 L.R.A. 298, 81 N. W. 1041; Daily v. State, 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710; Bronson v. Albion Teleph. Co. 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201; Metropolitan Teleph. & Telegr. Co. v. Colwell Lead Co. 67 How. Pr. 365; Cater v. Northwestern Teleph. Exch. Co. 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; Hershfield v. Rocky Mountain Bell Teleph. Co. 12 Mont. 102, 29 Pac. 883; Magee v. Overshiner, 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; State, Winter, Prosecutor, v. New York & N. J. Teleph. Co. 51 N. J. L. 83, 16 Atl. 188.

Appellant has a right to a writ of injunction to prevent the taking of his property by the appellee before the latter has paid just compensation therefor, determinable as to amount by a common-law jury.

Ala. Const. 1901, art. 12, § 235; Ala. Const. 7 L.R.A. (N.S.)

1875, art. 14, § 7; Southern R. Co. v. Birmingham, S. & N. O. R. Co. 130 Ala. 660, 31 So. 509, 131 Ala. 663, 29 So. 191; Montgomery Southern R. Co. v. Sayre, 72 Ala. 443; East & West R. Co. v. East Tennessee, V. & G. R. Co. 75 Ala. 275; Woodward Iron Co. v. Cabaniss, 87 Ala. 330, 66 So. 300; Postal Telegr. Cable Co. v. Alabama G. S. R. Co. 92 Ala. 332, 9 So. 555; Memphis & C. R. Co. v. Birmingham, S. & T. R. Co. 96 Ala. 580, 18 L.R.A. 166, 11 So. 642; Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 129, 24 So. 368.

The legislature is without authority to deprive abutting owners of their rights by granting away those rights for a public use, unless and until just compensation therefor has been made or provided.

Cater v. Northwestern Teleph. Exch. Co.; Postal Telegr. Cable Co. v. Eaton; and Kincaid v. Indianapolis Natural Gas Co.,—supra; Moose v. Carson, 104 N. C. 431, 7 L. R.A. 548, 17 Am. St. Rep. 681, 10 S. E. 689; Board of Trade Telegr. Co. v. Barnett, supra; Lewis, Em. Dom. § 131; Ford v. Chicago & N. W. R. Co. 14 Wis. 610, 80 Am. Dec. 791; Krueger v. Wisconsin Teleph. Co., Eels v. American Teleph. & Telegr. Co.; and Western U. Telegr. Co. v. Williams,—supra; Columbus & W. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Perry v. New Orleans, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 740; Const. 1901, §§ 23, 235; Black, Const. Law, 335, 336; 22 Am. & Eng. Enc. Law, 2d ed. p. 916; Presbyterian Soc. v. Auburn & R. R. Co. 3 Hill, 567; Williams v. New York C. R. Co. 16 N. Y. 97, 69 Am. Dec. 651.

"The primary law of the road is motion;" the road was constructed and condemned for the purpose of a way along and over it for persons and vehicles to pass; permanent structures could not be maintained therein. The uses to which a street may be put are more varied than the uses to which a road may be put.

Western R. Co. v. Alabama G. T. R. Co. 96 Ala. 272, 17 L.R.A. 474, 11 So. 483; Southern Bell Teleph. Co. v. Francis, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1.

The fee remains in the attinent owner; and, having the fee, he owns, also, all of the rights not included in the easement given the public.

Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023; Columbus & W. R. Co. v. Witherow and Southern Bell Teleph. Co. v. Francis, supra.

There are seven states which hold as this court has held in its majority opinion, and of these seven at least four hold that a commercial or steam railroad is not an ad-

ditional servitude, which is in direct opposition to the holding of this court.

Columbus & W. R. Co. v. Witherow; Western R. Co. v. Alabama G. T. R. Co.; and East & West R. Co. v. East Tennessee, V. & G. R. Co.,—*supra*.

On petition for rehearing.

A court of equity will intervene to keep the persons interested with the right of eminent domain within the line of authority.

Columbus & W. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Highland Ave. & Belt R. Co. v. Matthews, 99 Ala. 24, 14 L.R.A. 462, 10 So. 267; Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 129, 24 So. 368; Montgomery v. Lemle, 121 Ala. 609, 25 So. 919; Southern R. Co. v. Hood, 126 Ala. 312, 85 Am. St. Rep. 32, 28 So. 662; Southern R. Co. v. Birmingham, S. & N. O. R. Co. 131 Ala. 663, 29 So. 191; Montgomery Light & Water Power Co. v. Citizens' Light, H. & P. Co. (Ala.) 40 So. 981.

Messrs. Erle Pettus, M. K. Clements, and E. W. Godbey, for appellee:

Poles and wires may be so placed as not to afford the slightest impediment to the access of light and air or to ingress and egress. In such case there is no taking because there is no damage.

Lewis, Em. Dom. § 131.

Some injury must be averred as the probable result of the act sought to be restrained.

7 Cyc. Pl. & Pr. p. 713; McCann v. Johnson County Teleph. Co. 69 Kan. 210, 66 L.R.A. 178, 76 Pac. 870.

A telephone is not an additional burden on the fee.

Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Lockhart v. Craig Street R. Co. 139 Pa. 419, 21 Atl. 26; People v. Eaton, 100 Mich. 208, 24 L.R.A. 721, 59 N. W. 145; Cater v. Northwestern Teleg. Exch. Co. 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; Maxwell v. Central Dist. & Printing Teleg. Co. 51 W. Va. 127, 41 S. E. 125; Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; Frazier v. East Tennessee Teleph. Co. 115 Tenn. 416, 3 L.R.A.(N.S.) 323, 90 S. W. 620; Magee v. Overshiner, 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; Coburn v. New Teleph. Co. 156 Ind. 90, 52 L.R.A. 671, 59 N. E. 324; Hershfield v. Rocky Mountain Bell Teleph. Co. 12 Mont. 102, 29 Pac. 883; Cumberland Teleph. & Teleg. Co. v. Avritt, 27 Ky. L. Rep. 394, 85 S. W. 205; Kirby v. Citizens' Teleph. Co. 17 S. D. 362, 97 N. W. 4; New York Teleph. Co. v. Keeseey, 5 Pa. Dist. R. 366; Southern Bell Teleph. Co. v. Francis, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1. 7 L.R.A.(N.S.)

An injunction is not granted where injury will be inflicted and no injury prevented.

Lewis, Em. Dom. § 131; East & West R. Co. v. East Tennessee, V. & G. R. Co. 75 Ala. 281; Mobile & M. R. Co. v. Alabama Midland R. Co. 116 Ala. 60, 23 So. 57.

The damages are too insignificant to warrant equitable relief.

Mobile & O. R. Co. v. Postal Teleg. Cable Co. 120 Ala. 21, 24 So. 408; McCormick v. District of Columbia, 4 Mackey, 396, 54 Am. Rep. 287; Gay v. Mutual Union Teleg. Co. 12 Mo. App. 485; New York Teleph. Co. v. Keeseey, *supra*; Jaynes v. Omaha Street R. Co. 53 Neb. 631, 39 L.R.A. 754, 74 N. W. 67; McCann v. Johnson County Teleph. Co. *supra*; Goodrich v. Moore, 2 Minn. 61, 72 Am. Dec. 75, Gil. 49.

A street railway pole properly placed at the curb line of a street no more interferes with access to or egress from property outside of the street line than a lamp-post, or hitching post, or shade tree, and no more interferes with the ordinary use of the street for public travel.

La Crosse City R. Co. v. Higbee, 107 Wis. 389, 51 L.R.A. 928, 83 N. W. 701; Jaynes v. Omaha Street R. Co. *supra*.

Dissemination of intelligence has always been as important a function of a highway as any other.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 10, 24 L. ed. 710.

Simpson, J., delivered the opinion of the court:

This was a bill filed in the chancery court by appellant (complainant) against appellee (defendant) alleging that defendant was engaged in the construction of a telephone line across certain lands owned by complainant, and seeking to enjoin further work on the same until payment should be made to the complainant, as compensation for damages to said lands. The defendant filed an answer denying the allegations of the bill, but alleging that it was engaged in constructing said line along the margin of a public road which runs through complainant's land, making as an exhibit a map which shows the location of said line, showing that six trees on the line and a little underbrush will be cut, which, it is alleged are practically of no value, and alleging that, when cut, the same will be left on the land for complainant. Demurrers were also filed to the bill and a motion to dismiss for want of equity. A preliminary injunction was granted, and subsequently the chancellor overruled the demurrers, and motion to dismiss the bill, and dissolved the injunction, and it is from this decree that

the appeal is taken by the complainant. A cross-appeal is taken by the defendant, but subsequently dismissed by the cross-appellant, so that the only question raised is the correctness of the chancellor's decree in dissolving the injunction.

While, in the formative period of our system of laws, the courts were partly judicial and partly quasi legislative, meeting each case on its own merits, and thus building up the customs which became the law; yet the principles of the law came to us in their entirety, and, under our written constitutions, it is a cardinal principle that the judicial and legislative departments shall be entirely separate. Nevertheless, it has been true that, in this wonderful age of inventions, the burden rests upon the courts continually of applying the principles of the law to situations and complications of human affairs hitherto undreamed of, and it sometimes becomes a matter of great difficulty to determine just how to preserve those principles and yet meet the demands of justice. Since the days of the Cæsars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports could be speedily brought to the capital, and the interchange of commerce promoted. The laws of Congress have provided for post roads, etc., before the telephone was known, provided for the same privileges for telegraph companies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of "post routes" and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to place. The rights of the abutting owners, and the question as to what is or is not an additional servitude, have furnished material for a vast number of conflicting decisions, so numerous and so conflicting that it would extend an opinion beyond all reasonable limits to attempt an analysis of them; yet a careful examination of them will show a gradual development of the principles of the law in order to accommodate them to the progress of events and the onward march of civilization.

Thus, even in as late and excellent a work as that of Judge Dillon on Municipal Corporations, the rights of surface railways on the streets, and the question as to whether they constitute an additional burden, are spoken of as unsolved problems. And in a note the wise words of Chief Jus-

tice Hale are quoted, in which he advises patience in solving these questions, and says: "Time is the wisest thing under heaven. . . . It discovers such varieties of emergencies and cases, and such inconvenience in things, that no man would otherwise have imagined;" and the author of the note goes on to remark, among other things, that "good fruit in the law, as in the natural world, is the product alone of patient cultivation." In a second note the then recent case of Taggart v. Newport Street R. Co. 16 R. I. 668, 7 L.R.A. 205, 19 Atl. 326, is quoted, to the effect that an electric street railway, with its poles and wires, was not an additional servitude. 2 Dill. Mun. Corp. § 734c, and notes.

On this subject, a recent writer states that the judgment of "substantially all of the courts of last resort in the United States," except New York, is that the "ordinary electric street railway with trolley wire," etc., is not an additional burden on a street. Nellis, Street Surface Railroads, pp. 134, 135; Elliott, Roads & Streets, 2d ed. §§ 698, 699, pp. 754, 757.

The progress of thought on this subject is succinctly stated in Joyce on Electric Law, § 341; Keasbey, Electric Wires, §§ 124, 145, conclusion on p. 178.

So, on the subject of erection of poles for electric lighting, on streets, after some contrary decisions, the evident necessity is so great that it has come to be generally understood that it is not an additional burden, though there still remains, in the decisions and text writers, the impression that it is saved by the fact that the light companies generally light the streets as well as private dwellings, and, now, a recent text writer says: "The distinction, however, is not made with respect to pipes for lighting by gas. It seems to be now conceded that city streets may be used for gas pipes, without compensation to abutting owners, whether it be for the purpose of supplying private houses, or for the purpose of lighting the streets and public places. The pipes used for both purposes are generally the same; the purpose is, in a sense, necessary and general, and the streets are the most convenient, if not the only, means of access. The same conditions apply to the electric light. . . . If the purpose is a public purpose for which the streets may be used, it would seem that compensation could not properly be required for the mere occupation of the soil by a pole any more than by a gas pipe." Keasbey, Electric Wires, § 112, p. 139. Other writers have also called attention to the fact that the streets are constantly used for fire plugs, fire alarm stations, and other things necessary for the protection

and good order of the city; yet no court would, for a moment, entertain the idea that they are an additional burden, for which the abutter could claim compensation. The last-named writer, we think, suggests the practical solution of these matters, when he says: "It does not follow that the landowner is without redress, if poles be put up so as to interfere with his access, or even so as to be inconvenient or unsightly, or if wires be hung so as to be dangerous, or so as to prevent ready access in case of fire." Keasbey, *Electric Wires*, § 113, p. 139. "It might tend to a reconciliation of the cases and the adoption of a uniform rule, if the question of new burden were left on one side, and the attention were directed to the practical question whether or not the rights and privileges of the abutting owner . . . were affected." *Id.* § 145, p. 177. When the property is taken for a public road or street, although technically the fee remains in the abutting owner, yet he cannot interfere with the surface, and it would seem that practically an additional burden, such as would justify an action on his part, should be something which either interfered with or made inconvenient his enjoyment of what remained to him in the land. As to obstructing the road, that would be a matter in which he had no greater right than the public generally; but, if the new use impaired his proper use of his own property in any manner, then, if it could be said to be a use not included within the original grant, it would be a matter for which he would be entitled to compensation. *Id.* § 124, p. 153.

Judge Elliott says that "the owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage or the right of ingress and egress to and from adjoining property." Elliott, *Roads & Streets*, 2d ed. § 407, p. 417.

The New Jersey court of chancery declares that "his right [the abutter on a public highway who holds the fee therein] is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest;" also (quoting from Justice De-pue of New Jersey court of errors and appeals) "with respect to lands over which streets have been laid, the ownership, for all substantial purposes, is in the public. Nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest." *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 860. 7 L.R.A. (N.S.)

Courts are not organized to decide academic questions, but to decide upon practical rights of the people, and remedy their real wrongs. It is in accordance with these principles that the courts have held that a steam railroad is an additional burden, because it renders the property of the abutting owner less habitable; while, as shown, the evident trend is to hold that electric lines are not. As said by the supreme court of Michigan: "When they do not interfere with the owner's access to and the use of his land, we see no reason why they should be held to constitute an additional servitude." Joyce, *Electric Law*, § 336; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

We have indulged in these general remarks, because, as Mr. Cook says, on the subject of telegraph and telephone companies: "The decisions are in irreconcilable conflict." 3 Cook, *Corp.* 4th ed. § 933. And Mr. Keasbey says [1892 ed. p. 82]: "It is not yet safe to predict which of the two views will finally prevail." Joyce, *Electric Law*, § 306.

Without referring to the cases, which will be found collated on both sides in the Tennessee case, to which we shall hereafter refer, our conclusion is that the public roads, when dedicated, were dedicated, not merely for travel on foot, or on animals, or in vehicles, but for locomotion by any means that should be afterwards discovered, and for communication between the citizens of the country, by carriers, on foot, or riding, or by any other means that might be found suitable and best. The mails could be sent over them in any way that was found most expeditious. If it had been found advisable to send the mails in metal boxes swung on wires far above the heads of the people, in place of in stages and by carriers, no one would have supposed it was an additional burden upon the abutting owner. So, if it is found better to string wires high above the roads and convey messages by that mysterious something which is in the atmosphere and which seems to be as exhaustless as the bounties of Providence, it is accomplishing one of the great purposes for which public roads are dedicated. Some of the cases have drawn a distinction between urban and suburban roads, but in regard to wires and posts there would be more reason for declaring them burdensome in a city (where they accumulate in such numbers as to interfere with the operation of engines in extinguishing fires) than in the country where there are but few and far away from houses. It has been said that "it is hard to distinguish between a rural and an urban street, and that the nature of a street changes insensibly from

the former to the latter, and a rule of property which depends on such a shifting and indefinite distinction is not likely to prove satisfactory." *Keasbey, Electric Wires*, § 103, p. 127.

We may add that the uses of the telephone are as important in the country as in the city, and it does not take a prophet's ken to see that in the near future they are to perform an important part in bringing the rural districts within the beneficial enjoyment of city improvements. The argument of Justice Devens of the Massachusetts supreme court is satisfactory to us on this general subject, and we think that the qualification which we make, that, if the abutting owner shows that there will be actual and substantial injury to his property, he is entitled to compensation, meets the objections made in the dissenting opinion. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

This matter of the rights of abutting owners has been recently considered by the supreme court of Tennessee in an opinion, a certified transcript of which is furnished us, and that court, after giving long lists of the cases on each side of the controversy, takes the ground that one important function of the streets and roads of the country is to furnish means of communication, and that the telephone is only a new and very important invention for accomplishing that end, and does not constitute an additional burden. *Frazier v. East Tennessee Teleph. Co.* 115 Tenn. 416, 3 L.R.A.(N.S.) 323, 90 S. W. 620.

Coming to the question of injunctive relief: It will be borne in mind that the right is granted by statute to telegraph and telephone companies to construct their lines "along the margin of the public highways." Code 1896, § 2490.

This right is said to "depend either upon whether such a line constitutes an additional servitude entitling him to compensation [which we have held it does not]; . . . or whether his right of ingress or egress have been impaired, or whether, in some other way, he has been injured in his property rights. . . . Nor will an injunction be granted where the injuries are merely consequential, since a court of law is the proper tribunal in such a case." *Joyce, Electric Law*, § 1022.

The court of errors and appeals of New Jersey says: "It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where the injury which

may result from the invasion of that right is not irreparable." *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 367, 20 Atl. 861; *Hagerty v. Lee*, 45 N. J. Eq. 255, 256, 17 Atl. 826.

Our own court has expressed itself very strongly as to the absolute right of the state to control and use the public thoroughfares for all public purposes, and against the right to enjoin a public improvement authorized thereon. *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 413, 28 Am. Rep. 740; *Western R. Co. v. Alabama G. T. R. Co.* 96 Ala. 272, 281, 17 L.R.A. 474, 11 So. 483.

In a more recent case it has declared the absolute right of a municipal corporation to authorize a telephone company, in stringing its wires, to cut trees on the sidewalk, without liability to the abutting owner. *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1.

In this case it is the right of the public authorities to cut all the trees on the public roads, or to authorize them to be cut, the abutting owner being merely entitled to the wood when felled. And, at any rate, even if the complainant has a right to compensation for the trees, his remedy at law is adequate and complete.

The decree of the Chancery Court is affirmed.

Weakley, Ch. J., and Haralson, Dowdell, and Anderson, JJ., concur.

Tyson, J., dissenting:

I cannot concur in the view expressed by my brothers. I prefer to follow the lead of the great weight of authority holding that poles and wires of a telephone company, erected along a public country highway, is an additional servitude upon the fee for which the owner must be compensated. I do not regard it as necessary to repeat the reasons for this holding, since they are ably, and, in my opinion, unanswerably, stated in the cases upon which I rely. These cases may be found collated in note on pages 721 and 722 of 24 L.R.A.; note on pages 261-263 of 106 Am. St. Rep. See also *Elliott, Roads & Streets*, §§ 397, 400 et seq.; 2 Dill. Mun. Corp. § 698a. We need not have any apprehension of depriving people of the use of this quasi public utility by this holding. Indeed, in those states where the cases cited above maintained this principle, the telephone systems, urban and suburban, are far more extensive than in this. The requirement of telephone companies to pay just compensation to the owners of land adjoining the public country

roads does not seem to have been an impediment in the way of their extensive construction and operation; but, even if that requirement is an impediment, this could be no possible justification for depriving the owner of his constitutional guaranty.

Denson, J., concurs in these views.

Petition for rehearing denied July 6, 1906.

MINNESOTA SUPREME COURT.

CAROLINE LESCH, Resp.,
v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(97 Minn. 503, 106 N. W. 955.)

Homestead—possessory right of wife.

1. A wife has an interest in the homestead of herself and husband, although the legal title thereto is in him; and she is entitled to the peaceful and quiet enjoyment thereof. Any unlawful invasion of such right is a legal wrong against her.

Trespass—fright—damages.

2. In an action to recover damages sustained by the plaintiff by reason of fright caused by the wrongful acts of the defendant's employees, it is held that the evidence justified the submission of the cause to the jury, and that it sustains the verdict in favor of the plaintiff.

(Jaggard, J., dissents.)

(April 20, 1906.)

A PPEAL by defendant from a judgment of the District Court for Ramsey County in plaintiff's favor in an action brought to recover damages for wrongful acts of defendant's servants which resulted in injuries to plaintiff through fright. Affirmed.

The facts are stated in the opinion.

Messrs. M. L. Countryman and R. A. Hastings, for appellant:

No action for damages for personal injuries will lie because of a trespass to property, where no personal wrong was committed or threatened against the plaintiff, although she may have become "scared" by the trespass.

Headnotes by START, Ch. J.

Note.—This case adds another to the many conflicting decisions on the right to recover for physical injuries resulting from fright caused by a wrongful act. An extensive review and analysis of all the authorities on the question will be found in a subject note in 3 L.R.A.(N.S.) 49. See also the following case of *Engle v. Simmons*, 7 L.R.A.(N.S.)

Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290, 30 N. W. 888; *Bucknam v. Great Northern R. Co.* 76 Minn. 373, 79 N. W. 98; *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; *Sanderson v. Northern P. R. Co.* 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542.

Mr. Warren H. Mead, for respondent:

Recoverable damages in such cases are allowed and settled in this state when fright results in physical injuries, which are the proximate results of a legal wrong perpetrated against the plaintiff.

Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; *Sanderson v. Northern P. R. Co.* 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542.

Start, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment in favor of the plaintiff entered upon a verdict for \$80 in a personal injury action. This is the second appeal in the case. See 93 Minn. 435, 101 N. W. 965. The sole question presented by the record is whether the defendant was entitled to a direct verdict in accordance with defendant's motion made at the close of all the evidence. The case is here upon a bill of exceptions, which the trial judge certifies contains all of the evidence pertinent or material to the questions raised by the defendant's motion for a directed verdict. Counsel for plaintiff makes the objection that the bill of exceptions does not contain all of the evidence relevant to issues made by the pleadings and submitted to the jury; hence the action of the trial court in denying the defendant's motion cannot be here reviewed. We must accept the certificate of the trial judge as correct, there being nothing properly in the record to impeach it. *State v. Ronk*, 91 Minn. 419, 98 N. W. 334.

If the record discloses any evidence, taking the most favorable view of it for the plaintiff, sufficient to sustain a verdict for her, the defendant's motion for a directed verdict was properly denied; but, if it does not, the defendant is entitled to judgment notwithstanding the verdict. The alleged wrongful acts on the part of the defendant were committed by two of its employees. No claim is here made by the defendant that there was no evidence to sustain a finding by the jury that such alleged acts were within the scope of the employment of the defendant's employees and in furtherance of its business. This question was settled adversely to the defendant on the first appeal. The

evidence on behalf of the plaintiff was sufficient, the jury having found it credible, to establish these facts: On the 21st day of July, 1903, plaintiff was living with her husband and family at 113 Acker street, St. Paul, Minnesota; the premises consisting of a three-room house and one lot, the property and homestead of her husband, Lawrence Desch. About 9:30 A. M. of that day she was alone in the house, the same being her home, and, hearing her dog bark, she went into the yard and saw two men on the outside of the fence looking at some second-hand or worn-out railroad ties which were piled near the fence. These men were the defendant's employees, Charles J. McKenna and Louis Fanger. Some conversation then ensued between her and them upon the subject of railroad ties. McKenna asked plaintiff if the dog would bite, and she replied: "Sure, he will bite." Without asking her permission, and without invitation, the men then opened the gate and entered the yard of the Desch premises, where they remained about half an hour, most of the time engaged in examining and making a written list of a lot of tools which they found in the yard and in a small shed. They put the tools in a pile in the yard near the house, and left them in that position. While they were so engaged she remained in the yard near them and observed what they were doing. She did not at that time know their names, nor that they were defendant's employees, nor did they explain the object of their investigations. They were strangers to her, and she had never seen them before. After examining and listing the tools, the two men, without invitation and without asking plaintiff's permission, opened the door of the Desch dwelling house and entered it; plaintiff following as far as the open door, where she stood and watched them as they went from one room to another. In one room they opened a trunk containing family wearing apparel and underclothing, and threw the contents onto the floor, apparently searching for something. They then went into another room and in like manner searched another trunk and threw the contents (clothing, etc.) onto the floor. They also emptied two hat boxes of their contents, which included a sum of money (\$325), also disturbed the contents of a clothes basket in one of the rooms. During these proceedings she was watching them. They did not put anything into their pockets, or attempt to carry anything away. While they were in the house she called a neighbor's little girl, about six years old, who came and stood near her, by the door, looking at the men. They went away. She asked them who they were, and if they had a warrant. 7 L.R.A. (N.S.)

They told her they had none, but did not tell their names. Neither of the men made any threats against her. Nor did they offer any violence to her person, nor use any violent or improper language to her at any time, and there was no testimony indicating that either of the men had any purpose or intention of injuring or interfering with the plaintiff's person in any manner. She was frightened by their acts, and immediately after they left she became sick, feverish, her head ached, she trembled, and had spells of vomiting. She was obliged to go to bed, and was confined to her bed most of the time for about two weeks, and was not well for a considerable time afterwards. The evidence on the part of the defendant tended to contradict, in many important particulars, the plaintiff's version of what happened on the occasion referred to by her.

1. The defendant's first contention is to the effect that it conclusively appears from the evidence that the plaintiff's alleged fright was not the result of any legal wrong against her; hence she cannot recover any damages resulting therefrom. It is the law of this state that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; *Sanderson v. Northern P. R. Co.* 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542. While the legal title to the plaintiff's home was in her husband, she had an interest therein. It was her homestead, and she had an interest therein and the same right to its peaceful and quiet enjoyment as her husband had. Any unlawful or wanton invasion of, or interference with, such right would be a legal wrong against her within the meaning of the rule, which is to be liberally construed and applied in cases where the defendant's acts are wanton and ruthless. The evidence tends to show that the defendant's employees not only thus invaded the plaintiff's right to the peaceful enjoyment of her home, of which she was, for the time, the sole occupant, but that they unlawfully interfered with her personal wearing apparel, which, the jury might well have inferred, was included in the family wearing apparel. We hold that the evidence was sufficient to sustain a finding by the jury that the defendant's employees committed a tort against the plaintiff. *Watson v. Dilts*, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068.

2. The defendant's last contention is that the plaintiff's fright and resulting illness were not the proximate result of the acts of

the defendant's employees complained of. We are of the opinion that the evidence is sufficient to sustain the finding of the jury in favor of the plaintiff on this question. It is a matter of common knowledge that fright may, and often does, affect the nervous system to such an extent as to cause physical pain and serious bodily injury. The acts complained of in this case were, if committed, an outrageous invasion of the sanctity of the home and the constitutional rights of the citizen, well calculated to frighten the wife and mother left alone in charge of her home. Whether she was frightened by such acts, and whether her illness, which immediately followed, was the proximate result of such acts, were questions of fact for the jury. The trial court did not err in denying the defendant's motion to direct a verdict in its favor.

Judgment affirmed.

Jaggard, J., dissenting:

I dissent. The plaintiff in this case had a cause of action against the defendant. It has been previously held that the defendant was responsible for the acts of its servants in making a search without a warrant. Their interference with the personal property which the jury would have been justified in finding in part belonged to the plaintiff, constituted a trespass to personal property which properly might have been made the basis of recovery. Even if it be conceded that the wife has such an interest in the homestead, the title to which is in her husband's name, as to enable her to recover for an unlawful invasion of her right, I am unable to see how in this case the plaintiff could recover damages sustained by her by reason of fright. If this be conceded, then the plaintiff's causes of action were two, namely: (1) For trespass to her personal property; (2) to real estate in which she had an interest. There was no injury to her person. Trespass *vi et armis* would not have lain. The trial court certifies, and the record shows, that "plaintiff testified that neither of the men made any threats against her. They did not offer any violence to her person, or use any violent or improper language to her at any time. There was no testimony indicating that either of the men had any purpose or intention of injuring or interfering with the plaintiff's person in any manner. The substance of all the evidence of plaintiff was that the men were engaged in examining and searching for ties and tools outside the house, and in searching trunks, etc., as above stated, inside the house." The law provides full remedy to the individual whose property, real or personal,

has been trespassed upon. Such person may, under appropriate circumstances, recover general or special damages, direct or consequential damages; circumstances of insult, humiliation, or outrage may be shown in evidence to aggravate damage, and in appropriate cases vindictive damages will be awarded. "The jury is not bound to weigh in gold scales how much injury a party has sustained by trespass." *Davenport v. Russell*, 5 Day, 145; *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217; *Stevens v. Stevens*, 96 Ga. 374, 23 S. E. 312; *Jefcoat v. Knotts*, 13 Rich. L. 50. The cases of aggravated damages will be found collected in volume 46, col. 484, § 143, *Century Dig.* Cases of exemplary damages will be found collected in the same volume, cols. 488, 492, § 144.

The recovery, however, does not extend to remote damages. *Berry v. San Francisco & N. P. R. Co.* 50 Cal. 435; *Butler v. Collins*, 12 Cal. 457. It is said, in the majority opinion in this case, to be "the law of this state that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant." This rule is too broadly stated, if it means that, when damages caused by fright are the result of any or every legal wrong to plaintiff, or are the result of a legal wrong to plaintiff's property only as distinguished from his person, they are recoverable. It is well settled generally (*Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222), and in this state, that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury to the plaintiff. *Start, Ch. J.*, in *Sanderson v. Northern P. R. Co.* 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; citing *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 865, 54 S. W. 944, and notes. Neither the invasion of the plaintiff's homestead right, nor the interference with her personal property, constituted impact or contemporaneous physical injury. The case would have been materially different if the defendant's servants had committed either assault or assault and battery upon the plaintiff's person. Accordingly, while I think there might have been a recovery not merely in nominal damages in this case, I also think that the defendant's assignments of error directed to plaintiff's inability to recover merely because she was scared on account of the search were well taken and that the judgment of the trial court should have been reversed.

ALABAMA SUPREME COURT.

MARY P. ENGLE, Appt.,
v.

W. B. SIMMONS.

(— Ala. —, 41 So. 1023.)

Personal injury—right of action—trespass on real estate.

1. A woman is not prevented from maintaining an action for injuries to her person by one committing a trespass upon the real estate upon which she resides by the fact that the ownership of the property is in her husband.

Fright—action for injury from.

2. One who causes nervous excitement in a pregnant woman by his wrongful trespass upon her home to such an extent as to cause her miscarriage is liable to her for the bodily pain and suffering endured in direct line of causation from the wrongful act, although no physical violence is done to her person.

(June 30, 1906.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Morgan County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's wrongful act. Reversed.

The facts are stated in the opinion.

Messrs. John R. Sample and S. A. Lynne, for appellant:

Whenever there is a wrong there is a remedy.

Van Norden v. Robinson, 45 Hun. 567; Booth v. Starr, 5 Day, 419.

There can be a recovery for bodily injury caused by fright and mental disturbance.

Hill v. Kimball, 76 Tex. 210, 7 L.R.A. 619, 13 S. W. 59; Watson v. Dilts, 116 Iowa, 249, 57 L.R.A. 560, 93 Am. St. Rep. 239, 89 N. W. 1068; Brownback v. Frailey, 78 Ill. App. 262; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848; Chicago & N. W. R. Co. v. Hunerberg, 16 Ill. App. 387; Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703.

On petition for rehearing.

Cowan v. Western U. Teleg. Co. 122 Iowa, 379, 64 L.R.A. 549, 101 Am. St. Rep. 268, 98 N. W. 281; Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944; Kline v. Kline, 158 Ind. 602, 58 L.R.A. 399, 64 N. E. 9; Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 60 L.R.A. 619, 42 S. E. 983; Sloane v. Southern California R. Co.

Note.—As to the right to recover for physical injuries resulting from fright caused by wrongful act, see subject note in 3 L.R.A.(N.S.) 40, also preceding case of Lesch v. Great Northern R. Co. 7 L.R.A.(N.S.)

111 Cal. 668, 32 L.R.A. 196, 44 Pac. 320; Mack v. South Bound R. Co. 52 S. C. 323, 40 L.R.A. 684, 68 Am. St. Rep. 913, 29 S. E. 905; Barnes v. Western U. Teleg. Co. 27 Nev. 438, 65 L.R.A. 670, 103 Am. St. Rep. 776, 76 Pac. 931.

Mr. E. W. Godbey, for appellee:

If the count is in form *ex delicto* and case, no damage being averred or claimed for any actual injury to the person, reputation, or estate of the plaintiff, and only damages for mental suffering, it is subject to the demurrer.

Western U. Teleg. Co. v. Krichbaum, 132 Ala. 535, 31 So. 608; Western U. Teleg. Co. v. Blocker, 138 Ala. 484, 35 So. 469.

No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 783, 56 Am. St. Rep. 604, 45 N. E. 354; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 324, 75 Am. St. Rep. 374, 55 N. E. 380; 8 Am. & Eng. Enc. Law, 2d ed. p. 667; Nelson v. Crawford, 122 Mich. 460, 30 Am. St. Rep. 577, 81 N. W. 335; Blount v. Western U. Teleg. Co. 126 Ala. 105, 27 So. 780; Western U. Teleg. Co. v. Krichbaum, and Western U. Teleg. Co. v. Blocker, *supra*; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 205, 51 N. E. 657; Johnson v. Wells, F. & Co. 6 Nev. 224, 3 Am. Rep. 248; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340.

Dowdell, J., delivered the opinion of the court:

This is an action by the plaintiff, appellant here, to recover damages for the wrongful act of the defendant, whereby she was caused to suffer great physical pain and consequent temporary physical disability. The complaint as amended contained five counts, to all of which a demurrer was sustained by the trial court, and the plaintiff declining to plead over, a judgment was rendered in favor of the defendant.

The principal and important question in the case is: Does the complaint as amended state a cause of action? It is a sound and just principle of law that, where one, in violation of the law, does an act which in its consequences is injurious to another, he is liable for the damages caused by such wrongful act. Van Norden v. Robinson, 45 Hun, 567. The allegations of the complaint show that the defendant entered into the dwelling house of the plaintiff, who was at the time far advanced in pregnancy, and in the absence of her husband, and with the

evident purpose of collecting a claim against the husband, and after being informed by the plaintiff that her husband was absent from home, and after having been requested by plaintiff to leave the premises, he refused without legal cause or good excuse to do so, persisting in interrogating the plaintiff and in taking an inventory of her household effects, making at the time threats of what he intended to do, whereby the plaintiff was thrown into a state of nervous excitement, bringing on labor pains attended with unusual severity continuing for three days, and resulting in the premature birth of a child, and causing a physical disability to the plaintiff which for a long time incapacitated her for the discharge of her household duties. That the defendant violated the law in his refusal to immediately leave the premises when ordered to do so, there can be no question, and that his subsequent conduct as alleged was wrongful is equally certain. The action was properly brought in the name of the wife. Code 1896, §§ 2523, 2527. The suit is for an injury to the plaintiff, and not for a trespass to the realty, as supposed by appellee. It is wholly immaterial, under the circumstances alleged, whether the ownership of the premises was in the plaintiff or her husband, although it is averred that the possession of the dwelling was held under a contract of lease made by the wife. In *Watson v. Dilts*, 116 Iowa, 249, 57 L.R.A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, it was said: "Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband, . . . and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover."

Nor is it important that no physical violence was done her person. The bodily pain and suffering which she endured were in direct line of causation from the alleged wrongful act of the defendant. *Armstrong v. Montgomery Street R. Co.* 123 Ala. 233, 26 So. 349. In a case similar to the one under consideration the supreme court of Texas, in an opinion by Gaines, J., said: "That a physical, personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation in an action at law, when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but

if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had. . . . Here, according to the allegations in the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury that the recovery is sought." *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 619, 13 S. W. 59. In the case of *Brownback v. Frailey*, 78 Ill. App. 262, it was said: One who goes to the house of a pregnant woman and flourishes a whip, and makes threats in a boisterous manner, is liable for her miscarriage and sickness, resulting from fright proximately occasioned thereby, which fright he must have observed by the exercise of ordinary care, even though he did not know of the condition of her health. To the same effect are the following cases: *Watson v. Dilts*, supra; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387; *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703. The plaintiff here was in her home, and had a right to the peaceful and undisturbed enjoyment of the same, and any unlawful entry or invasion thereof, which produced physical injury to her, whether by direct personal violence, or through nervous excitement the proximate result of the wrongful acts of the defendant, was a wrong for which she is entitled to recover.

It follows from the foregoing views that the trial court, in our opinion, erred in sustaining the demurrer to the amended complaint, and for which error the judgment appealed from must be reversed, and the cause remanded.

Haralson, Simpson, and Denson, JJ., concur.

Rehearing denied.

ARKANSAS SUPREME COURT.

LITTLE ROCK RAILWAY & ELECTRIC COMPANY, Appt.,

v.

O. C. GOERNER.

(— Ark. —, 95 S. W. 1007.)

Carrier—refusal to honor transfer—damages.

1. A street-car passenger who is given an invalid transfer check upon paying his fare and asking for a transfer, to which he

Case Note.—Rights and duties of passenger receiving defective street-car transfer:—There is a conflict among the decisions as to the rights and duties of passengers who receive an incorrect or invalid

is entitled. cannot, upon refusal by the conductor of the connecting car to honor it, refuse to pay his fare, thereby rendering necessary forcible ejection, and hold the carrier liable for the assault; but his remedy is confined to damages for the breach of contract, including reasonable compensation for the indignity put upon him through the fault of the company.

Same—assault.

2. A street car company is liable not only for actual and compensatory damages, but for punitive damages also, if its conductor wilfully refuses to honor a valid transfer under circumstances of insult and aggravation, followed by an assault upon the passenger.

Instructions—rights of passenger.

3. An instruction that a street-car passenger is entitled to courteous treatment, and that the carrier is liable if he is not

treated with care and courtesy, without more explicitly defining the duty of the carrier towards him, is too uncertain.

Same—absence of evidence.

4. The jury should not be instructed as to the rights of a street-car passenger whose transfer was dishonored if he intended to pay his fare, where the evidence is that he intended to rely on his transfer and refuse further payment.

Counsel—erroneous argument.

5. It is improper for counsel to attempt to get before the jury by argument evidence which could not be produced by direct proof.

(July 23, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to re-

street-car transfer. One line of authorities supports the view that the transfer received by the passenger must be considered as conclusive evidence to the conductor of the passenger's right to ride. These cases hold that, if the transfer is inaccurate, the expulsion of the holder upon refusal to pay additional fare is justified, although the mistake or defect is due to the negligence of the conductor who issued the transfer.

This doctrine finds support in *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481, in which the court held that a passenger who receives an incorrect transfer check from the conductor of the first car without examination, although he is able to read, cannot refuse to pay his fare to the conductor of the second car who refuses to honor the check, where the passenger is familiar with the practice of the street car company to give checks differing in language and color according to the line on which they are to be used. The court thus summarized the arguments in support of its position: "The conductor of a street-railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple, and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage." 7 L.R.A. (N.S.)

Similar language was employed by the court in the case of *Woods v. Metropolitan Street R. Co.* 48 Mo. App. 125, in which a like decision was rendered.

Under such circumstances, this line of cases holds it to be the duty of a passenger to pay his fare, or peaceably leave the car, and enforce his rights in an appropriate way by an action for breach of contract to carry him. *Bradshaw v. South Boston R. Co. supra*; *Norton v. Consolidated R. Co.* 79 Conn. 109, 63 Atl. 1087; *Kiley v. Chicago City R. Co.* 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794.

And, if the passenger refuses to pay his fare or peaceably leave the car, and consequently is ejected, he has no right of action against the company for damages for his ejection (*Bradshaw v. South Boston R. Co. supra*; *Norton v. Consolidated R. Co. supra*, in which only nominal damages were allowed; *Kiley v. Chicago City R. Co. supra*); unless the one in charge of the car uses more force than is necessary. (*Ibid.*).

There is another line of decisions which denies the transfer such conclusive force, and holds that the passenger has a right to rely upon the acts and statements of the conductor issuing the transfer, and, if he is expelled from the second car on account of a mistake or defect in the transfer, notwithstanding he acts in good faith and offers a reasonable explanation, the carrier is liable in damages for such expulsion. These authorities declare it to be the duty of the conductor to whom the transfer is offered to listen to the reasonable explanation of the passenger, and he must, at his peril, determine whether the passenger is entitled to ride upon the transfer, notwithstanding it does not upon its face show such right. In support of this doctrine, see *Georgia R. & Electric Co. v. Baker*, 125 Ga. 562, 54 S. E. 639; *Hornesby v. Georgia R. & Electric Co.* 120 Ga. 913, 48 S. E. 339; *Citizens' Street R. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950, 67 N. E. 993;

cover damages for alleged wrongful ejection from defendant's car. Reversed.

Statement by Wood, J.:

The appellee alleged that on September 3d he boarded and paid his fare on a car of appellant going north on Main street, which was bound for East Markham street, and obtained a transfer to a West Markham street car; that the conductor of said west-bound car took up his transfer ticket, and, without fault of plaintiff, called him a deadbeat, and struck him over the eye with some instrument, inflicting severe wounds on his head and face, and pushed and pressed him back upon the railing of the car, inflicting wounds on his back and shoulders; that the transfer ticket was presented within the proper time, and the con-

ductor was in the line of his employment at the time he committed the assault and battery upon the plaintiff. He prayed for judgment in the sum of \$1,500. The appellant denied that plaintiff became a passenger on its west-bound car, and that its conductor took up his transfer ticket, and then, without fault of his, called him a deadbeat and struck him over the eye; denied that the transfer ticket was presented within the proper time, and that plaintiff was entitled to ride thereon; and, further answering, alleged that, if there was any difficulty between plaintiff and its conductor, such difficulty was provoked by abusive language and insulting conduct toward the conductor. The appellee testified, in substance, that he boarded one of appellant's East Markham street cars between Sixth and Seventh on

O'Rourke v. Citizen's Street R. Co. 103 Tenn. 124. 46 L.R.A. 614, 76 Am. St. Rep. 639, 52 S. W. 872; Carpenter v. Washington & G. R. Co. 3 Mackey, 227.

Although the conductor personally may have been justified by his instructions in ejecting a passenger who tendered a transfer incorrectly punched by the conductor of the first car, yet the court, in *Muckle v. Rochester R. Co.* 79 Hun, 32, 29 N. Y. Supp. 732, held that the street car company was put in the wrong by the act of the first conductor, and was no more justified in an attempt to eject the passenger than it would have been if he had at the time presented the evidence of his right to remain as a passenger in the car without further payment; and therefore the company was held liable for such violence upon the person of the passenger as was used by the conductor for the purpose of ejecting him.

And the right to damages for such expulsion was held, in *O'Rourke v. Citizens' Street R. Co.* supra, not to be affected by a condition on the transfer check that the passenger agrees to pay the regular fare in case of controversy with the conductor about the check, and then apply at the office of the company for reimbursement; since such a condition was considered to be void because unreasonable.

The following cases held that the law does not impose upon the passenger the duty to inspect the transfer, but that the passenger has the right to assume that the agent of the company has correctly discharged his duty in punching the check. *Memphis Street R. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729; *Moon v. Interurban Street R. Co.* 85 N. Y. Supp. 363; *Georgia R. & Electric Co. v. Baker*, supra; *Indianapolis Street R. Co. v. Wilson*, supra; *Lawshe v. Tacoma R. & Power Co.* 29 Wash. 682, 59 L.R.A. 350, 70 Pac. 118.

It was considered unreasonable in *Indianapolis Street R. Co. v. Wilson*, supra, to require a passenger, upon receiving a transfer

containing many words, figures, spaces, and abbreviations, which to many is prima facie unintelligible, to inspect the same in order to discover if the conductor has made a mistake in the performance of his duty.

A condition printed on a street-railway transfer check that the passenger shall examine date, time, and direction, and see that they are correct, was held to be void for unreasonableness, in *O'Rourke v. Citizens' Street R. Co.* supra,—especially when these matters are so complex that an inexperienced passenger cannot examine them and see that they are correct within the time of disposal and without explanation.

The ejection of a passenger from a car which he would have been entitled to take if the time on his transfer check had been properly punched was held, in *Eddy v. Syracuse Rapid Transit R. Co.* 50 App. Div. 109, 63 N. Y. Supp. 645, and *Jacobs v. Third Ave. R. Co.* 71 App. Div. 199, 75 N. Y. Supp. 679, to be wrongful, and entitled him to damages, where he did not know the transfer was defective, and was too ignorant to tell whether it was punched correctly or not.

In *Laird v. Pittsburg Traction Co.* 166 Pa. 4, 31 Atl. 51, the court held a street car company liable for the ejection of a passenger by a conductor who refused to accept a transfer, on the corner of which was the sentence, "It is the duty of the person receiving this, and one of the conditions upon which this check is accepted, that the passenger examine date and time and see that the same are correct," and which contained two time punches, one correct and the other incorrect, and which had been given to the passenger on leaving the first car without allowing him sufficient opportunity to ascertain whether the transfer was incorrect, if such was the case.

On the general subject of the duty of a passenger to pay fare wrongfully demanded in order to avoid expulsion and lessen damages, see exhaustive subject note in 43 L.R.A. 706.

Main street; that the car was going north; that he paid his fare, called for and received a transfer to Pulaski Heights; that at Main and Markham he boarded a Pulaski Heights car immediately after debarking from the car on which he was riding. The conductor was the same who on a previous occasion had compelled appellee and his wife to get off the car. He took up appellee's transfer and asked him if he got his transfer the other night. Appellee answered in the affirmative, whereupon the conductor called him "a liar and deadbeat," and pounded appellee with a "billet," inflicting upon him painful injuries in his eye, back, and shoulder. W. H. Rankin, a justice of the peace, testified that there was a trial or investigation of the conductor before him, and that Mr. Loughborough, one of the attorneys for the street car company, represented the conductor. The testimony on behalf of the appellant tended to show that the fight between the conductor and Goerner was brought on by the latter; that he presented a transfer ticket to the conductor at 10:30 o'clock that was issued at 9 o'clock. The transfer ticket was therefore an hour and a half late, and void under the rules of the company, according to the testimony on behalf of appellant. There was testimony also tending to prove that the transfer ticket was from a Fifteenth street car, instead of an East Markham, as claimed by appellee. There was testimony that appellee had boarded the same car at the same place two or three times before that, and presented transfers that were late, which the conductor refused to accept. When the conductor called appellee's attention to these things, he said he was not going to pay another fare. Thereupon the conductor said to him: "It looks to me like you are trying to beat anyway." Then appellee "grabbed" the conductor by the throat, and the latter struck appellee one blow "to protect himself." Such was substantially the testimony of the conductor. He contradicted the testimony of appellee in every material statement, and the testimony of the conductor was corroborated by other witnesses who were on the car at the time, and also by the motorman.

The court gave, at the request of appellee, the following instructions: "(1) If you find from the evidence that plaintiff took a car of the defendant on Main street, paid his fare, and obtained a transfer ticket from the conductor on said car, and took a Pulaski Heights car intending to present said ticket to the conductor of said Pulaski Heights car, the plaintiff became a passenger on said car, and was entitled to courteous treatment at the hands of said

conductor; and if you find that he was, without fault on his part, not treated with care and courtesy, you will find for the plaintiff. (2) You are instructed that, if you find for the plaintiff, you may find for him in such a sum as, in your judgment, will compensate him for pain and suffering, humiliation, and loss of time which you may find he sustained by reason of said injury. (3) You are instructed that, if you find from the evidence that the conductor wilfully and wrongfully struck and injured plaintiff, you may find by way of punishment in addition to any actual damages sustained, if you find any actual damages were sustained, such additional damages by way of punishment as in your judgment will deter others from like conduct again. (4) If you find from the evidence that plaintiff boarded a car with a transfer, which he believed to be good and valid, you will find for the plaintiff on this point, although you may find as a matter of fact said transfer ticket was invalid, unless you further find that plaintiff did not intend to pay fare."

The court also gave the following: "If you find from the evidence that the transfer ticket which plaintiff presented to the conductor of defendant was received by plaintiff previous to or at the hour shown by the punch mark on said ticket, and that plaintiff did not present it for payment of his passage on the first Pulaski Heights car passing Markham and Main after he left the other car, then the court instructs you that the transfer ticket was invalid and the conductor was not obliged to receive it. And if you further find that at the time plaintiff boarded the Pulaski Heights car he knew that the transfer ticket was invalid because it was stale, but that he boarded said car intending to use it for his passage [not intending to pay his fare any other way], then the relation of carrier and passenger did not exist between plaintiff and defendant, and [if conductor and plaintiff engaged in an independent fight] railway company is not liable." The words in brackets represent the modification which the court made to the request as it was asked by appellant. The court refused the request as presented, but modified and gave it in the manner indicated. Appellant objected to the ruling of the court in refusing its request as offered, and in making the modification.

In his opening argument to the jury counsel for appellee used the following language: "Mrs. Goerner was a passenger on that car and gave up one of these transfers; but she being the wife of the plaintiff in this case, and the law being that the wife

cannot testify for or against her husband, her mouth is sealed. We cannot hear anything from her. Usually a woman makes a good witness. She is quick to see and notice details. It makes a deeper impression on her than anybody else." And in his closing argument counsel for appellee made use of the following: "Now the conductor is not in the employ of the street car company any more, and you noticed when I asked, 'What were you discharged for?' they said, 'Oh, we object,' and I did not get to show, and could not show, why he got out." Objections were made by appellant to the above remarks at the time, and the court was asked to exclude same from the jury. The court refused, and appellant saved its exceptions to the court's ruling. The verdict was for \$160. Judgment was entered accordingly, which this appeal seeks to reverse.

Messrs. Rose, Hemingway, Cantrell, & Loughborough, for appellant:

The limitation of time was a reasonable regulation.

Booth, Street Railways, ¶ 237; Nellis, Street Surface Roads, ¶¶ 6, 8, pp. 432, 440; Clark, Acci. Law, ¶¶ 81, 82; Mahoney v. Detroit Street R. Co. 93 Mich. 612, 18 L.R.A. 335, 32 Am. St. Rep. 528, 53 N. W. 793; Hefron v. Detroit City R. Co. 92 Mich. 406, 16 L.R.A. 345, 31 Am. St. Rep. 601, 52 N. W. 802; Hornesby v. Georgia R. & Electric Co. 120 Ga. 913, 48 S. E. 339.

It was plaintiff's duty to examine his transfer ticket.

Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481; Kiley v. Chicago City R. Co. 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794; Little Rock & Ft. S. R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584.

If the plaintiff had become possessed of this transfer ticket in any improper way, and the use of it was a fraud upon the rights of the company, then the relation of carrier and passenger did not exist.

St. Louis, I. M. & S. R. Co. v. Ledbetter, 45 Ark. 246; Higley v. Gilmer, 3 Mont. 90, 25 Am. Rep. 450; Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66.

Messrs. Carmichael, Brooks, & Powers, for appellee:

The conductor should have used no more force than was necessary.

St. Louis & S. F. R. Co. v. Brown, 62 Ark. 259, 35 S. W. 225; Little Rock Traction & Electric Co. v. Winn, 75 Ark. 529, 87 S. W. 1025; St. Louis & S. F. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971.

7 L.R.A. (N.S.)

How the tickets were punched, it was not plaintiff's duty to know. If he had been a wilful trespasser, the conductor would have had no right to strike and beat him.

St. Louis, I. M. & S. R. Co. v. Davis, 56 Ark. 51, 19 S. W. 107; St. Louis I. M. & S. R. Co. v. Osborn, 67 Ark. 399, 55 S. W. 142; St. Louis, I. M. & S. R. Co. v. Stroud, 67 Ark. 112, 56 S. W. 870; Malecek v. Tower Grove & L. R. Co. 57 Mo. 21.

Wood, J., delivered the opinion of the court:

First. No objection was made and exception saved at the trial to the portion of the testimony of W. H. Rankin, which appellant now urges as error. We will therefore not consider that question.

Second. A street railway may make and enforce reasonable rules to facilitate its business, and to protect itself from fraud and imposition. So long as these rules are not inconsistent with the rights of the public to transportation over the company's road, and do not impose unnecessary and unreasonable burdens upon them, they will be enforced. Booth, Street Railways, § 237; Nellis, Street Surface Railroads, p. 440, § 8; Clark, Acci. Law, § 81. A rule requiring transfer tickets showing the right of passengers who pay a single fare to ride upon the different cars and to various points on the company's road is reasonable. Where a passenger on a street car pays his fare, and calls for and receives a transfer ticket, which is void upon its face, and which is refused when presented to another conductor, he, nevertheless, had a valid contract with the company to be carried to his place of destination, and the company, in expelling him from its car for a refusal to pay additional fare, violates its contract, and is liable in damages for its breach. Thus far there is practical unanimity in the adjudications. But, as to the measure of damages for such breach, and whether the action shall sound in tort for wrongful expulsion or be confined solely to one *ex contractu*, there is great diversity of opinion. See Clark, Acci. Law, § 83, p. 196, and O'Rourke v. Citizens' Street R. Co. 103 Tenn. 124, 46 L.R.A. 614, 76 Am. St. Rep. 639, 52 S. W. 872, where the authorities pro and con are cited and reviewed. Mr. Freeman in his exhaustive notes to Com. v. Power, 41 Am. Dec. 465 (7 Met. 596), states the rule upon the subject as to commercial railways as follows: "If, by a mistake of one of the officers of the company, he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right, nevertheless, remains, and if, for want of the requisite evidence of that right, another servant of the company refuses to

carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But, as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover as a part of his damages reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected, being reasonable, is a complete protection to the company and its servants against the recovery of any damages directly or indirectly, for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used." This rule is equally applicable to street railways, and is, we believe, based upon better reason than those authorities which hold to a different view. Judge Taft, in *Poulin v. Canadian P. R. Co.* 17 L.R.A. 800, 3 C. C. A. 23, 6 U. S. App. 208, 52 Fed. 197, says: "The law settled by the great weight of authority . . . is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle; with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting its fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent." See, also, for a cogent statement of the reasons for the rule, *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481.

The strongest cases we have read, to wit, *O'Rourke v. Citizens' Street R. Co.* supra, and *Lawshe v. Tacoma R. & Power Co.* 29 Wash. 682, 59 L.R.A. 350, 70 Pac. 118, holding that, under circumstances similar to the case at bar, the passenger may refuse to

pay his fare, suffer ejection, and then sue the railway company for the wrongful expulsion, are not in conflict with the rule we have announced as to the liability of the railway company. They differ only as to the nature of the action, and the consequent measure of damages. It follows that under either rule the appellee was a passenger at the time of the alleged assault upon him. Under the rule we have announced, had there been nothing more than a refusal to accept the transfer ticket, a demand for additional fare, and upon refusal an expulsion without using more force than necessary to accomplish the purpose, the railway company would have been liable only for a breach of its contract. But, under the allegations of the complaint and the testimony on behalf of appellee, there was a wilful breach of the contract under such circumstances of insult and aggravation as to constitute a tort. *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967. These allegations, if true, would render appellant liable not only for actual and compensatory, but also for punitive, damages. While we do not find the first instruction obnoxious to the particular objections urged against it in brief of counsel, the latter portion of it was erroneous. It told the jury that, if appellee became a passenger, he "was entitled to courteous treatment," and if he was without fault, and "not treated with care and courtesy," he was entitled to recover. The court should have defined the duty of appellant to appellee to use ordinary care to protect him, if he became a passenger, from insults and injuries, and should have told the jury that in case appellee was a passenger if the conduct of appellant's conductor towards him as alleged in the complaint was established by the evidence, that it would render appellant liable. The instruction allowed the jury to generalize and speculate as to what would be "courteous treatment," and left them to say what "care and courtesy" was due from appellant to appellee. That is too uncertain. Jurors might differ greatly in their ideas of what would be "courteous treatment." The law fixes the standard and defines the measure of appellant's duty in such cases. The learned counsel for appellant has made no criticism of the instruction upon this ground. He seems to concede that, if appellee was a passenger, (which the jury found), the conduct of the conductor towards him would render appellant liable, and this is true, for, if appellee was a passenger, the conductor had no right to insult him by saying as he says he did: "It looks to me like you are trying to beat anyway." Therefore, we will treat the error pointed out as nonprejudicial; but we call attention to it so that a correct

declaration may be given upon a new trial. The cause must be reversed for an error hereafter indicated.

There was no error in the second and third instructions given at the request of appellee. In the fourth the meaning is not clearly expressed, but it doubtless intended to tell the jury that, if appellee boarded appellant's car with a transfer ticket which he believed to be valid, but which as a matter of fact turned out to be void, that he would still be a passenger if he intended to pay his fare. The instruction was abstract and prejudicial. There was no proof that appellee intended to pay his fare, if the transfer ticket was invalid. On the contrary, the undisputed evidence is that he "was not going to pay another fare." Under the rule we have announced supra, appellee was a passenger if he had paid his fare which entitled him to a proper transfer ticket, even though the ticket given him was invalid, provided he presented such transfer ticket in proper time, and on the proper car. He was a passenger under such circumstances, whether he intended to pay an additional fare or not, in case the transfer ticket given him was refused. The only contention of appellee in the lower court, as shown by the pleadings and proof, was that he had paid his fare and had received a transfer ticket which he presented at the proper time and on the proper car, and that this established between him and appellant the relation of passenger and carrier which entitled him to recover for injuries alleged. On the other hand, it was the contention of appellant that appellee had not paid his fare, and had not received a transfer ticket which he presented at the proper time and place, but that appellee was attempting to defraud the company by offering and claiming the right to ride on a spent or bogus transfer ticket, and appellant adduced evidence tending to prove its contention. Appellant was therefore entitled to an instruction presenting this theory to the jury. The court was asked to give such an instruction in appellant's request No. 8. But the court refused it as asked, and modified it by allowing the jury to find that, if appellee had not paid his fare in the manner indicated in his complaint and proof, that he might have intended to pay it in some other way. This was not only without evidence to support it, but, as we have shown, there was positive and undisputed evidence to the contrary. Appellant's request for instruction No. 8 was correct as asked, and should have been granted without modification.

Third. The remarks of counsel for appellee, both in the opening and closing argument, was an effort to place before the jury 7 L.R.A. (N.S.)

as evidence indirectly by argument that which could not be produced directly in the proof. The remarks were highly improper. But, inasmuch as the cause must be reversed for the errors indicated in the instructions, it is unnecessary to determine whether or not the remarks constituted reversible error. It is safe to assume they will not be repeated.

Reversed, and remanded for new trial.

Hill, Ch. J., did not participate.

GEORGIA SUPREME COURT.

GEORGIA RAILWAY & ELECTRIC COMPANY, Plff. in Err.,
v.

MRS. C. L. BAKER.

(125 Ga. 562, 54 S. E. 639.)

Carrier—transfer—consideration.

1. Although a street railway company may not be required by law to carry a passenger on any other line than the one over which the car originally boarded runs, still, if such company holds out that it will, when fare is paid on the first car, issue a transfer giving the right to ride on other cars of its lines, a request for a transfer is an acceptance of this offer, and the delivery of the transfer completes a contract under which the passenger is entitled to demand the right to ride on both the original car and the transfer car; and the amount paid to the conductor of the first car is the consideration for the right to ride on each car. The right to ride on the car to which the passenger is transferred is in no sense a gratuity.

Same—mistake—right of passenger.

2. If a mistake is made by the conductor of the first car in issuing a transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second car must, at his peril, determine whether the passenger is entitled to ride upon the transfer, notwithstanding it does not upon its face show such right.

Same—condition.

3. A condition on a transfer issued by a street railway company that "the holder, by accepting, agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void.

Headnotes by COBB, P. J.

Note. — The rights and duties of a street-car passenger who has received an erroneous transfer are considered in the note to Little Rock R. & Electric Co. v. Goerner, ante, 97.

Same—threat of expulsion.

4. A threat by the conductor of the second car to expel a passenger on account of a mistake in the transfer slip is a legal wrong, giving the passenger a right of action against the company, notwithstanding there is nothing insulting in the words or manner of the conductor, further than that a mere threat to expel might be deemed an insult.

Same—measure of damages.

5. In an action brought to recover damages for a threat to expel a passenger from a street car, who presented a transfer to the conductor which was defective through no fault of the plaintiff, but who, under the facts of the case, was entitled to a ride on the car, the measure of damages is not limited to the amount paid to prevent an expulsion, but general damages may be recovered as for an inexcusable trespass, even though there be no aggravating circumstances connected with the threat of expulsion.

Instruction—error.

6. While the evidence demanded a finding in favor of the plaintiff so far as the right to recover was concerned, the erroneous instruction in relation to the worldly circumstances of the parties was of such a character as to require the granting of a new trial.

(May 18, 1906.)

ERROR to the City Court of Atlanta to review a judgment in plaintiff's favor in an action brought to recover damages for attempted ejection of plaintiff from defendant's car. Reversed.

Statement by Cobb, P. J.:

Mrs. Baker sued the street railway company for damages. The petition alleged that she boarded a car of the defendant at Grant Park, in the city of Atlanta, about 3:30 p. m.; that she paid her fare and requested of the conductor a transfer to the Marietta street line, and in response a transfer was given to her by the conductor. On arrival at the transfer point established under the rules of the company, she inquired how long she would have to wait for a Marietta street car, and the conductor told her that the car was then approaching, and pointed to it. The plaintiff alighted and immediately boarded the Marietta street car, which was the first car on that line passing after her arrival. The conductor of this car approached plaintiff, and she gave to him the transfer slip which had been given to her by the conductor of the other car. He refused to honor the transfer, and demanded that she pay another fare, threatening to eject her if she refused to do so. This was all done in an insulting manner; the conductor charging her with having had the

transfer since 11 o'clock A. M. The bell was rung in order to eject her, and she paid to the conductor a fare. He was proceeding to eject her at the time, and she paid the fare under protest. The car was filled with passengers, and the threats of the conductor that he would eject her were made in the presence of these passengers, among whom were a number of her acquaintances. She was humiliated and mortified, and her feelings greatly wounded. The petition avers that it was the duty of the defendant to carry her to her destination on Marietta street without extra pay, and she prays for damages, actual, punitive, and vindictive. Damages were laid in the sum of \$1,500. By amendment, a copy of the transfer slip is attached to the petition as an exhibit. Upon this transfer appears the following: "This transfer is good for one continuous trip on the route punched, provided it is presented at the first intersecting point by the person to whom originally issued, and used on the date and before the expiration of time punched, and upon first car passing transfer point for route shown, and is otherwise subject to the rules of the company. . . . This transfer is issued upon further condition, and holder by accepting agrees, that should any controversy arise as to its validity, holder will pay fare and call at company's office for correction." On the transfer appear the names of the streets on which the lines of the company run. The street on which the first car was boarded is marked by a punch. Marietta street is not so marked, but there is a punch mark on Magnolia street. The punch marks indicate 11 o'clock as the hour at which the transfer was issued, but this mark does not appear in the column headed "A. M." or in the column headed "P. M." The defendant filed an answer, in which it admitted some of the allegations of the petition and denied others. The defense set up was in effect a denial of liability, on the ground that the transfer did not upon its face confer the right to ride. The allegations as to the alleged wrongful conduct of the conductor were all denied. The trial resulted in a verdict in favor of the plaintiff for \$60. The defendant excepted to the judgment refusing a new trial.

Messrs. Rosser & Brandon and Walter T. Colquitt, for plaintiff in error:

There was no tort committed, and whatever right of action plaintiff had was for breach of contract.

Louisville & N. R. Co. v. Spinks, 104 Ga. 692, 30 S. E. 968; Goins v. Western R. Co. 68 Ga. 190; Hughes v. Western R. Co. 61 Ga. 132; Brooke v. Cole, 108 Ga. 251, 33 S. E. 849.

The company was entitled to impose conditions on its tickets, and the passenger would have to comply with all the terms and conditions of the contract, which formed a part of the ticket, in order to entitle him to be transported.

Southern R. Co. v. DeSaussure, 116 Ga. 53, 42 S. E. 479; *Morse v. East Tennessee, V. & G. R. Co.* 73 Ga. 356; *Coyle v. Southern R. Co.* 112 Ga. 122, 37 S. E. 163; *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671; *Davis v. South Carolina & G. R. Co.* 107 Ga. 421, 33 S. E. 437; *Southern R. Co. v. Dyson*, 109 Ga. 103, 34 S. E. 997; *Lewis v. Western & A. R. Co.* 93 Ga. 225, 18 S. E. 650; *Central R. Co. v. Ricks*, 109 Ga. 339, 34 S. E. 570; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209; *Central R. Co. v. Lippman*, 110 Ga. 665, 50 L.R.A. 673, 36 S. E. 202; *Southern R. Co. v. Howard*, 111 Ga. 842, 36 S. E. 213; *Phillips v. Georgia R. & Bkg. Co.* 93 Ga. 356, 20 S. E. 247; *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St. Rep. 146, 30 S. E. 841; *Central R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990.

If a railroad company gives a person something the person has no right to demand of it because of no public duty imposed by law on it, then the railroad company has the right to impose terms and conditions on the gift, and these terms and conditions are valid and binding.

Holly v. Southern R. Co. 119 Ga. 767, 47 S. E. 188; *Southern R. Co. v. DeSaussure*, *supra*.

No duty is imposed by law on the defendant with reference to transfers.

Old Colony Trust Co. v. Atlanta, 83 Fed. 39, 32 C. C. A. 125, 59 U. S. App. 230, 88 Fed. 859.

The face of the transfer is conclusive evidence as to the passenger's right to ride on a particular car, as between the conductor to whom the transfer is tendered and the passenger.

Southern R. Co. v. DeSaussure and Holly v. Southern R. Co. *supra*; *Crowley v. Fitchburg & L. Street R. Co.* 185 Mass. 279, 70 N. E. 56; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Garrison v. United Railways & Electric Co.* 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 371.

Messrs. O. E. Horton and M. C. Horton for defendant in error.

Cobb, P. J., delivered the opinion of the court:

It is conceded that there is no law of this state, and no valid ordinance of the city of Atlanta, requiring street railway companies to issue transfers to passengers, authorizing them to ride upon a car other than the one which they originally board. This fact be-
7 L.R.A. (N.S.)

ing conceded, the argument is made that the right to ride upon the second car, resulting from the issuance of the transfer, is a mere gratuity. This is not true. The issuance of transfers is a voluntary act on the part of the company, using the word "voluntary" in its ordinary sense. The company is not bound to issue transfers. It is under no obligation to transfer the passenger to any other point than one on the line of the car originally boarded. But when the company voluntarily and without any compulsion adopts the custom of issuing transfers for the consideration paid the conductor of the first car, it binds itself by a contract to transport the passenger from the point where he enters the car to a point on any line to which, under the custom of the company, it is usual to issue transfers. In the absence of a custom, the company simply sells to the passenger, for the fare paid, the right to ride between points on the first line. Under a custom of issuing transfers, the offer is made for a stated consideration to transfer the passenger from a point on one line to a point on any other line embraced within the custom. When the passenger pays his fare to the conductor of the first car and requests a transfer, and a transfer is delivered, the offer arising under the custom is accepted, and the contract becomes complete, and the one fare is the consideration for the transportation of the entire journey. The company does not contract merely for the journey on the first line and donate a journey on the second line. Some companies will issue tickets entitling passengers to six rides for 25 cents, when the usual fare paid is 5 cents for each ride. No one would seriously contend that only the first five rides, under such circumstances, were paid for, and the sixth was a mere donation. The company is in the business of selling rides. It may fix the amount which shall be paid for a ride upon either one or more cars. When this amount is paid, the passenger is a purchaser of a ride between the points covered by the contract. This is true, whether or not, as an original proposition, the passenger could demand a right to ride between these points for the amount paid. The position that the transferred passenger is receiving a mere gratuity when he rides upon the second car is untenable.

2. Whether the transfer slip used by a street railway company is to be looked to as conclusive evidence of a right to ride on a second car, and whether any mistake made in the issuance of the transfer, resulting in its showing upon its face that the right to ride upon the second car does not exist, is a question about which the courts are not agreed. According to some of the decisions,

the transfer received must be considered as conclusive evidence of the passenger's right to ride, although it may not in its true sense express or evidence the contract into which the passenger enters. These decisions hold that, if the transfer is inaccurate, the expulsion of the holder upon refusal to pay additional fare is justified, although the mistake or defect is due to the negligence of the conductor who issued the transfer. On the other hand, there are numerous decisions which deny the transfer such conclusive force and dignity, and rule that the passenger has a right to rely upon the acts and statement of the conductor issuing the transfer, and, if he is expelled from the second car on account of a mistake or defect in the transfer, notwithstanding he has acted in good faith and offered a reasonable explanation, the carrier is liable in damages for such expulsion. See the cases cited in *Hornesby v. Georgia R. & Electric Co.* 120 Ga. 913, 48 S. E. 339, and in the note to that case in 1 Am. & Eng. Anno. Cas. 392. In the *Hornesby* Case it was held that, when a street railway company voluntarily offered to passengers the right to a transfer from one of its cars to another, to continue the journey without the payment of additional fare, it was reasonable to require, as a condition precedent to the exercise of this right, that the passenger should tender to the conductor of the second car a punched transfer ticket, which must be used within the time indicated by punch marks, provided a car upon which the passenger could be conveniently and comfortably transported passed the transfer point within the time so limited. The question now before us was not directly involved in that case. Attention was then, however, called to the conflict of authority above referred to on the question now under consideration. We think that our rulings in reference to tickets issued by ordinary railway companies are more in line with those authorities that hold that the transfer slip is merely evidence of the contract, and that, if any mistake is made in issuing the transfer, so that it does not express the true contract, the conductor of the second car, on presentation of the transfer and a reasonable explanation of the mistake that appears on the slip, would at his peril decline to transport the passenger, if, as a matter of fact, a proper transfer was called for and the passenger was in no fault in reference to the matter. And we think this is the true rule. As was aptly said by Caldwell, J., in *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 132, 46 L.R.A. 614. 76 Am. St. Rep. 639, 52 S. W. 872: "It is the contract, and not the ticket, that gives the right to transportation. The ticket is but an evi-

dence of the contract, made out and furnished by the carrier; and, if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance. The passenger is not required in law, nor allowed in fact, to print, or write, or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume that it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made."

In the case just quoted from, there was printed on the transfer a statement requiring the passenger to examine the date, time, and direction, and see that the transfer was correct. There was also a statement that the passenger accepting the transfer agreed to "read and be bound by all the conditions on the back" of the same, "subject to the rules of the company." These conditions, so far as they required the passenger to read the transfer and examine the date, etc., were held to be unreasonable for two reasons: In the first place, the time usually occupied in making a trip on street cars was not such as to permit a compliance with the regulation; and, in the second place, if there was time for the purpose, the transfer was more or less complicated in its nature, and an inexperienced, though intelligent, passenger, who happened to be unacquainted with the system of punch marks, names of streets, etc., of the particular company, would be unable to ascertain whether it was correctly issued or not. In that case the transfer was of such a character that even an intelligent officer of the company, who testified as a witness, was unable to explain the system to the satisfaction of the trial judge. As was said by Caldwell, J., in the opinion: "It cannot be fair, or just, or reasonable, to require passengers, in the hurry of rapid street-car travel, to decipher at their peril a check, whose meaning so intelligent a judge cannot ascertain by careful and deliberate inspection." In *Laird v. Pittsburgh Traction Co.* 166 Pa. 4, 31 Atl. 51, a similar condition on a transfer check was under consideration, and it was said: "If that is intended to be regarded as a reasonable regulation, the check should be given to the passenger before he leaves the car a sufficient length of time to afford him at least an opportunity of reading it, and, if wrong, having it corrected." The contract between the carrier and the passenger is made by the offer held out by the company, although voluntary on its part, to transport the passenger on two lines. The transfer slip is mere evidence of the right to ride upon two lines, and, if there has been in fact a contract between the passenger and the agent of the company in

charge of the first car, the right to ride upon the second car is complete, although the evidence of the right is defective. We are aware that this rule may lay the carrier open to imposition in some cases. But, on the other hand, a contrary rule would impose upon the traveling public, and especially those members of it who are inexperienced and uninformed, a serious burden, and one which it is not reasonable or proper that they should be compelled to carry. It is true that the carrier is under no obligation to make the contract, but, when it voluntarily enters into one, it is none the less a contract, and, on account of the public character of the business in which it is engaged, the courts have authority to determine whether the rules and regulations adopted by it in reference to the conduct of its business as a carrier of passengers are reasonable and proper. If what is contained in the statements on the transfer slip were embodied in an express contract, based upon a sufficient consideration, it may be that the courts would not interfere.

3. It is said that there is a condition on the transfer that, if there is any controversy in reference to the same, the holder will pay fare and call at the company's office for correction. There was a similar condition on the transfer involved in the case decided by the supreme court of Tennessee, above referred to. In reference to this stipulation the court said: "This condition is unreasonable, in that it makes the conductor, for the time, the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare, though his ticket may be refused without sufficient cause, . . . in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company; which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully enacted. It puts all of the burden of the 'controversy' upon the wronged passenger, and none upon the wrongdoing company, and thereby makes the just suffer for the unjust." We thoroughly concur in this view. Counsel in their argument say that the decision of the supreme court of Tennessee which we have followed was based upon a statute of that state requiring a street railway company to issue transfers. There is no reference to a statute in the opinion of the court. In addition to this, none of the reasoning of the learned judge who delivered the opinion is based upon any statute, and the questions seemed to have been solved merely by the application of general rules of law.

4. The averments of the petition that the

conductor of the second car refused to recognize the transfer and demanded payment of a second fare, and threatened to eject the plaintiff, in an insulting manner, were not sustained by the proof. The evidence, however, does show that he refused to accept the transfer, and that he demanded a second fare, and that he told the plaintiff that if she did not pay the second fare he would be compelled to eject her from the car. But the plaintiff testified that he acted in a gentlemanly manner, and that there was nothing insulting, either in his words or in his conduct, other than such an insult as may arise from a simple threat to eject. It is a case, therefore, where a conductor has simply complied with what he understood to be the rules and regulations of the company by which he was employed. In complying with these rules, although he might have had the manner of a perfect gentleman, and used language which would be proper in the most polite society, still, if the plaintiff had a right to ride upon the car and was threatened with expulsion, no matter in what words, it was a breach of the duty which the company owed her as a passenger, and gave her a right of action against the company. A jury would have been compelled to find that the explanation made by the plaintiff of the mistake in the transfer was reasonable, and, although the conductor was placed in an embarrassing position, under the law he was compelled to choose between two alternatives, and if he made a mistake, and used a threat to expel a passenger who had a right to ride on the car, the company would be liable, without reference to the manner in which he made the threat and his good faith in the matter.

5. There are some decisions which hold that the damages recoverable for an expulsion resulting from the wrongful refusal to accept a transfer, the mistake being due to the conductor of the initial car, are compensatory only. *Pine v. St. Paul City R. Co.* 50 Minn. 144, 16 L.R.A. 347, 52 N. W. 392; *Eddy v. Syracuse Rapid Transit R. Co.* 50 App. Div. 109, 63 N. Y. Supp. 645. In Ohio it was held by a circuit court that a passenger's recovery was limited to the additional fare paid, when there were no aggravating circumstances. *Carr v. Toledo Traction Co.* 19 Ohio C. C. 281. But we think the decision by the supreme court of Pennsylvania in the case of *Laird v. Pittsburgh Traction Co.* supra, takes the better view of the matter. It was there held that in such a case the damages are not limited merely to the amount sufficient to compensate the plaintiff for the trouble and delay caused by the conductor of the company and the expense necessary to complete his journey, but he is en-

titled to substantial damages, as for an inexcusable trespass. In that case there was a request to instruct the jury that the damages to be recovered were simply those resulting from the trouble and inconvenience caused by the expulsion from the car. In commenting on the propriety of this instruction, Sterrett, Ch. J., well says: "To sanction such a measure of damages as is suggested in this point would tend to encourage rather than prevent the commission of indignities to which no well-behaved passenger in a public conveyance should be subjected."

6. The charge of the court was, in effect, an instruction that the plaintiff was entitled to recover. There would have been no error in instructing the jury in terms to this effect. Under the undisputed facts, a recovery was demanded, and the only question to be determined was the amount of the verdict. In the instructions on the subject of damages the court charged: "The worldly circumstances of the parties and all the attendant facts are to be weighed." This charge was assigned as error, for the reason that there was no evidence to authorize it. There was no evidence as to the worldly circumstances of the parties. While the verdict is not large, and possibly a larger verdict, as a recovery of general damages, would be permitted to stand, still the question of what should be assessed as general damages was a matter for determination by the jury, and we cannot undertake to say that the jury was not misled by the erroneous charge into giving a larger amount than they in their judgment would have thought sufficient in the absence of such an instruction.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

COLORADO SUPREME COURT.

JOHN H. LEIPER, Plff. in Err.,
v.

CITY & COUNTY OF DENVER et al.

(— Colo. —, 85 Pac. 840.)

Highway—change of grade—damages.

A municipal corporation is not liable for injury to abutting property by al-

teration of the natural surface of a street in bringing it to the first established grade where the change is not unreasonable or carelessly done, even under a constitutional provision that private property shall not be damaged for public use without compensation.

(April 2, 1906.)

ERROR to the District Court for the City and County of Denver to review a judgment in favor of defendants in an action brought to recover damages for injuries to plaintiff's property through the change of the grade of the street. Affirmed.

The facts are stated in the opinion.

Mr. Isham R. Howze, for plaintiff in error:

Plaintiff was entitled to damages.

Rigney v. Chicago, 102 Ill. 64; Harmon v. Omaha, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; Hammond v. Harvard, 31 Neb. 635, 48 N. W. 462; Werth v. Springfield, 78 Mo. 107; Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107; Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Brown v. Seattle, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214; O'Brien v. Philadelphia, 150 Pa. 589, 30 Am. St. Rep. 832, 24 Atl. 1047; 2 Dill. Mun. Corp. 4th ed. §§ 989-995; Lewis, Em. Dom. § 223; Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629; Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; New Brighton v. United Presby. Church, 96 Pa. 331; Householder v. Kansas City, 83 Mo. 488; Atlanta v. Green, 67 Ga. 386; Montgomery v. Townsend, 80 Ala. 489, 60 Am. Rep. 112, 2 So. 155, 84 Ala. 478, 4 So. 780; Montgomery v. Maddox, 89 Ala. 181, 7 So. 433; McElroy v. Kansas City, 21 Fed. 257; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

Where a change is made from the natural grade after a street is opened compensation must be made for the change.

Lewis, Em. Dom. § 223; Eachus v. Los Angeles Consol. Electric R. Co. supra; Bloomington v. Pollock, 141 Ill. 351, 31 N.

Case Note.—Liability of municipality for injury to abutting property from bringing street to the grade established in the first instance, under constitutional provision against "damaging" private property for public use without compensation:—An examination of the authorities shows that they are massed against the position taken by the court in LEIPER v. DENVER.
7 L.R.A. (N.S.)

In Cooper v. Dallas, 83 Tex. 239, 29 Am. St. Rep. 645, 18 S. W. 565, the plaintiff was allowed to recover for damages occasioned by the grading of the street, thereby raising it higher than his lands and flooding the same. The Texas Constitution, under which this recovery was permitted, provides against the taking, damaging, or destroying of property for public use without adequate

E. 146; *Elgin v. Eaton*, supra; *Davis v. Missouri P. R. Co.* 119 Mo. 180, 41 Am. St. Rep. 648, 24 S. W. 777; *Hickman v. Kansas City*, 120 Mo. 110, 23 L.R.A. 658, 41 Am. St. Rep. 684, 25 S. W. 225; *Smith v. St. Joseph*, 122 Mo. 643, 27 S. W. 344; *New Brighton v. United Presby. Church*, supra; *Hendrick's Appeal*, 103 Pa. 358; *Jones v. Bangor*, 144 Pa. 638, 23 Atl. 252; *O'Brien v. Philadelphia*, supra; *Winner v. Graner*, 173 Pa. 43, 33 Atl. 698; *Norristown's Appeal*, 3 Walk. (Pa.) 146; *Wilks-Barre Paper Mfg. Co. v. Wilks-Barre*, 5 Kulp, 333; *Ft. Worth v. Howard*, supra; *Less v. Butte*, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140; *Root v. Butte, A. & P. R. Co.* 20 Mont. 354, 51 Pac. 155.

The owner of a city lot has a kind of property in the public street for the purpose

of giving to such land facilities of light, of air, and of access to the street.

Bohm v. Metropolitan Elev. R. Co. (*Somers v. Metropolitan Elev. R. Co.*) 129 N. Y. 576, 14 L.R.A. 344, 29 N. E. 802.

These easements are property, protected by the Constitution from being taken or damaged without just compensation.

Root v. Butte, A. & P. R. Co.; *Chicago v. Taylor*; *Eachus v. Los Angeles Consol. Electric R. Co.*; *Rigney v. Chicago*; and *Brown v. Seattle*,—supra; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Hickman v. Kansas City*; *Ft. Worth v. Howard*; and *Harmon v. Omaha*,—supra; *Schaller v. Omaha*, 23 Neb. 325, 36 N. W. 533.

The Constitution does not distinguish between the first grade and subsequent ones.

Searle v. Lead, 10 S. D. 312, 39 L.R.A. 345,

compensation. The court did not discuss the distinction between the original grading of the street and a subsequent change of a grade already established, and there is nothing in the opinion to show that the street had been previously graded.

But in *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059, the question is clearly presented, and the court held the abutting owner entitled to recover for damages resulting from the original grading of the street, and stated that the rule rested upon "the broad principle of equity, now embodied in the Constitution itself, that the public should make good the loss to the individual where private property is damaged for the public benefit." The highway involved in this case had been in existence for several years prior to the grading, during which time two or three dwellings had been erected by the plaintiff.

And in *Texarkana v. Talbot*, 7 Tex. Civ. App. 202, 26 S. W. 451, the court recognized the abutting owner's right to recover for damages resulting from the original grading of the street, and cited both the *Dallas* and *Ft. Worth* Cases but held against the plaintiff upon the ground that, by signing the petition for the improvement of the street, he had consented to the same within the meaning of the provision of the Constitution making the right to compensation depend on the want of consent of the person injured.

Under the South Dakota Constitution declaring that private property shall not be taken for police use, or damaged, without compensation, the court, in *Searle v. Lead*, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101, restrained the grading of the street, which had not previously been graded, until the plaintiff's damages had been ascertained and paid. The plaintiff had erected a house upon her lot in accordance with the natural grade of the street. The municipality contended that it was not liable for an incidental injury caused by the making of a grade for the first time, but that the liability was limited to those cases in which a grade

which had been previously established was changed, and cited the statute of South Dakota, declaring a municipality liable for damages resulting from the changing of a grade which had been previously established. To this the court said that the act of the legislature could not abridge or control the provisions of the Constitution, and that the provisions of the Constitution were self-executing, general in their language, and not limited to change of grade previously established.

This ruling was adhered to in *Whittaker v. Deadwood*, 12 S. D. 606, 82 N. W. 202, where the plaintiff had erected buildings conforming to the grade which had been previously established under what the trial court found to be an invalid ordinance. But the court held this finding immaterial as the plaintiff was entitled to recover even though the grade had not been previously established.

In *Werth v. Springfield*, 78 Mo. 107, the court, in holding an abutting owner entitled to recover for damages caused by changing the grade of the street, under the Missouri Constitution forbidding the taking or damaging of private property for public use without compensation said: "When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution." The report of the case does not show whether the grade of the street involved had been previously established, though it does show that the highway had been in existence for some time previous to the grading complained of.

In another Missouri case in which a similar decision was rendered, and where the highway had been in existence for some time, it does not clearly appear whether the street had been previously graded, though the opinion conveys the impression that it had not been so graded; and the court quoted from the *Werth* Case the language above referred to. *McElroy v. Kansas City*, 21 Fed. 257.

73 N. W. 101; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Eachus v. Los Angeles Consol. Electric R. Co.* supra; *McCall v. Saratoga Springs*, 29 N. Y. S. R. 699, 9 N. Y. Supp. 170, 121 N. Y. 704, 24 N. E. 1100; *Hendrick's Appeal and O'Brien v. Philadelphia*, supra; *Blair v. Charleston*, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. Rep. 837, 26 S. E. 341; *Hickman v. Kansas City and Harmon v. Omaha*, supra.

Messrs. H. A. Lindsley and H. L. Ritter, for defendants in error:

Plaintiff was not entitled to recover.

Denver v. Bonesteel, 30 Colo. 107, 69 Pac. 595.

Campbell, J., delivered the opinion of the court:

The sole question for decision is whether

The right to recover for damages arising from the grading of a street which had never been previously graded was squarely raised in *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750. Plaintiff was permitted to recover under the provisions of the California Constitution forbidding the taking or damaging of private property for public use without compensation. In this case it was admitted that the street had never been changed from its natural grade until the excavations were made by the defendant in the construction of its railroad, although it had been in existence for twenty years, and the plaintiff had erected a house on the adjoining lot, and the court said: "The same rule is applicable when a street is for the first time reduced to an established grade, as when a change in the grade has been made after the street has once been brought to such grade."

In *Eachus v. Los Angeles*, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829, the defendant municipality was held liable for the establishment and enforcement of a grade of the highway in front of the plaintiff's lots, under the provisions of the California Constitution.

The question here discussed has been passed upon under the Illinois Constitution declaring that private property shall not be taken for public use without just compensation, and the liability of the defendant sustained. *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146. In the *Bloomington* Case the grading of the highway was fixed by an ordinance adopted in 1860, but no attempt had been made to carry it into effect until 1889. In 1858, two years prior to the adoption of the ordinance, a house had been constructed on the abutting lot, which the plaintiff purchased in 1878. The constitutional provision requiring compensation for property damaged for public use was not adopted until after the ordinance fixing the grade complained of, although prior to its execution. In holding a municipality liable

a municipality is liable to an abutting lot owner for damages resulting thereto from the authorized lowering or raising of the grade of a public street from the natural surface to a grade established by municipal ordinance in the first instance, notwithstanding the fact that the change is reasonable and the work of making the same is skilfully performed. In *Denver v. Bonesteel*, 30 Colo. 107, 69 Pac. 595, § 15 of article 2 of our Constitution, which is here invoked as creating such liability, was considered at some length. It was there held that, under this provision, which declares that private property shall not be taken or damaged for public or private use without just compensation, where a permanent grade of a street is established by a city, and an abutting lot owner improves his

for damages arising from the grading of a street, even though it be the original grading, the court made no comment on the fact that the ordinance fixing the grade complained of was adopted prior to the plaintiff's purchase of the house, and no attempt was made to make a point of this fact. The fact that the ordinance was adopted prior to the constitutional amendment referred to was discussed, but it was held that that did not relieve the defendant from liability, as "the matter of the liability or nonliability for injury that might or might not thereafter be occasioned by bringing the street to the grade so established was and is a matter wholly *dehors* the ordinance itself, and the question of such immunity or liability depends exclusively upon the mandate of the law which is in force at the time the grading is in fact done."

And in Montana it has been held, under a similar constitutional provision, that the abutting owner is entitled to compensation for the damages here discussed, notwithstanding the fact that the grade complained of is the first one established. *Less v. Butte*, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140. The fact that the grade involved was the original grade was raised by the defendant municipality as a ground for immunity from liability, and such defense disapproved by the court in the following statement: "The first grade of Broadway street was that provided by nature, and the alteration made by appellant was as much a change of grade as if the change had been made from a grade previously established by the authorities." This highway, which had been in existence for several years, was dedicated to the city as a street upon the annexation to the city of the adjoining territory, at which time the plaintiff erected a house. Subsequently the city established the grade complained of.

In *New Brighton v. United Presby. Church*, 96 Pa. 331, it was held that an abutting owner whose property has been injured by a change of the grade of a street from

property in conformity thereto, the city is liable in damages to such property occasioned by a subsequent change of the grade of the street. In prior decisions of this court, referred to in the opinion, the same clause of the Constitution was the subject of careful consideration. While in the various cases the precise question now presented was not expressly determined, the court, as then constituted, made several observations, which were strictly germane to the exact point decided, that indicated its disapproval of the principle now invoked by the plaintiff. It is true that in some of the cases from other states cited in the Bone-steel opinion it was ruled that the municipality is liable to an abutting owner for consequential damages caused by a reduction from the natural surface to a grade

the natural grade may recover damages to the same extent as though the change had been made from a grade previously established by the proper authorities. This was followed in Hendrick's Appeal, 103 Pa. 358. These decisions were rendered pursuant to a statute requiring compensation to the abutting owners for damages caused by the changing of the grade of a street, which statute was passed for the purpose of giving effect to the provision in the Pennsylvania Constitution declaring that municipal and other corporations invested with the power of eminent domain shall make compensation "for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements."

And in O'Brien v. Philadelphia, 150 Pa. 589, 30 Am. St. Rep. 832, 24 Atl. 1047, the abutting owner was allowed to recover against the city for injuries resulting in a change of the existing grade of an old and open public highway, although such grading was the first that the highway had received.

Under the Nebraska Constitution containing a provision against taking or damaging private property for public use without just compensation, a municipality is liable to an abutting owner, who erected buildings before the grade of the highway was established, for damages sustained by him by the subsequent raising of the street in front of his property. Harmon v. Omaha, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503.

Existence and use of highway prior to establishment of grade.

It is deemed desirable to call attention to the fact that in each of the above cases the proceedings to establish the grade were separate from the proceedings to lay out the highway, so that the highway was actually in existence for a time prior to the establishment of the grade.

No suggestion was made in any of the cases that a different result might be reached in a case where the laying out of the highway and the establishment of the

established in the first instance, as well as from one authorized grade to another. In other cases the doctrine is applied only in the latter contingency. This diversity in the holdings was expressly referred to at page 111 of 30 Colo., and page 597 of 69 Pac. Such reference, however, was not intended as a final or definite expression of our approval of the former doctrine, or rejection of the latter. Yet that opinion shows that not only is there nothing in any of our own previous cases inconsistent with the conclusion then reached, but all such antecedent expressions of opinion were regarded as consistent with the distinction drawn by Judge Dillon, in his valuable work on Municipal Corporations, 4th ed. vol. 2, § 995b, which was then clearly indicated as the basis of the decision, and as foreshadowing

grade were closely related in point of time, or where they in fact were accomplished in a single proceeding, though, of course, in the latter case an action to recover damages for the grading might well be subjected to the defense of *res judicata* where there had been a previous proceeding to assess damages, though only the damages for the taking had been assessed.

Thus, in Massachusetts and New Jersey, where the statutes expressly require payment for damages arising from the grading of streets, the courts have been called upon to determine the right of the abutting owner, who has failed to have the damages for the grading assessed in the proceedings determining the amount of his compensation for the taking of the land, to institute a second proceeding for the recovery of such damages; and it seems to turn upon whether or not the proceedings to construct the road were separate from those relating to the grading of the highway.

In Van Ripper v. Essex Public Road Board, 38 N. J. L. 23, where land had been taken for the widening of a highway and the commissioners had appraised the complainant's damages for the taking of the property, and where subsequently it was decided to alter the grade of the street, it was held that, such proceedings being separate, the plaintiff was not prevented by the first assessment of damages from having a second assessment for the purpose of fixing his damages resulting from the grading.

In a similar case in Massachusetts damages were assessed for the widening of a street the grading of which was fixed by a subsequent proceeding, and it was held that the damages for the grading were not contemplated in the original widening, and the plaintiff was entitled to recover. Lane v. Boston, 125 Mass. 519.

In Snow v. Provincetown, 109 Mass. 123, the town widened a street, and damages were assessed and paid for the same, and two years later the town voted to grade and pave the street. It was held that the proceedings were entirely independent of each

our present conclusion, namely, that municipal liability in these cases should be limited to changes in established grades, and is not to be extended to reductions from the natural surface, except when the change is unreasonable or carelessly made.

It must be conceded that in Illinois, from which our constitutional provision is borrowed, and in the majority of the other states that have adopted similar clauses, a municipality is held liable for consequential damages resulting from changes in the grade of the street, whether made for the first time or for a change from one established grade to another. However, we are now constrained to hold that for reasonable and carefully made changes of the grade of a public street from the natural surface to a legally established grade in the first instance a municipality is not liable to the abutting lot owner for consequential damages to his property. We are led to this conclusion not only because of the strong reasons advanced by Judge Dillon, *supra*, but also because of our former decisions, which, in view of the general understanding of the profession as to the doctrine they announce, should be regarded as *stare decisis*. Judge Dillon, at § 995a, in stating what the abutting lot owner, who builds with reference to the natural surface, in law is bound to contemplate with respect to the power of

the municipality in changing the grade of streets, says: "In view of these considerations, it seems to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line there is no legal right, or even natural equity, in the dedicant or his assignee to compensation." He further says: "But where a grade has been officially established, and particularly where improvements have been thereafter made according to such established grade, and it is afterwards changed to the injury of the abutting owners, there is a strong natural equity in their favor for compensation. . . . For the reasons above suggested, it seems to us that, on principle, the mere provision of the Constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary, we doubt whether they were well considered, and think that they are not well decided. . . . Although sensible of the apparent difficulty of defining the grounds for the distinction, it seems to us, where a grade line has been officially established, and where

other, and the abutting owner was entitled to institute a second proceeding to recover damages for the grading. In rendering its decision, the court, in referring to the measure of damages, used language indicating that the abutting owner could not recover in the second proceeding damages which would necessarily arise in carrying out the original construction of the highway, as it said, in speaking of the original assessment of damages: "These damages no doubt included compensation for changes in the surface of the street injurious to the owners, and which were contemplated as necessary in its original construction. But this did not prevent the town from changing the original grade at any time thereafter for the purpose of improving or repairing the way. The question for the jury, in case of such change, would be, how much additional damage for that act the landowner ought to receive; in other words, how much of the change from the original surface was due to original construction and how much to subsequent improvement of the street."

Where the grading of a street is a part of the original laying out and construction of the highway, a proceeding to assess damages must be brought under the statute providing for damages occasioned by the laying out of the highway, and not under the statute providing for compensation for the raising or lowering of a highway, as the 7 L.R.A. (N.S.)

latter statute presupposes the existence of a highway, the damages for the laying out of which have once been paid, and not a case where the grading is a part of the original construction. And he is entitled to recover in the one proceeding all the damages arising out of the laying out, construction, and grading of the highway. This latter statement is a *dictum*, as the only question actually involved was whether the proceedings had been brought under the proper statute. *Geraghty v. Boston*, 120 Mass. 418.

Erection of improvements in reliance on natural grade.

The decisions upon the question here annotated have all been placed upon the broad ground that the injuries inflicted upon adjoining property by the grading of a highway, whether it be the initial grading or a subsequent change in the grade, constitute a damage within the meaning of the constitutional provision against damaging private property for public use without compensation, and in no case has the fact that improvements had been erected in conformity to the natural grade been referred to as a ground of liability, and no attempt has been made to distinguish the cases in which no improvements had been made. The liability was sustained in both classes of cases and on the same ground.

property has been improved on the faith of it (which is, of course, done on the assumption that the grade is permanent, although the power to change it for the public good exists), that such a case rests upon so strong a basis of natural justice as to bring it within the purpose of the constitutional provision in question. . . . The decisions under the amended constitutional provision upon the exact point, as to its effect on street grade cases, are not as yet very numerous, but some of those referred to in the note to the next section appear to give this provision a scope greater than the one here suggested."

Counsel for plaintiff in error, however, says that these observations of Judge Dillon were made in 1890, and after that time a number of cases by the courts of the states where this constitutional provision is in force have ignored his distinction and held that municipal liability is created whenever consequential damages to the abutting owner result from any change whatever in the grade of a street. A leading case so holding is *Less v. Butte*, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140, in which the later cases are cited. It is true, as already stated, that the majority of cases support the contention of plaintiff in error, and possibly in only the states of Georgia, Mississippi, and Colorado has the qualified doctrine apparently been announced. Notwithstanding the number of cases to the contrary, we are still convinced of the soundness of the views of Judge Dillon, and our previous decisions are in harmony with this conclusion. This is apparent from the following excerpts taken from several of its opinions:

The leading case is *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6. The precise question there determined was that, for consequential damages to a lot abutting on a street over which the city by ordinance had granted to a railroad company the right to build a railroad track, the railroad company, and not the city, was liable. In the course of the carefully considered opinion by Helm, Justice, in discussing consequential damages in such cases, it was said: "But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria*, as where they are occasioned by a reasonable improvement of the street by the proper authority for the greater convenience of the public." And in speaking of the power of the city over its streets the judge said: "In determining what changes and improvements are most conducive to this end, the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises

through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though in fact the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof." The following remark is quite pertinent: "The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be raised or lowered, that pavements might be laid and bridges and culverts constructed, and that a street railroad even might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor." And in referring to the fact that some of the decisions under this constitutional provision would establish the liability of the city in a case like that under consideration, and in summing up the doctrine upon the point, the learned judge concludes: "As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with *obiter dictum*, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street by the council in a careful manner the abutting owner should not recover."

In *Denver v. Vernia*, 8 Colo. 399, 404, 8 Pac. 656, the Bayer Case was approved, and the concluding observation of Judge Helm, which we have just quoted, was by Chief Justice Beck said to be a correct legal proposition. The concurring opinion of Judge Dickey in *Rigney v. Chicago*, 102 Ill. 83, in which the following language was used, was also referred to with approval: "It is not every change of grade made in a street, which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in the street as it may reasonably be supposed might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. The making of such changes is, therefore, no invasion of his right in that regard." One of the elements of damages claimed by the plaintiff against the city in the Vernia Case was for the fixing of the grade of a street in the first

instance 3 feet below the natural surface of plaintiff's lots; and the court held that that was not an element upon which he was entitled to recover.

In *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714, Judge Helm, in his concurring opinion, refers to the *Bayer and Vernia Cases*, *supra*, and says with reference to the constitutional provision here under consideration that the abutting lot owner was bound to anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary purposes of a highway, and that the city would from time to time so change and improve the street as to render it more convenient for such purposes, and that indirect injuries resulting to him therefrom remain now, as they existed before the constitutional provision was adopted, wrongs without a legal remedy.

In *Durango v. Luttrell*, 18 Colo. 123, 31 Pac. 853, in an opinion by Mr. Justice Elliott, the doctrine was recognized that, for a reasonable improvement of the street by the authority of the city in bringing it to a legally established grade, no liability for consequential damages to an abutting lot owner resulted.

In *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814, the court remarked that it was not proper to say, notwithstanding the broad terms of our Constitution and the unqualified expressions of certain judicial opinions elsewhere, that, whenever a depreciation of private property is caused by some public improvement, the owner of the property thus depreciated may recover compensation against the party making the improvement; and again the previous cases, cited above, were referred to with approval.

In *Pueblo v. Strait*, 20 Colo. 13, 24 L.R.A. 392, 46 Am. St. Rep. 273, 36 Pac. 789, Mr. Chief Justice Hayt, in summarizing the doctrine of these cases, says: "For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality the abutting owner cannot recover, provided the change or improvement is made in a careful and skilful manner for the benefit of the public." And in referring to the interpretation put upon similar clauses of the Constitution of Illinois and other states, where a recovery is allowed in all cases where private property sustains substantial damage by the making of a public improvement, he recognizes that in Colorado such interpretation has not been followed, and says that in this state "the right of recovery has been limited to those unusual uses to which but few streets are subjected."

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As well said by Judge Dillon, while sensible of the apparent difficulty of defining the grounds for the distinction, we regard it as almost, if not quite, *stare decisis* in this jurisdiction, that, for the raising or lowering of the grade of a street by a municipality from the natural surface to the grade established in the first instance, the municipality is not liable to the abutting lot owner for consequential damages to his property, unless the change of grade is unreasonable or has been negligently made.

The judgment of the District Court, being in line with our conclusion, is affirmed.

Petition for rehearing denied May 7, 1906.

DISTRICT OF COLUMBIA COURT OF APPEALS.

COLUMBIA NATIONAL SAND DREDGING COMPANY et al., Appts.,

v.

GEORGE B. MORTON et al.

(— App. D. C. —)

Equity—injunction—foreign lands.

1. Equity has no jurisdiction to restrain acts of trespass on lands in another state where the principal fact involved and upon which the right to exercise the restraint depends is that of title to the land, even though the necessary parties are properly before it.

On motion to reform.

Appeal—costs—division.

2. Each party may be required to pay his own costs on reversal of a decree for want of jurisdiction in the trial court, where defendant did not question the jurisdiction, but proceeded to try the case on its merits.

(November 7, 1906.)

Case Note.—Jurisdiction to enjoin acts with respect to real property in another state: — In a note in 69 L.R.A. 673, upon the general subject of the jurisdiction of equity over suits affecting foreign real property, it was stated, as a qualification of the general rule which upholds the jurisdiction when the parties are personally within the jurisdiction and effective relief may be granted by a decree in *personam*, that a court of one state or country will not assume jurisdiction of a suit that in its essentials involves merely the title or possession of land in another, and presents no ground of equitable intervention. The decision in the foregoing case seems to fall within that exception, and, since it is at least doubtful whether, upon the state of facts presented in this case, a court of equity would, before the establishment of title by an action at

A PPEAL of defendants from a decree of the Supreme Court enjoining defendants from interfering with certain sand and gravel alleged to belong to complainants. Reversed.

The facts are stated in the opinion.

Messrs. J. K. McCammon and James H. Hayden for appellants.

Messrs. Enoch Harlan, G. E. Hamilton, M. J. Colbert, and J. J. Hamilton for appellees.

Shepard, Ch. J., delivered the opinion of the court:

This is an appeal from a decree perpetuating an injunction against acts of continued trespass upon land. George B. Morton, a resident and citizen of Prince George's coun-

ty, Maryland, and the Potomac Dredging Company, of Baltimore, a corporation of the state of Maryland, filed their bill against the Columbia National Sand Dredging Company, a corporation of the state of Virginia, maintaining an office in the District of Columbia, and against Lewis E. Smoot, a resident of said District. The bill alleges that George B. Morton is owner in fee simple of a certain tract of land known as Auburn, located on the southern side of Piscataway creek, in Prince George's county, Maryland, and is entitled to the bed of said creek to the head of the stream, which forms the northern boundary thereof for a long distance, as appears from the original deed conveying said property to him, which is made an exhibit to the bill. That some distance from

law, entertain a suit to enjoin a trespass, even with respect to land within the territorial jurisdiction (2 Pom. Eq. Jur. § 502), the case also seems to fall within the more specific statement in that note, to the effect that, if the action is one which, if it related to real property within the territorial jurisdiction, would be at law and not in equity, a court of equity will not assume jurisdiction merely because, the property being beyond the territorial jurisdiction, a court of law could not entertain an action in respect of it.

Although, as subsequently shown, jurisdiction to restrain acts with respect to foreign lands has not infrequently been upheld, it has been denied in a number of cases upon the grounds suggested in the foregoing statements of the exception to the general rule as to equity jurisdiction over suits affecting foreign real property, and for reasons quite similar to those upon which the decision in the above-reported case rests.

Thus, it was held in *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220, that a court will not entertain jurisdiction where the naked question of title is involved, or a mere trespass or nuisance on extraterritorial real property is sought to be restrained.

And in *Genet v. Delaware & H. Canal Co.* 13 Misc. 409, 35 N. Y. Supp. 147, the court said that equity acts in *personam* when the parties are within the jurisdiction of the court, though the lands affected are within another state, but not to the extent of awarding relief more appropriately obtainable in a common-law action of ejectment, triable by a jury of the vicinage.

So, the court, in *Thomas v. Hukill.* 131 Pa. 298, 18 Atl. 875, in denying the jurisdiction of a suit to restrain further operations under a lease of oil lands in another state, said that, while the proceeding was in form a bill in equity, it was in substance a possessory action involving the title to real estate.

And the United States Supreme Court, in *Northern Indiana R. Co. v. Michigan C. R. Co.* 15 How. 233, 14 L. ed. 674, in denying 7 L.R.A. (N.S.)

the jurisdiction of a Federal court sitting in Indiana of a suit by an Indiana corporation to enjoin defendant from constructing a road in Indiana upon the ground that complainant had the exclusive right, said no action of ejectment or for trespass on real property—which concededly would be local—could have a more decidedly local character than the appropriate remedies for the injuries complained of, and that such character was not changed by a bill in chancery.

Courts of equity, however, having personal jurisdiction of the necessary parties, have assumed jurisdiction to restrain the commission of acts injurious to real property in another state.—*Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; to enjoin interference with a right of way over land in another state,—*Alexander v. Tolleston Club*, 110 Ill. 65; to enjoin the conveyance of land in another state to third persons by the grantor in a deed which is sufficient to pass the legal title, but so defectively acknowledged that it cannot be so recorded as to charge third persons with constructive notice,—*Frank v. Peyton*, 82 Ky. 150; to restrain defendant from interfering with complainant's possession of land in another state pending a suit to establish complainant's title,—*Kirklin v. Atlas Sav. & L. Assn.* (Tenn. Ch. App.) 60 S. W. 149; to restrain a judgment debtor and his mortgagee from transferring or assigning any interest in land in another state,—*Kirdahi v. Basha*, 36 Misc. 715, 74 N. Y. Supp. 383.

So, courts of equity having jurisdiction of the persons of the parties have in some instances enjoined legal proceedings with respect to real property located in other states or countries. *Bunbury v. Bunbury*, 1 Beav. 318; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Hope v. Carnegie*, L. R. 1 Ch. 320. So, in *Bowers v. Durant*, 43 Hun, 348, jurisdiction was upheld to restrain partition suits brought in other states for the partition of lands in those states, in violation of defendant's agreement that a suit for that purpose might be brought in New York.

And *Gibson v. American Loan & T. Co.* 58 Hun, 443, 12 N. Y. Supp. 444, held that

the shore, but well south of the thread of the creek, is a sand and gravel bar, attached at places to said shore, and short distances beyond this are other deposits of sand and gravel, which, by reason of the formation of the shore line, are gradually added to and form accretions to said shore, and all of which belong to said Morton. That for a valuable consideration said Morton had granted to the Potomac Dredging Company the exclusive privilege until May 1, 1909, of taking away said sand and gravel from said shore, and the said bar in front of said shore, and from the gravel flats attached thereto. That the said company made a channel up said creek, into said bar, and made it possible to come in contact with the said deposits of sand and gravel attached to and forming part of the said shore. That this sand and gravel is valuable for building purposes, and the said company can and does sell the same profitably in the District of Columbia, paying the said Gorge B. Morton a fair sum for the privilege of taking the same. That after the said company had, at great expense, made the channel for its use and benefit, the defendant corporation brought one of its dredging plants up said channel and took large quantities of sand and gravel from the bar heretofore referred to as belonging to complainant, and continued same until complainant replevied some scow loads so taken, which they were able to follow, though with much trouble. That within a few days past one of the dredg-

ing plants belonging to the defendant Smoot moved into the same position at the direction of defendants, and is now engaged in taking large and valuable quantities of sand and gravel heretofore referred to as belonging to complainants, though complainants have requested and warned them to desist. That the damage such wrongful taking has caused and will continue to cause complainants, though amounting to many hundreds of dollars, is not susceptible of accurate, or even approximate, measurement, so as to make it possible for them to obtain adequate compensation in damages for the wrongful taking thereof, and will necessitate the institution of a large number of suits; and, inasmuch as the damage is irreparable, and the quantities taken are so extremely difficult, if not impossible, to approximate, and it is impracticable to follow and replevin the property taken and carried away, complainants aver that they should have an injunction to restrain the further taking of sand and gravel from the premises aforesaid.

The restraining order was granted, and on June 16, 1905, the defendants filed a joint answer in which they denied that the said Morton is entitled to any part of the bed of the said creek, and alleged that the northerly boundary line of his land is the high-water mark on the southerly margin of said creek, as appears from two deeds recorded among the land records of Prince George's county, whereunder the said Morton and his predecessors in title derived and obtained

a court of New York had jurisdiction to restrain a trust company from proceeding with a suit in another state to foreclose a mortgage upon real property in the latter state, pending the determination of an action in New York for the removal of the trustee upon the ground of bad faith in the prosecution of the action.

And in *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140, 72 N. E. 494, it was held that a court of Indiana had power to declare a note, and mortgage securing the same, void because executed by a married woman as security for a debt of her husband, and to enjoin defendant from attempting to enforce either the note or mortgage, although the mortgaged land lay in another state.

But a court of equity of one state will not enjoin the foreclosure of a mortgage upon real property in another, merely because the courts of the situs entertain different views of the law as to the rights of the parties from those entertained by the courts of the state in which the injunction is sought, and by the United States Supreme Court. *Carson v. Dunham*, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 312.

In *Schindelholz v. Cullum*, 5 C. C. A. 293, 12 U. S. App. 242, 55 Fed. 885, the jurisdiction was denied upon the ground that the

person whose rights were to be affected was not a party.

And in the following cases an injunction to restrain legal proceedings with respect to land in another jurisdiction was denied as a matter of discretion or upon the merits, and not upon the ground of an entire lack of jurisdiction: *Moor v. Anglo-Italian Bank*, L. R. 10 Ch. Div. 681; *White v. Hall*, 12 Ves. Jr. 321; *Jones v. Geddes*, 1 Phill. Ch. 724; *Norton v. Florence Land & Public Works*, L. R. 7 Ch. Div. 332; *Durant v. Pierson*, 19 N. Y. Civ. Proc. Rep. 203, 12 N. Y. Supp. 145; *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 415; *Mead v. Merritt*, 2 Paige, 402; *Mariposa Co. v. Garrison*, 26 How. Pr. 448. It is, of course, an indispensable prerequisite to jurisdiction of a suit affecting foreign real property that all the necessary parties shall be subject personally to the jurisdiction of the court, and also that the case shall be one in which effective relief may be granted by a decree *in personam*. But, as shown by the case above reported and by cases cited in this note, the existence of both these conditions will not confer jurisdiction if the action in its essence involves merely the legal title or possession of the land, so that it is essentially a local, and not a transitory, action.

any and all right, title, or interest which they or any one of them has or had in and to the land referred to in the bill. Copies of said deed and a plat of the land referred to are attached and made an exhibit. The defendants further answered that the said creek is a navigable water of the United States, and a public river of the state of Maryland, and that the entire right and title to the bed thereof is in the state of Maryland, and not in the complainants, or either of them, as alleged; and they further denied that the sand and gravel bar described constitutes an accretion appurtenant to any land owned by the complainant Morton, and aver that he has no right or title to the same. They admit the taking of sand and gravel from the bar aforesaid under a written permit and grant to defendants by the Secretary of War of the United States on April 14, 1903, the same being attached and made an exhibit to the answer. They further aver that the complainants instituted criminal proceedings against them under an act of Maryland of March 3, 1900, providing that persons wilfully trespassing upon the lands of others should be subjected to fine or imprisonment, and caused agents and employees of defendant to be arrested and placed in jail in the state of Maryland, from which they were released on writs of habeas corpus issued out of the circuit court of Prince George's county, Maryland. They further aver that complainants brought a suit in equity against defendants in the circuit court of Prince George's county, Maryland, on or about June 9, 1905, making substantially the same allegations and asking the same relief as in this bill, but that the same was dismissed by complainants on June 13, 1905, for the reason that the said court had declined to grant the preliminary injunction forbidding the defendants from dredging, taking, or removing sand and gravel from the sand and gravel bar hereinbefore mentioned. Upon this answer they moved to dissolve the restraining order, but the same was overruled and continued in force until final decree.

Testimony was then taken, and resulted in a final decree entered April 13, 1906, sustaining the bill and perpetually enjoining the defendants from taking and removing by dredge or otherwise sand and gravel or other materials from the bar or deposit of sand and gravel attached to the shore or in front thereof, and extending into and towards the center of Piscataway creek in the state of Maryland, in front of and bounding on the farm known as Auburn, in Prince George's county, in said state, belonging to George B. Morton.

No objection was taken by pleading or 7 L.R.A. (N.S.)

otherwise to the jurisdiction of the court in the premises, and the same was assumed and maintained without consideration. The appeal is from the decree on its merits.

When this case was called for hearing on appeal no suggestion of want of jurisdiction was made by the appellants, but the court, of its own motion, declined to hear argument on the merits of the questions involved, until satisfied that the court below had jurisdiction of the subject-matter of the bill; and argument was required on the point. The submission was on that question and none other.

It is plain from the allegations of the bill and answer that the necessary questions to be determined in the suit is whether George B. Morton has title to the sand and gravel bar, lying wholly within the state of Maryland, either by deed conveying the title to the middle line of Piscataway creek, or, in case the boundary of the land conveyed thereby shall be confined to the shore of said creek, as an accretion to his land upon the shore. This is not only the principal, but substantially the only, question involved.

It is to the principal question involved in any case that we look to determine whether the action be local or transitory in its nature. If the principal fact carry with it the idea of some certain place, for example, relates to land, it is local, and the action must be maintained in the place where it is situated. If an action had been brought at law for a trespass upon the land in question in removing sand and gravel therefrom, the supreme court of the District would clearly have had no jurisdiction. *Ellenwood v. Marietta Chair Co.* 158 U. S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771. In that case an action was brought in the circuit court of the United States for the district of Ohio, alleging continued acts of trespass upon the land of plaintiff in the state of West Virginia, as well as the cutting and removing therefrom of large quantities of timber. No question of the jurisdiction was made by the defendant, but the court of its own motion ordered the case stricken from the docket for want of jurisdiction. In affirming that judgment, the Supreme Court of the United States, speaking through Mr. Justice Gray, said: "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies. . . . The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and

the cause of action stated in the second count might have been considered as transitory, although the first was not. . . . But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, . . . and its cutting and conversion of timber grown thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States*, 11 How. 229, 13 L. ed. 675; *Eames v. Prentice*, 8 Cush. 337; *Howe v. Wilson*, 1 Denio, 181; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Merriman v. McCormick Harvesting Mach. Co.* 86 Wis. 142, 56 N. W. 743. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio."

The contention that the doctrine of this case is impaired by the later case of *Stone v. United States*, 167 U. S. 178, 182, 42 L. ed. 127, 129, 17 Sup. Ct. Rep. 778, is untenable. As we have seen, it was said in the former case that, if the cause of action had been confined to the recovery of timber removed from the land, the action might have been considered as transitory. In the *Stone* Case the action was to recover the reasonable value of lumber and railroad ties manufactured from trees alleged to have been unlawfully cut by the defendant *Stone* from certain lands in Idaho belonging to the United States. The jurisdiction of the district court of the United States for the state of Washington, in which the suit was brought, was affirmed. Referring to the case of *Ellenwood v. Marietta Chair Co.* supra, Mr. Justice Harlan said: "But that case proceeded upon the theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only; and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership

in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the government's denial of the ownership of the land made it necessary for . . . [the government] to prove its ownership, the action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process. And a suit could have been brought to recover the property wherever it could be found. In *Schulenberg v. Harriman*, 21 Wall. 44, 64, 22 L. ed. 551, 555, it was said: 'The title to the land remaining in the state, the lumber cut upon the land belonged to the state. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.'"

The distinction between the two cases is thus clearly defined. It follows, therefore, that an action for trespass upon the land, involving necessarily and chiefly the question of its title, is local, and could only be brought in the jurisdiction wherein the land is situated; on the other hand, an action to recover the value of the sand and gravel severed from the land and removed therefrom, though incidentally made to involve the question of title, could be maintained in the District of Columbia against parties found therein and personally served with process.

It is contended, however, that, because the equity jurisdiction is rightfully invoked to restrain acts of continuing trespass upon the land working injuries irreparable at law, as well as to prevent a multiplicity of suits, the difficulty with the action of trespass at law is obviated by reason of the principle that equity acts *in personam*, and not *in rem*. In other words, that the court of equity in this District, having jurisdiction of the persons of the defendants, may restrain them from committing acts of trespass upon lands in Maryland notwithstanding the principal fact involved, and upon which the right to exercise the restraint depends, is that of title to the land. We cannot agree with this contention. From a very early period courts of equity, having jurisdiction of the person of a party, have exercised the power to compel him to perform a contract, execute a trust, or undo the effects of a fraud, notwithstanding it may

relate to, or incidentally affect, the title to land in another jurisdiction. The doctrine is thoroughly well established within this limitation, that the principal question involved must be one of contract, trust, or fraud, raising up a duty which a person within the power of the court may be compelled to perform, although the act when performed may operate to affect, and even to pass, the title to land outside the territorial jurisdiction of the court. As was said by Mr. Justice Field in *Pennoy v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565, 569: "Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. *Penn v. Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976."

The leading case upon this question, to which reference is universally made, is that of *Penn v. Baltimore*, 1 Ves. Sr. 444, 2 *White & T. Lead. Cas. in Eq.* 4th Am. ed. 1806. The bill was filed in England, where both parties resided at the time, to compel specific performance of a contract entered into by them providing for the establishment of the boundaries of their respective grants of Pennsylvania and Maryland. In defining the grounds upon which he maintained jurisdiction in the case, Lord Hardwicke said: "This court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries, and this bill does not stand in need of that. It is founded on articles executed in England under seal for mutual consideration, which gives jurisdiction to the King's courts both of law and equity, whatever be the subject-matter."

... The conscience of the party was bound by this agreement; and, being within the jurisdiction of this court, ... which acts in *personam*, the court may properly decree it as an agreement, if a foundation for it."

The learned American editors, in their notes to the above case (2 *White & T. Lead. Cas. in Eq.* 1830), after reviewing the American decisions, say: "It will be observed that in the foregoing cases the jurisdiction attached on the ground of the defendant's fraud or failure to perform some equitable obligation, irrespective of any question of title, and the decree was capable of being enforced against the person of the defendant. 7 L.R.A. (N.S.)

And, although equity has no jurisdiction over naked questions of title to real estate, yet it will not refuse to determine a controversy which, in other respects, is within its jurisdiction, because it incidentally adjudicates upon the title to lands without its control. But these cases must not be confused with another and totally different class, wherein the validity of rights claimed under a disputed title to lands in other states becomes the primary question, and the decree depends upon the construction given. Here the relief will be refused unless under very peculiar circumstances, for to hold otherwise would be to try an ejectment through the medium of a court of chancery, governed by rules possibly differing from those in force where the land is situate, and whose decree would be utterly ineffective as to the subject-matter of the controversy."

And they further say in conclusion: "The result of the cases as a whole would seem to be that, as the right of real property is essentially local and can only be enforced at law by a recourse to the local tribunals, equity will follow the law, and refuse to assume a power which might further the purposes of justice in particular instances, but would ultimately disturb the comity which ought to exist between the courts of different nations, by bringing the decisions of foreign tribunals into conflict with those of the *locus rei sitæ*. . . . But rights growing out of trust or contract, or founded upon a fraudulent violation of the principles of equity as between man and man, are purely personal, and will consequently be upheld and enforced, both by law and equity, whenever jurisdiction has been acquired over the parties, without regard to the nature of situation of the property in which the controversy has its origin, and even when the relief sought consists in a decree for the conveyance of land which lies beyond the control of the court, and can only be reached through the exercise of its powers over the person."

The question was first passed on by the Supreme Court of the United States in *Massie v. Watts*, supra, the opinion in which was delivered by Chief Justice Marshall. In that case a bill was filed by a citizen of Virginia in the circuit court of the United States for the district of Kentucky, against *Massie*, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the state of Ohio, the defendant having obtained the legal title by fraud. The complainant claimed the equitable title, and alleged certain fraudulent surveys by the defendant through which he had appropriated complainant's land. Appeal was taken from a final decree establishing complain-

ant's title and directing the defendant to execute a conveyance to him for the land. In affirming the decree, the Chief Justice said on the question of jurisdiction: "Was this cause, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell,—the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character; where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practised on the plaintiff,—the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction." After reviewing the English authorities, commencing with the case of *Penn v. Baltimore*, *supra*, he further said: "Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." See also *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960.

The doctrine announced has been followed by the same court ever since without question, for we cannot regard the case of *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473 (relied on by the appellants), either as furnishing an exception to it, or as extending its limitations. In that case the bill was filed in the supreme court of the District of Columbia by Phelps, who had regularly been appointed assignee in bankruptcy under proceedings in the district court of the United States for the southern district of Ohio, declaring McDonald a bankrupt. In the schedule of assets filed by the bankrupt was a brief statement of a claim against General Osborne, of the United States Army, and others, "for burning, in January and February, 1865, from 1,000 to 2,000 bales of my cotton in Arkansas and Louisiana." There was no further description of the claim, except that in a duplicate schedule filed in the office of the register the amount is stated as 7,000 to 8,000 bales, and the claim there, with others, is designated as worthless. McDonald was duly discharged in bankruptcy on March 17, 1869. The assignee, having obtained an order to sell certain accounts,

notes, and judgments of the bankrupt, sold them at public sale, including the claim aforesaid. One White became the purchaser of the uncollected accounts, and it is alleged that the purchase was made for McDonald with money furnished by him, and the claim transferred to him by White. It was then alleged that, prior to the filing of his petition in bankruptcy, McDonald had a just and valid claim against the United States for cotton destroyed by the Army; that, being a British subject (a fact concealed in describing the claim), although for many years a resident of this country, he prosecuted the claim before the joint British and American commission, organized under the treaty of May 8, 1871; that the claim was finally adjudged to be valid, and on September 23, 1873, the commission awarded the sum of \$197,900 to be paid in gold by the government of the United States to the government of Her Britannic Majesty, in respect of the above claim. That the United States had paid the money to the agent of the British government in the city of Washington, who was about to pay the same to McDonald. An injunction was prayed restraining McDonald and White, or either of them, from receiving said award, and for a decree that said fund be held in trust for the creditors of McDonald, and be subject to the complainant's rights as assignee in bankruptcy. Process was formally served on both defendants and a temporary injunction was awarded. Subsequently, by consent of parties, a decree was made that one half of the amount of the award be received by the defendants to pay the expense of prosecuting the claim before the joint commission, and the other half placed in the hands of George W. Riggs, as receiver, to await the final action of the court; and that McDonald execute all orders, receipts, and acquittances necessary to enable the receiver to obtain the fund. The defendants withdrew their answer and filed a demurrer to the effect that the court below had no jurisdiction of the case; and upon other grounds relating to the rights of the complainant. The demurrer was sustained, the bill dismissed, and on appeal the decree was reversed. The opinion of the majority of the court was delivered by Mr. Justice Swayne, who said: "In this case, whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right. This court has twice decided that a British subject can sue the United States in the court of claims, because an American citizen is permitted to sue the British government by a petition of right. The act of Congress creating the court requires reciprocity. United States v.

O'Keefe, 11 Wall. 178, 20 L. ed. 131; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426. If the claim of the assignee were presented to the British government by a petition of right, and the claim of McDonald were also presented, the parties, in the absence of any judicial determination, would, doubtless, be required to settle their controversy by interpleading, or in some other appropriate form of litigation. If the appellant shall be finally successful in this case, and the record should be presented with his petition, no such question could arise, and judgment in his favor must necessarily follow. Conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense, and other inconveniences of a suit before a foreign tribunal? The adjudication would be as binding in one case as in the other. Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction. . . . It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree. . . . Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story, Eq. § 899; Miller v. Sherry, 2 Wall. 249, 17 L. ed. 830; Penn v. Baltimore, 1 Ves. Sr. 444; Mitchell v. Bunch, 2 Paige, 606, 22 Am. Dec. 669."

Notwithstanding some of the language of the opinion, it is to be observed, as in *Massey v. Watts*, *supra*, the case involved a fraud committed by the defendant in re-obtaining the title; and, having jurisdiction of his person, the court could compel him to execute such an assignment as would be necessary to re-vest the title of the defrauded assignee in bankruptcy; and, the money having been voluntarily deposited in the custody of the court, it could be ordered paid to the established owner.

A recent case in the House of Lords of England carries the doctrine of jurisdiction, by virtue of power over the person, to a great length; but it was maintained because the bill sought the enforcement of a duty under a trust relating to the personal estate of a deceased testator. *Ewing v. Ewing*, L. R. 9 App. Cas. 34, 40.

In that case a testator, domiciled in Scotland and possessed of a large personal estate in that country and a smaller one in England, by a will made in Scotch form, 7 L.R.A. (N.S.)

appointed six persons to be executors and trustees, three of whom resided in England and three in Scotland. The trustees obtained confirmation of the will in Scotland, and this was confirmed by the English court of probate. An infant legatee, resident in England, brought suit in England through his next friend, for the administration of the estate as one of the beneficiaries of the trust. Service was had upon all of the trustees, who entered appearance and obtained an order of reference to ascertain if the prosecution of the action would be for the infant's benefit. Upon this reference, the order for further prosecution was made, from which no appeal was taken. Before the action came to trial, the trustees removed all of the English personalty to Scotland. It was held that the English court had jurisdiction to administer the trusts of the will as to the whole estate, and that, as no proceedings were pending in Scotland by which the interest of the infant would have been clearly protected, the jurisdiction was not discretionary, but that the decree was a matter of course. Lord Chancellor Selborne said: "A jurisdiction against trustees which is not excluded *ratione legis rei sitæ* cannot be excluded as to movables because the author of the trust may have had a foreign domicile; and for this purpose it makes no difference whether the trust is constituted *inter vivos*, or by a will, or *mortis causa* deed. Accordingly, it has always been the practice of the English court of chancery . . . to administer, as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad, by decrees like that now in question. The appellants' counsel were not able to produce any precedent for an administration decree limited (where there was a general probate and a general trust) to assets locally situate within the jurisdiction. . . . The English jurisdiction was sustained on the same principle in *Johnstone v. Beattie*, 10 Clark & F. 42, 84. If English trustees having . . . English trust funds were found within the jurisdiction of the Scottish courts, those courts, upon the same principle, might compel them to do their duty. *Ferguson v. Douglas*, 3 Paton, 503, 510."

In another recent English case, the facts of which are analogous to those of the case at bar, the court distinguished the decision in *Ewing v. Ewing*, L. R. 22 Ch. Div. 456, (rendered in the chancery division, and not then decided on appeal), and expressly maintained the limitation of the equity jurisdiction, acting *in personam*, that we have here attempted to point out. *Graham v. Massey*, L. R. 23 Ch. Div. 743. That suit

was brought to recover three fourths of one moiety of the purchase money of a house in Dresden, Saxony, sold by Charles Stewart Hawthorne, the testator. The defendants were his executors and devisees in trust. The house originally belonged to Colonel Hawthorne, a domiciled Irishman, and his wife, Sarah, jointly. By his will, dated in 1851, he gave his real and personal estate, which would include his moiety of the house, to trustees in trust to pay the rents, profits, etc. to his wife, Sarah, for life, and after her death, upon trust for his daughter, Mabella. This will was not executed according to Saxon law. Colonel Hawthorne left his widow and a daughter, Georgiana, surviving; his daughter Mabella having died in his lifetime. The widow died on the 31st of May, 1875, leaving a will executed according to Saxon law, by which she devised all her real and personal property at her residence in Dresden, including this house, to Charles Stewart Hawthorne. In 1875 he sold the house, received part of the purchase money, and the remainder was secured to him by a mortgage of the house, according to Saxon law. He died in 1877. The plaintiffs in this were the administrator and the widow and children of John Graham, the surviving husband of Georgiana. It was alleged, in effect, that on the death of Colonel Hawthorne, one moiety of the house, subject to his widow's life interest, devolved by Saxon law, as to three-fourths part, on Georgiana and the remaining one fourth on Sarah Hawthorne, who was entitled to the other moiety; and that on the death of Georgiana in 1863, John Graham became by Saxon law entitled to her three fourths of one moiety, and that he died intestate. Plaintiffs, as his administrator and next of kin, respectively, claimed three fourths of one moiety of the purchase money, with interest, against the estate of Charles Stewart Hawthorne. It was also alleged that on the death of Sarah Hawthorne, Charles Stewart Hawthorne procured himself to be registered in Dresden as the owner of the house, and so became the legal owner, and that by Saxon law he could confer an indefeasible title on a purchaser; but that a seller under such circumstances became by the law responsible to the person really entitled, if he had acted bona fide, for the purchase money of which he became a trustee for the person really entitled. The defense denied utterly the claims of the plaintiffs, and alleged that Charles Stewart Hawthorne was sole and legal owner of the entirety of the house for his own use and benefit, and submitted that the rights of the parties to this action ought to be determined in the courts of Saxony. Kay, Justice, said: "An important question of jurisdiction arises in 7 L.R.A. (N.S.)

this case. . . . It is obvious that neither Charles Stewart Hawthorne nor the defendants is or are, with reference to this claim, by English law, in any fiduciary relation to the plaintiffs. They are not bound by contract with them. Nor is the claim in any way based upon a suggestion of fraud. It is a bona fide claim on both sides of title to land, or the proceeds of land, in Saxony. The claim depends primarily upon the law of Saxony as to the devolution of land in that country. If maintainable, it can only be so upon the ground that by the law of Saxony upon the death of Sarah Hawthorne three fourths of one moiety of this property descended to Georgiana Hawthorne, under whom the plaintiffs claim. The next question is whether the plaintiffs, by the law of Saxony, are entitled to such interest, if any, as did so descend to Georgiana Hawthorne. A third question is whether by Saxon law, Charles Stewart Hawthorne having sold the property, he or his estate after his death is accountable for a share of the purchase money to the plaintiffs." After discussing the uncertainty of determining a question purely of foreign law, the court said: "I am not aware of any case where a contested claim depending upon the title to immovables in a foreign country, strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here. Lord Mansfield, in *Mostyn v. Fabrigos*, 1 Cowp. 161, 176, distinguished such a case from those in which actions might be brought here. He said: 'So, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.' The cases cited in the argument were such as the enforcement in England of an equitable mortgage . . . concerning Scotch land, where the court gave relief, treating the remedy as in the nature of specific performance, when the court acts *in personam*. *Ex parte Pollard*, 1 Mont. & C. Bankr. 239. There is no doubt of the jurisdiction in such a case, and the courts will even foreclose an English mortgage of foreign land (*Toller v. Carteret*, 2 Vern. 494); the foreclosure decree being, as Vice Chancellor Bacon pointed out in *Paget v. Ede*, L. R. 18 Eq. 118, merely an extinction of the right to redeem, as was said, also, by Lord Cranworth in *Colyer v. Finch*, 5 H. L. Cas. 905, 915. In *Norris v. Chambers*, 29 Beav. 246, Lord Romilly distinguished the case of a foreign mortgage of foreign land where no relief . . . would be given by the English courts. There is a class of cases in which jurisdiction as to

lands in the colonies has been maintained on the ground of fraud, like *Cranstown v. Johnston*, 3 Ves. Jr. 170. It is not pretended that there was any fraud in the present case. Perhaps the decision that goes furthest in the plaintiff's favor is the recent case of *Re Ewing*, L. R. 22 Ch. Div. 456. There a legatee under a Scotch will or trust deed was allowed to maintain an action for administration against the executors who had proved in England, three of whom were in this country and the others had been served in Scotland, without objection. The usual administration order was made, though there were no assets in England; but the late master of the rolls and Lord Justice Cotton both pointed out that the plaintiff's claim was undisputed, and the master of the rolls repudiated the notion that Scotland is a foreign country for the purpose of such a question of jurisdiction. According to *Enochin v. Wylie*, 10 H. L. Cas. 1, if the claim had been contested, and had involved a disputed question of the construction of a Scotch will, it may be doubted if a decree could properly have been made. But the case is infinitely stronger where the contested claim is based upon the right to land where the land is situate, not in Scotland, but in Dresden, where the question whether the plaintiff has any claim or not must be determined by the law of Saxony as to immovables, and where the only ground for instituting proceedings in this country is the fact that the defendants are residents here. All these circumstances concur in this case, and, in my opinion, the courts of civil judicature in England, which sit, as Lord Westbury said in *Cookney v. Anderson*, 1 DeG. J. & S. 365, to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the plaintiff's claim is well founded, and I must therefore dismiss this action."

We have stated the facts of the case and quoted from the opinion at length, because it appears to us substantially to determine the question that is presented here. There is no allegation of contract, trust relation, or fraud on which the jurisdiction may be based. The essential question involved is whether the complainant Morton is the owner of the sand and gravel bar, either by virtue of a deed carrying his boundary to the middle line of Piscataway creek, in Maryland, or if not, by reason of its being a navigable stream, as an accretion to his adjacent shore land. The effect of the decree is to establish his title by a perpetual injunction against the acts of trespass complained of; and this question of title is determinable by the laws of Maryland alone.

We will not extend an opinion already too
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long by reviewing the several state cases cited on behalf of the appellants. It is sufficient to say of many of these that they related to lands lying in different counties in the same state, and depended in part, at least, upon local statutes defining the jurisdiction of the courts. Others which go very far in the direction contended for—*Schmaltz v. York Mfg. Co.* 204 Pa. 1, 59 L.R.A. 907, 93 Am. St. Rep. 782, 53 Atl. 522; *Clad v. Paist*, 181 Pa. 148, 37 Atl. 194; *Jennings Bros. v. Beale*, 158 Pa. 283, 27 Atl. 948; *Alexander v. Tolleston Club*, 109 Ill. 65, 77; *Carroll v. Lee*, 3 Gill & J. 504, 510, 22 Am. Dec. 350, being the principal ones—involve the construction and enforcement of contracts or a trust. *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, maintains the right of the courts of equity of the state to enjoin one of its citizens from prosecuting a suit in another state violative of the laws of Maryland, and affecting the rights of another citizen of the same state. The same doctrine is upheld by the Supreme Court of the United States, but stands upon a ground very different from that of the present case. *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269. In another case cited, the same principle is applied, though to a different state of facts. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462. Complainant maintained a dam extending across the Salmon river from the shore in New Hampshire to the shore in the state of Maine. The defendant, a citizen of New Hampshire and served with process therein, owned lands on each side of the river that were overflowed by reason of complainant's dam. He removed a portion of the dam and threatened to lower it further. The bill prayed that he might be enjoined from destroying any part of the dam, or from meddling with it in any way. An objection to the jurisdiction was overruled, and the decree granting the injunction was affirmed. In the discussion of the question it was said: "The court are not asked to assume any jurisdiction or exercise and control over the land in Maine, or to interfere with the laws of that state. Nothing more is asked than that the respondent, a citizen of New Hampshire and residing within her limits, shall be subject to her laws; and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit injury to property of other citizens situated here and entitled to the protection of our laws."

Entertaining the opinion that the court below was without jurisdiction of the subject-matter of the suit, we must reverse the decree appealed from and remand the cause

with direction to dismiss the bill. It is so ordered.

On a motion by the appellees to reform the decree of this court in the matter of costs, Shepard, Ch. J., delivered the opinion of the court:

The opinion of the court in reversing this case is silent in respect to the question of costs, and the entry of the decree therefor against the appellees was in accordance with the general provision of § 3 of rule 18. The appellees have filed a motion to reform that decree so as to show a reversal without costs to either party. The contention that there should have been no decree for costs, as against either party, because the dismissal of the appeal was for want of jurisdiction in the court below, as governed by § 1 of rule 18, is untenable. That section applies in those cases where the appellate court has no jurisdiction whatever. When the appeal is from a decree rendered by a trial court, without jurisdiction in the premises, the rule is different. In such a case the appellate court has jurisdiction of the appeal for the purpose of reversing the erroneous judgment. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 387, 28 L. ed. 462, 465, 4 Sup. Ct. Rep. 510; *Hancock v. Holbrook*, 112 U. S. 229, 232, 28 L. ed. 714, 715, 5 Sup. Ct. Rep. 145; *Graves v. Corbin*, 132 U. S. 571, 590, 33 L. ed. 462, 468, 10 Sup. Ct. Rep. 196; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 269, 44 L. ed. 1061, 1064, 20 Sup. Ct. Rep. 869.

The entry of the decree was, therefore, clearly within the power of this court under § 3, rule 18. That section of the rule provides that in case of reversal costs shall be awarded to the appellants, "unless otherwise ordered by this court." The complainants were undoubtedly at fault in bringing the suit in a court without jurisdiction. The defendants, appellants here, tacitly conceded the jurisdiction of the court below, and were apparently as anxious, on account of convenience, to have the case tried therein on its merits as were the complainants. They made no suggestion of want of jurisdiction at any stage of the proceeding, and the point naturally passed unnoticed by that court. From the decree against them on the merits they appealed to this court, and again failed to suggest the want of jurisdiction. On this appeal, when the argument was begun on the merits, the court of its own motion suggested the probable want of jurisdiction in the court below, and refused to hear the argument until that question could be determined. The result of the suggestion was the conclusion that the court below had no ju-

risdiction of the case, and that necessarily its decree must be reversed with direction to dismiss the bill. Now, had the appellants raised the question of jurisdiction below, and brought it up as a ground of appeal, there would be no question of their right to recover costs in this court. We must presume, however, that, had the suggestion of want of jurisdiction been made in the court below, it would have prevailed. The result of the failure to raise the question of jurisdiction has been the taking of testimony at considerable expense and a great increase in the volume of the transcript of the record. As the appellants were at fault in the respects indicated, and brought the case here upon the merits alone, we now think it just that each party shall pay the costs incurred by him. Having the power, under § 3 aforesaid, to make such an order, the decree will be reformed so as to require each party to pay the costs incurred by him in this court. It is so ordered.

DISTRICT OF COLUMBIA COURT OF APPEALS.

JAMES H. HARRIS, Appt.,

v.

ROBERT LANG.

(27 App. D. C. 84.)

Sentence—excessive—effect.

1. The imposition of cumulative sentences in a criminal action, the aggregate of which exceeds the jurisdiction of the court to impose, does not render the entire sentence void, but it will be valid for the term which the court has jurisdiction to impose. Same—release of prisoner.

2. A prisoner under sentence for a longer term than the court had jurisdiction to

Case Note. — Cumulative sentences.

Power to impose generally.

It has been held in Indiana, Kentucky, Michigan, Missouri, and Texas that the courts of those states, in the absence of statutory provision, had no authority to adjudge on several convictions that one term of imprisonment should commence to run at the expiration of another. *Miller v. Allen*, 11 Ind. 389; *Kennedy v. Howard*, 74 Ind. 87; *James v. Ward*, 2 Met. (Ky.) 271; *Re Bloom*, 53 Mich. 597, 19 N. W. 200; *Ex parte Meyers*, 44 Mo. 279; *Prince v. State*, 4 Tex. 480.

But in Kentucky, Michigan, Missouri, and Texas statutes have subsequently been passed giving the courts this authority. *Evens v. Com.* 11 Ky. L. Rep. 573, 12 S. W. 768; *People v. Huntley*, 112 Mich. 569, 71 N. W. 178; *Ex parte Meyers*, *supra*; *Shu-*

impose cannot be relieved from custody until the expiration of the time which was within the court's jurisdiction.

Same—cumulative sentences.

3. A sentence of fine, in default of payment of which there shall be imprisonment for a certain time, imposed upon conviction for assault, and one subsequently imposed upon the same defendant of imprisonment for another assault upon a different person, to which he pleaded guilty at the time of his former conviction, which term is to begin at the expiration of the former one, are not cumulative within the meaning of a statute limiting the jurisdiction of the court as to the term for which it may impose imprisonment, and declaring that cumulative sentences shall be regarded as one.

Appeal—habeas corpus—expiration of term.

4. If the term of imprisonment expires

pending an appeal by the jailer from a decision in a habeas corpus proceeding releasing a prisoner from custody, the appeal will be dismissed.

(February 14, 1906.)

A PPEAL by respondent from an order of the Supreme Court of the District of Columbia discharging from custody a petitioner confined under a sentence of the police court. Dismissed.

The facts are stated in the opinion.

Messrs. Daniel W. Baker and Stuart McNamara, for appellant:

The application for discharge was premature.

Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; United States v. Pridge-

maker v. State, 10 Tex. App. 117; Smith v. State, 34 Tex. Crim. Rep. 123, 29 S. W. 774.

And such statutes have also been adopted in Iowa, Kansas, and New York. *Mieir v. McMillan*, 51 Iowa, 240, 1 N. W. 525; *State v. Carlyle*, 33 Kan. 716, 7 Pac. 623; *Re White*, 50 Kan. 299, 32 Pac. 36; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

But it is held that the New York statute applies only to cases where the separate offenses are charged in separate indictments, and does not apply where separate offenses of the same character are charged in separate counts of the same indictment. *People ex rel. Tweed v. Liscomb*, supra.

Such a statute, being an *ex post facto* law, is not applicable to offenses committed prior to its adoption. *Hannahan v. State*, 7 Tex. App. 664; *Baker v. State*, 11 Tex. App. 262.

It is generally held, however, that, even in the absence of a statute to that effect, the court has power to impose cumulative sentences upon conviction under separate indictments for separate offenses, the imprisonment under one to commence at the termination of that under the other. *United States v. Farrell*, 5 Cranch, C. C. 311, Fed. Cas. No. 15,074; *Re Esmond*, 12 Fed. 827; *Howard v. United States*, 34 L.R.A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; *People v. Forbes*, 22 Cal. 135; *State v. Smith*, 5 Day, 175, 5 Am. Dec. 132; *Parker v. People*, 13 Colo. 155, 4 L.R.A. 803, 21 Pac. 1120 (in this case the aggregate of all the sentences imposed was less than that allowable upon any one of the convictions); *Re Packer*, 18 Colo. 525, 33 Pac. 578; *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Simmons v. Georgia Iron & Coal Co.* 117 Ga. 315, 61 L.R.A. 739, 43 S. E. 780; *Fitzpatrick v. People*, 98 Ill. 269; *Re Breton*, 93 Me. 39, 74 Am. St. Rep. 335, 44 Atl. 125; *Rigor v. State*, 101 Md. 465, 61 Atl. 631 (though the prior sentence was imposed by another and a different tribunal); *Kite v. Com.* 11 Met. 581; *Mims v. State*, 26 Minn. 498, 5 N. W. 374; *Re Walsh*, 37 Neb. 454, 55 N. W. 1075; 7 L.R.A. (N.S.)

State v. Mahaney (N. J. L.) 62 Atl. 265; *State v. Hamby*, 126 N. C. 1063, 35 S. E. 614; *Russell v. Com.* 7 Serg. & R. 489; *Com. v. Leath*, 1 Va. Cas. 151; *Re Wilson*, 11 Utah, 114, 39 Pac. 498; *McCormick's Petition*, 24 Wis. 492, 1 Am. Rep. 197; *King v. Williams*, 1 Leach, C. L. 529.

And so has it the power to impose such sentences upon conviction of several separate offenses included in one indictment. *Blitz v. United States*, 153 U. S. 308, 38 L. ed. 725, 14 Sup. Ct. Rep. 924; *Re Greenwald*, 77 Fed. 590; *Ex parte Peeke*, 144 Fed. 1016; *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225; *State v. Robinson*, 40 La. Ann. 730, 5 So. 20; *Castro v. Queen*, 14 Cox, C. C. 546.

Kan. Crim. Code, § 250 (Gen. Stat. 1901, § 5695), provides that "when any person shall be convicted of two or more offenses before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior convictions." Under this statute, it is held that sentences to imprisonment may be cumulative if defendant is convicted upon separate counts or separate indictments for separate and distinct felonies. *State v. Carlyle*, supra; *State v. Hodges*, 45 Kan. 389, 26 Pac. 676; *State v. Emmons*, 45 Kan. 397, 26 Pac. 679; *Re White*, supra.

In *People ex rel. Tweed v. Liscomb*, supra, it was held that the excess above the maximum was void where, for crimes identical in character, set forth in twelve counts of the same indictment, the prisoner was sentenced to twelve successive terms of imprisonment, each term being the maximum fixed by law.

This last case has been much criticized upon the ground that it was an authority against the common-law power of the court to impose cumulative sentences in any event. But what the court did hold was that, even if it were proper to join distinct offenses, committed at different times, in the

on, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Re Graham* (*Graham v. Weeks*) 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *People ex rel. Trainor v. Baker*, 89 N. Y. 460.

The sentences imposed upon appellee were several and distinct, and the court erred in treating them as cumulative.

25 Am. & Eng. Enc. Law, 2d ed. p. 307; 12 Cyc. Law & Proc. p. 774; *Re Jackson*, 3 MacArth. 24.

The imprisonment which the petitioner underwent in the first case was not the sentence, but the sanction of the sentence.

United States v. Mills, 11 App. D. C. 500
Bowles v. District of Columbia, 22 App. D. C. 321.

same indictment, there was no warrant in such case for several and distinct judgments or for a cumulative sentence exceeding the maximum for a single offense. The court, however, distinctly said that it had been the practice of that state, even before the same was sanctioned by statute, to impose sentence of imprisonment upon a second conviction, to commence at the termination of an imprisonment upon a prior conviction.

Necessity of specifying that sentences are cumulative.

If the imprisonment under one sentence is to commence on the expiration of the other, the sentence must so state or the two periods of time will run concurrently. *Re Jackson*, 3 MacArth. 24; *Fortson v. Elbert County*, 117 Ga. 149, 43 S. E. 492; *Re Breton*, 93 Me. 39, 74 Am. St. Rep. 335, 44 Atl. 125; *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484; *Ex parte Hunt*, 28 Tex. App. 361, 13 S. W. 145.

Where the judgment fails so to state no presumption will be indulged, in favor of the correctness of the sentence, that it was cumulative. *Lockhart v. State*, 29 Tex. App. 35, 13 S. W. 1012.

The rule requiring the sentence to state that the second term is to begin upon the expiration of the first has no application in a case where the different sentences were imposed by different courts. *Hightower v. Hollis*, 121 Ga. 159, 48 S. E. 969.

It is not necessary expressly to adjudge that the second imprisonment shall begin at the close of a former term imposed, where the statute provides that "the imprisonment to which he [the prisoner] shall be sentenced upon the second or subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction." *Ex parte Durbin*, 102 Mo. 100, 14 S. W. 821.

Sufficiency and effect of specification.

In *Re Fry*, 3 Mackey, 135, it was held that 7 L.R.A. (N.S.)

The rule as to cumulative sentences had no application to pecuniary punishment.

Ex parte Banks, 41 Tex. Crim. Rep. 201, 53 S. W. 688.

The imprisonments are successive because of the order of sequence in point of time; but this does not make the sentences cumulative.

Mims v. State, 26 Minn. 498, 5 N. W. 374; *Carter v. McClaughry*, 183 U. S. 394, 46 L. ed. 250, 22 Sup. Ct. Rep. 124; *Re Henry*, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142; *Re De Bara*, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. Rep. 110.

A prisoner serving his term can be prosecuted and sentenced for a crime committed in prison, and for such crime his sentence

a cumulative sentence of imprisonment was sufficiently certain where the imprisonment was made to commence at the expiration of an imprisonment under a previous sentence, the number and date of which were given.

In *United States v. Patterson*, 29 Fed. 775, it was held that a sentence of "five years upon each of the three indictments above named, said terms not to run concurrently," without specifying the order in which they were to run, was uncertain; and that the terms therefore ran concurrently.

In *Wallace v. State*, 41 Fla. 547, 26 So. 713, it was held that, where a sentence to a term of imprisonment was made to begin "at the expiration of first sentence," and there was nothing in the record or in the language of the sentence to show for what offense, or in what court, such first sentence was imposed, or when it began, or where it was to be executed, or for what period of time it was imposed, such sentence was erroneous because vague and indefinite.

In *Ex parte Cox*, 29 Tex. App. 84, 14 S. W. 396, where three separate sentences were imposed for three separate offenses, and the cumulative clause was added to the last sentence only, it was held that the first two terms ran concurrently.

In *Ex parte Kirby*, 76 Cal. 514, 18 Pac. 655, where the statute provided: "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment as the case may be,"—it was held that, upon a second conviction before sentence pronounced upon the first, the judgment rendered was valid, although it made no reference to the first; and that the prisoner must serve the terms of the two sentences successively.

And in *State v. Lewis*, 63 Kan. 268, 65 Pac. 257, under a similar statute (see supra), it was held that a judgment of conviction imposing successive terms of imprison-

may be made to begin at the expiration of the one then current.

Kennedy v. Howard, 74 Ind. 87; State v. Wilson, 38 Conn. 126; Thomas v. People, 67 N. Y. 218; Wharton, Crim. Pl. & Pr. 930.

The case is not different where the prisoner serving his term is tried and sentenced to imprisonment for a crime committed before his confinement.

United States v. Farrell, 5 Cranch, C. C. 311, Fed. Cas. No. 15,074; Russell v. Com. 7 Serg. & R. 489; Com. v. Leath, 1 Va. Cas. 151; Howard v. United States, 34 L. R.A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; Rex v. Wilkes, 4 Burr. 2576; Rigor v. State, 101 Md. 465, 61 Atl. 631.

ment under several counts, and containing a condition that the period of imprisonment under each cumulative sentence should begin at the expiration of the period of sentence under a preceding count, which judgment did not specify the date of commencement of imprisonment under any of the counts, was not for such reason uncertain or indefinite as to the time of commencement of either the separate or aggregate terms of imprisonment.

But in *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, it was held that, under this statute, where a defendant had already been sentenced for one crime, a subsequent judgment upon a conviction for another crime, after judgment pronounced upon the first, reciting that the second term of imprisonment was to commence at the expiration of the first term, was void, and the prisoner must be discharged upon serving the longer term.

And it was so held in *Ex parte Meyers*, 44 Mo. 279, under a similar statute.

In *People v. Forbes*, 22 Cal. 135, it was held that the fact that the time of commencement of the terms of imprisonment under the successive sentences depended upon the existence of other judgments not specified, and ascertainable only by referring to the records of the court, would not render such sentences void where each sentence recited, "said term to commence at the expiration of previous sentences."

But in *Williams v. State*, 18 Ohio St. 47; *Pickett v. State*, 22 Ohio St. 405; and *Larney v. Cleveland*, 34 Ohio St. 599,—an opposite view was taken; and in the *Pickett Case* the court said: "The terms of a sentence of imprisonment ought to be so definite and certain as to advise the prisoner and the officer charged with the execution of the sentence of the time of its commencement and termination, without their being required to inspect the records of any other court, or the record of any other case."

For the obvious reason that the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment, 7 L.R.A. (N.S.)

Messrs. Armond W. Scott and M. T. Clinkscales, for appellee:

Where the punishment for a crime is fixed by statute the punishment inflicted must conform thereto, and a judgment which does not so conform is erroneous.

25 Am. & Eng. Enc. Law, p. 323; *Re Johnson*, 46 Fed. 477; *Harman v. United States*, 50 Fed. 921.

The statute in this case prohibits cumulative sentences aggregating more than one year.

People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

McComas, J., delivered the opinion of the court:

Robert Lang, the appellee, filed his peti-

a cumulative sentence should not fix the day on which the term of imprisonment is to commence, but should direct that it begin at the expiration of the previous one. *Re Walsh*, 37 Neb. 454, 55 N. W. 1075; *Johnson v. People*, 83 Ill. 431.

In *Ex parte Moseley*, 30 Tex. App. 338, 17 S. W. 418, it was held that the cumulative punishment need not be pronounced by the judgment of conviction if it is entered in the final judgment and sentence.

In *Mieir v. McMillan*, 51 Iowa, 240, 1 N. W. 525, it appeared that the statute provided: "If the defendant is convicted of two or more offenses before judgment on either, the punishment of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any of the other offenses;" that defendant, convicted upon two indictments, was separately sentenced upon the same day, neither judgment expressly providing that one term should commence at the expiration of the other; but the mittimus in the case in which judgment was last rendered did so provide. The defendant was held not entitled to his discharge until he had served both terms.

But in *Re Jackson*, 3 MacArth. 24, it was held that the mittimus must strictly pursue the judgment; and, where the judgment does not make the sentence cumulative, and the mittimus does, the latter cannot be resorted to for the purpose of justifying imprisonment beyond the first conviction.

Sufficiency of single judgment or sentence.

Where the punishment for selling liquor contrary to law is ten days' imprisonment, one convicted on two counts should not be sentenced to twenty days in gross, but should be sentenced for a specified time under each count, the time under the second to commence when the first ends. *Mullinix v. People*, 76 Ill. 213; *Martin v. People*, 76 Ill. 499; *Stack v. People*, 80 Ill. 32; *Fletcher v. People*, 81 Ill. 117.

In *Ex parte Peeke*, 144 Fed. 1016, where

tion for the writ of habeas corpus May 4, 1905, in the supreme court of the District of Columbia, and the writ was issued by the court and directed James H. Harris, warden of the District jail, to produce Robert Lang in court, and, upon hearing, the learned court below directed the discharge of the petitioner from the custody of the warden of the jail, who appealed to this court.

In the police court of the District of Columbia, on June 27, 1904, upon an information charging him with an assault, to which he pleaded "not guilty," Robert Lang was tried and convicted. He was sentenced to pay a fine of \$200, and, in default of payment of the fine, was committed to imprisonment in the District jail for three hundred and sixty-four days. On the same day the appellee, upon another information charging him with an assault, pleaded "guilty," and was remanded to jail to await sentence. While serving sentence under commitment for the first assault, the appellee was brought into the police court on March 14, 1905, and was sentenced under the second information, to which he had pleaded guilty, for a period of one hundred and eighty days, the said term "to take effect upon the expiration of sentence imposed in U. S. case No. 135,816, of date June 27, 1904."

When, on May 4, 1905, the appellee filed his petition for the writ of habeas corpus, he had been confined in the jail for ten months and seven days. In his petition the

appellee charged that the sentence imposed on March 14, 1905, was null and void; that, deducting the time to which he was entitled on account of good conduct, the period of his first sentence had expired, and that his present and further detention was unlawful. The appellant, the warden of the jail, in his return to the writ, stated that he held the appellee by virtue of the two sentences of the police court and the commitments issued thereon; that the assault in the first commitment mentioned was upon one Ida Middleton, while that in the second commitment mentioned was upon Ollie Brown.

The learned court below discharged the prisoner from custody, holding that the police court had no jurisdiction to impose sentence in case No. 135,817, and that the sentences imposed in No. 135,816 and No. 135,817 were cumulative and aggregated more than one year. The appellant contends that the court below erred upon both grounds, and therefore erred in not remanding the appellee to serve the residue of the two sentences, imposed upon him for two different offenses upon two different informations. Allowing a deduction for good conduct, the appellee's first term should have expired about April 25, 1905. If the appellee served the term of the sentence in the second charge, deducting time for probable good conduct, his incarceration should have terminated about September 26, 1905, and his release on May 5, 1905, was premature.

Section 931 of the Code [31 Stat. at L.

the prisoner was convicted of five distinct crimes of the same class set forth in five counts of an indictment, the maximum punishment for any one of which was imprisonment not to exceed two years, it was held that a single sentence for five years' imprisonment would not be construed as one for cumulative sentences, but would be held void for the excess above two years.

In *Rex v. Robinson*, 1 Moody, C. C. 413, it was held that a prisoner convicted of two separate offenses, charged in two counts, may be sentenced under consecutive judgments to two consecutive terms; but that one judgment extending beyond the maximum punishment fixed by law for either offense is bad.

As affected by deduction of time for good behavior.

In *Re Packer*, 18 Colo. 525, 33 Pac. 578, it was held that, for the purposes of the statute, which increases from year to year the deduction of time allowed for good behavior, cumulative sentences were to be construed as one continuous sentence.

The possibility of a deduction by good-time credits, although contingent upon the conduct of the convict, does not render the cumulative sentence so indefinite or uncertain that it will be invalid. *Howard v. 7 L.R.A. (N.S.)*

United States, 34 L.R.A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; *Ex parte Ryan*, 10 Nev. 261.

A contrary view was taken in *Re Bloom*, 53 Mich. 597, 19 N. W. 200, and *Re Lamphere* 61 Mich. 105, 27 N. W. 882. But a statute now authorizes such sentences in Michigan. *People v. Huntley*, 112 Mich. 569, 71 N. W. 178.

Effect of reversal or invalidity of first conviction.

A cumulative sentence is void for uncertainty where the prior sentence is afterward declared void on appeal (*Ex parte Roberts*, 9 Nev. 44, 16 Am. Rep. 1); or where the statute under which the prior conviction was had is afterward declared unconstitutional (*Ex parte Jordan*, 7 Ohio N. P. 563).

But in *Brown v. Com.* 4 Rawle, 259, 26 Am. Dec. 130, this contention was made, and it was held that the term of the second sentence began to run from the time of the reversal of the first.

And in *Ex parte Jackson*, 96 Mo. 116, 8 S. W. 800, where there were three successive sentences, it was held that reversal of the judgment as to the middle term did not entitle defendant to discharge upon expiration of his first term.

In *Kite v. Com.* 11 Met. 581, it was held

1340, chap. 854] allows for good conduct to all persons sentenced to imprisonment in the jail or the workhouse a deduction of five days in each month for the term.

Section 934 of the Code [31 Stat. at L. 1341, chap. 854] provides that "when any person is sentenced for a term longer than six months, and not longer than one year, such imprisonment shall be in the jail; and, where the sentence is imprisonment for more than one year, it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year, the prosecution shall be in the supreme court of the District [of Columbia]. When the maximum punishment is [a fine only or] imprisonment for one year or less, the prosecution may be in the police court."

The appellee contends that, under this section, the two sentences he was required to serve were cumulative sentences aggregating more than one year and should be deemed one sentence. In this view, the appellee's imprisonment would have been lawful until June 26, 1905, for sentence or sentences not exceeding one year. If the court have jurisdiction to sentence for one year, such sentence is valid within the limit of the court's jurisdiction, and in this view the petitioner could only be relieved from so much of the sentence or sentences as exceed one year.

that, upon reversal of the judgment in the first case, the sentence expires, and the subsequent sentence then takes effect as if the previous one had expired by lapse of time.

In *Blitz v. United States*, 153 U. S. 308, 38 L. ed. 725, 14 Sup. Ct. Rep. 924, it was held that, where the term of imprisonment under the judgment on the third count of an indictment was made to commence upon the expiration of the judgment on the first count, and the judgment on the first count was reversed on error, the term of imprisonment on the third count should commence on the date fixed for it to commence on the first count.

In *Gregory v. Queen*, 15 Q. B. 974, where cumulative sentences were imposed upon conviction on four counts, and upon error the court decided that the third count was insufficient, it was held that the sentence on the fourth count was not thereby invalidated, and that the imprisonment on it would commence from the end of the imprisonment on the second count.

Miscellaneous.

Upon conviction on a number of counts, the court cannot pronounce judgment as to but one count, and suspend it as to the others until after the term of imprisonment 7 L.R.A. (N.S.)

"A prisoner under an excessive sentence cannot be discharged until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose." *Re Swan*, 150 U. S. 637, 653, 37 L. ed. 1207, 1211, 14 Sup. Ct. Rep. 225; *United States v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 636, 14 Sup. Ct. Rep. 746; *People ex rel. Trainor v. Baker*, 89 N. Y. 467.

The discharge of the appellee in this instance was premature, and the learned court below, upon the view taken by it that the two sentences were cumulative, had no authority to relieve the petitioner, who should have been remanded to the custody of the appellant to serve out the remainder of the year at least. But we do not agree with the court below that the sentence imposed June 27, 1904, in case No. 135,816, and the sentence imposed March 14, 1905, in case No. 135,817, were cumulative. Upon the first conviction for the assault upon *Ida Middleton*, sentence was imposed June 27, 1904, that the appellee pay a fine of \$200, and the appellee was confined in jail in default of payment of the fine imposed, committed for the term of three hundred and sixty-four days. This was in accordance with § 44 of the Code [31 Stat. at L. 1196, chap. 854]. The sentence imposed on March 14, 1905, was for an assault upon *Ollie Brown*, and was for a term of imprisonment of one hundred and eighty days. The two sentences were imposed upon different in-

has been served and defendant released. *Re Beck*, 63 Kan. 57, 64 Pac. 971.

In *Ex parte Banks*, 41 Tex. Crim. Rep. 201, 53 S. W. 688, it was held that judgments imposing fines are cumulative and independent of each other, and the payment of one is not a satisfaction of the other.

In *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, it was held that a judgment imposing punishment by way of fines aggregating over \$6,000, and, in case the fines were not paid within a limited time, defendant to be confined at hard labor in the house of correction for a term exceeding fifty-four years, for 307 distinct violations of the liquor law, was not cruel and unusual punishment. A writ of error to the Supreme Court of the United States (144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693) was dismissed because the record failed to present a Federal question. But three of the justices, dissenting, were of the opinion that the punishment inflicted in this particular case was cruel and unusual.

In *Bullard v. State*, 40 Tex. Crim. Rep. 270, 50 S. W. 348, it was held that, unless the conviction occurred at the same term that defendant was tried, the court would not be authorized to make the sentence cumulative without record evidence of his former convictions, together with oral evidence of his identity.

formations, after separate convictions at different times, the punishments were different in character, and the appellee was convicted for separate assaults upon different persons.

The court below has in general term more than once upheld similar sentences. "The law is well settled that in a criminal case there is no error in a judgment making one term of imprisonment commence when another terminates; and, when this forms part of the sentence, the judgment is then considered sufficiently certain as to the time when the successive sentences are to be carried into execution." *Re Jackson*, 3 *MacArth*, 24, 26; *Re Fry*, 3 *Mackey*, 141. This applies not only to the second sentence of the appellee, which was imprisonment for the assault, but as well to the first sentence, which was a fine and imprisonment in default of payment of the fine. This court of appeals referred to the fact that there is a well-defined system of commutation of fines provided in this District in *United States v. Mills*, 11 App. D. C. 506, saying: "We need go no further back than the last act of Congress upon this subject, the act of July 23, 1892 (27 Stat. at L. 262, chap. 236), wherein it was expressly provided that, 'in all cases where the said [police] court shall impose a fine, it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.'" This provision is now § 44 of the Code, and was considered by this court in *Bowles v. District of Columbia*, 22 App. D. C. 328, where it is said: "Imprisonment is not provided . . . by the Code as an alternative punishment; but imprisonment is very properly provided as the only available mode for the enforcement of the fines imposed as punishment. Without it there would be no practicable means for the enforcement of fines. When imprisonment is provided as an alternative punishment, it is proper so to state, and it is so stated in the laws. . . . Imprisonment could not be imposed in this case primarily; and it is always competent for the party to avoid it by paying his fine. It would not be competent for him to avoid it if it were originally imposed as punishment."

In the case before us, in June the appellee was sentenced to pay a fine, or in default to be imprisoned; in March following he was sentenced to imprisonment. Whatever may be meant by "cumulative sentences," in § 934 of the Code, the term has no application to fines as punishment.

In *Ex parte Banks*, 41 Tex. Crim. Rep. 202, 53 S. W. 688, in construing a statute 7 L.R.A. (N.S.)

very similar to the provisions of the Code, it is said: "The statute regulating cumulative sentences refers only to cases in which imprisonment in the penitentiary or the county jail is a part of the punishment." We are of opinion that the language of § 934 of the Code, "cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision," has no reference to a sentence to pay a pecuniary fine followed by imprisonment in default of payment, but relates only to cases in which the punishment is to be imprisonment. It should be observed that the language just quoted sanctions cumulative sentences by the police court, the total of which do not aggregate more than one year. We conclude that the two sentences for which the appellee was imprisoned were lawful sentences and should have been served. Nor are the sentences cumulative merely because two imprisonments are made successive in point of time, if it happen that the prisoner convicted upon two separate informations receives two separate definite sentences for the two separate offenses.

The supreme court of Minnesota said: "There are raised in this case only two questions. . . . These are that the sentence is cumulative, and that a sentence cannot be made to commence at a future day. If both offenses had been charged in one indictment, and there had been but one trial, and the plaintiff in error had been sentenced upon each count in the indictment, both sentences exceeding in the aggregate the punishment prescribed by law for such offense, the objection that the sentence were cumulative might be made. But we have never seen it laid down by any court or text writer that, because a person upon a conviction for one offense had been sentenced to the full extent of the power of the court to punish, the court cannot sentence him upon another conviction, under another indictment, separately tried, for a similar but distinct offense. It is not a case of cumulative sentences. The power of a court to make the term of imprisonment imposed by one sentence to commence at the expiration of the term imposed by another sentence exists from necessity; for, otherwise, a person might be convicted at the same term of court for several distinct, similar, or dissimilar offenses, and the court have power to punish for only one. A sentence to imprisonment ought to be certain as to the time when it shall commence and end; but where the court has to punish by imprisonment upon each of several convictions, to make one term commence at the expiration, by lapse of time or otherwise, of

a preceding term, makes the sentence as certain as is possible under the circumstances." *Mims v. State*, 26 Minn. 498, 499, 5 N. W. 374.

And in *Williams v. State*, 18 Ohio St. 47, the supreme court of Ohio said: "To hold that where there are two convictions and judgments of imprisonment at the same term, both must commence immediately, and be executed concurrently, would clearly be to nullify one of them. To postpone the judgment in one case until the termination of the sentence in the other would, if allowable, be attended with obvious inconvenience and expense, without any correspondent benefit to the convict. There is nothing in the statute requiring this, and it is not to be construed so as to defeat or impede the execution of its own provisions as to the punishment of crimes. We think, both upon principle and the weight of authority, that we are required to hold that it is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates. There is but little force in the objection that the term of the commencement of the second term is contingent and uncertain. It is true that the first term may be ended by a pardon or a reversal of judgment, but its termination will be rendered certain by the event, and then the second sentence, by its terms, takes effect."

And the supreme court of Nebraska, answering a similar objection, said: "But, in our opinion, the great weight of authority is in favor of the proposition that upon conviction of several offenses, charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences." *Re Walsh*, 37 Neb. 454, 55 N. W. 1076.

In *Blitz v. United States*, 153 U. S. 308, 317, 318, 38 L. ed. 725, 728, 729, 14 Sup. Ct. Rep. 924, the defendant was convicted upon each of the three counts in the indictment. A motion in arrest of judgment was sustained as to the second count, and the defendant was sentenced on the first count to an imprisonment in the penitentiary for a year and a day, and on the third count for a like period beginning upon the expiration of the sentence on the first count. The Supreme Court held that the motion in arrest of judgment should have been sustained as to the first count also. It affirmed the judgment on the third count, and directed that the term of imprisonment thereunder should be held to commence on the day named for the commencement of the first term. As the court below had pronounced judgment on both the first and third counts, 7 L.R.A. (N.S.)

the imprisonment under the third count commenced upon the expiration of the judgment on the first count; therefore, the plaintiff in error contended that there should be a new trial, but the Supreme Court said: "In *Kite v. Com.* 11 Met. 581, 585, it appeared that the accused was sentenced for a named period to confinement at hard labor, to take effect from and after the expiration of three previous sentences specified. The judgment was objected to as erroneous and void, because there were not three former sentences, legal and valid, and therefore no fixed time from which the punishment on the last sentence should begin. Chief Justice Shaw, referring to this objection, and delivering the unanimous judgment of the court, said that it was not error in a judgment in a criminal case to make one term of imprisonment commence when another terminates. 'It is as certain,' he said, 'as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires, and then, by its terms, the sentence in question takes effect as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, not void; and until reversed by a judgment, it is to be deemed of full force and effect, and, though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect.' See also *Dolan's Case*, 101 Mass. 219, 223."

The appellee in the case before us committed two successive offenses, and it was competent for the court to punish him for the two different offenses. It would be very unjust to hold that if one person committed one misdemeanor the police court could punish him for that offense; that if he committed a second like offense immediately after the other, he should have immunity from punishment because the two sentences for the different offenses resulted in successive terms of imprisonment.

If this were a case where the appellee were still in jail awaiting the result of the appeal of the warden of the jail, we would reverse the order appealed from and remand the case to the supreme court of the District of Columbia with direction to proceed therein in accordance with law and in a manner not inconsistent with this opinion.

On a habeas corpus, where the personal liberty of the citizen is involved, our decision should be made upon the actual status of the case. This record discloses that the term of the second sentence of the appellee has expired, and, although he did not serve the full period of his imprisonment by reason of his discharge by the court below, the time which he lawfully should have served has now expired. To direct a reversal of the order of the court below would be to do a vain thing.

It appears in No. 135,817 that on June 27, 1904, the defendant was arraigned and pleaded guilty, a judgment of guilty was entered, and the last entry of that date was, "committed to jail and held to await sentence." The next and final entry was "March 14, 1905, sentenced to be imprisoned one hundred and eighty days in jail, to take effect upon the expiration of sentence imposed in U. S. case No. 135,816, of date June 27, 1904. Committed."

We will not consider whether the police court, which may suspend judgment in its discretion for proper reasons shown, and which has statutory power to extend a term of its court, has power to withhold sentence during a long and indefinite period. It may be that in this case the term was extended until the time of sentence. At least, nothing appears to the contrary.

Concerning the suspension of sentence in this case in its present status, we may accept the language of the supreme court of Tennessee that "in favor of the propriety of the action of the court we would presume good cause appeared for such suspension." *State v. Miller*, 6 Baxt. 513.

Many states by statute provide that the prisoner shall not be discharged under a writ of habeas corpus where it appears that he is held in custody by virtue of the judgment of a court of competent jurisdiction; and the courts uniformly hold that the writ of habeas corpus is not to take the place of a writ of error or the appeal. See *Smith v. Hess*, 91 Ind. 428.

It is not necessary in this case to consider whether or not there are limitations upon the right of the police courts to suspend sentence beyond the current term or the succeeding term, and, if so, what such limitations may be.

The only formal order we can now enter is an order dismissing the appeal, in view of the expiration of the second sentence of the appellee pending the consideration of this appeal by this court. *United States v. Mills*, 11 App. D. C. 510, 511.

As the appeal must be dismissed, it is now so ordered.

7 L.R.A. (N.S.)

KANSAS SUPREME COURT.

CHARLES W. DYERSON, Plff. in Err.,
v.

UNION PACIFIC RAILROAD COMPANY.

(— Kan. —, 87 Pac. 680.)

Railroad—employee on track.

1. The rule that a railroad employee who is engaged in the discharge of a duty, the performance of which requires him to be on or near the track, need not keep a strict watch for approaching trains in order to be deemed to be exercising reasonable care for his own protection, does not apply to the case of an employee who is injured while attempting to cross a track merely for the purpose of getting from one point to another; the circumstances not requiring the crossing to be made at a particular time or place.

Same—duty to look.

2. The fact that such employee works close to a track, and has frequent occasion to pass back and forth over it, does not relieve him from the requirement that, in order that he may be deemed to be in the exercise of ordinary diligence, he must look in both directions for an approaching train before undertaking to cross it.

Same—change of rule.

3. The fact that such an employee knows that it had previously been the rule and practice of the company to run trains along said track only in one direction, except under unusual circumstances, does not

Headnotes by MASON, J:

Case Note. — Doctrine of last clear chance as affected by question whether negligence of plaintiff or deceased and of defendant was concurrent: — The point upon which the decision in the above case turns, namely, that the negligence of the plaintiff continued up to the very moment he was hurt, and was therefore contemporaneous and concurrent with the negligence of defendant, has been too often disregarded by the courts in applying the doctrine of last clear chance in cases where the negligence charged against the defendant consisted of some act or omission occurring before the discovery of the peril in which the plaintiff or deceased had placed himself or his property by his own negligence. As shown in a note in 55 L.R.A. 418, the function of the doctrine of last clear chance is not to permit a recovery in spite of contributory negligence, but merely to relieve the antecedent negligence of the plaintiff or deceased, which would otherwise be regarded as contributory, of its character as such; and this result, it accomplishes, by characterizing the negligence of the defendant, if it intervenes or continues between the negligence of the plaintiff or the deceased and the accident, as the sole, proximate cause of the injury, and the plaintiff or deceased's antecedent negligence merely as a condition or remote cause.

relieve him from such requirement, although a change has been made in such rule and practice without notice to him.

Last clear chance—continuing contributory negligence.

4. A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort.

(November 10, 1906.)

In other words, as it is succinctly stated in *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863, 923, the doctrine simply furnishes a means of determining whether the plaintiff's negligence is a remote or proximate cause of the injury. It is apparent, therefore, that, in order to make the doctrine operative,—at least, in order to make it operative so as to sustain a recovery against the defendant when the negligence charged against the latter consists of an act or omission occurring before the discovery of the danger,—the defendant's negligence must have intervened or continued after the negligence on the part of the plaintiff or deceased had terminated. If the negligence of the plaintiff or deceased concurred with that of the defendant up to the very instant of the accident, or if it continued at least as long as the defendant's negligence, the doctrine cannot be properly applied against the defendant.

The importance of this point in the application of the doctrine of last clear chance is clearly brought out by a comparison of the case of *Smith v. Norfolk & S. R. Co.* supra, with the subsequent case of *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264. These cases on their facts were very similar, both involving the liability of a railroad company for the killing of an intoxicated person asleep on the track, the negligence charged against the defendant in both instances being the failure to discover the deceased on the track, and not the failure to take proper steps to avoid the accident after discovering him. In both cases it was assumed that the defendant was negligent in failing to keep a proper lookout, but in the first case its liability was denied upon the ground of the contributory negligence of the deceased. The applicability of the doctrine of last clear chance was denied in that case upon the ground that, notwithstanding the intoxication of the deceased, his negligence continued up to the very time he was struck, and was therefore concurrent with the defendant's negligence 7 L.R.A. (N.S.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. C. F. Hutchings, S. D. Hutchings, and E. L. Fischer for plaintiff in error.

Messrs. N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error:

It was plaintiff's duty to look.

Zirkle v. Missouri P. R. Co. 67 Kan. 77, 72 Pac. 539; *Atchison, T. & S. F. R. Co. v. Withers*, 69 Kan. 620, 72 Pac. 542; *Atchison, T. & S. F. R. Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *1 Labatt, Mast. & S.* 332; *Wabash R. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576; *Grand Trunk R. Co. v. Baird*,

in failing to discover him. In the last case, however, the doctrine of last clear chance was applied so as to hold the defendant liable, notwithstanding the negligence of the deceased in the first instance in lying down upon the track. The difference in the ultimate decisions in these two cases is due to the court's change of view as to the effect of intoxication upon the question as to the continuing negligence of a trespasser who lies down upon the track, it being held in the last case that the deceased's negligence was to be regarded as having culminated at the time he lay down upon the track in a drunken stupor, and not as continuing up to the time he was struck. It is apparent, therefore, that, though the decisions are diametrically opposed, the first case expressly holds, and the last case clearly assumes, that, in order to sustain a recovery upon the doctrine of last clear chance, the negligence of the plaintiff or deceased must have culminated or terminated before that of the defendant. Other cases have also recognized and emphasized the importance of this point. Thus, in *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632, the court held that, if the helplessness of a trespasser at the time he was struck by a train while lying upon the track was due to a fit, his original negligence in going upon the track would not preclude a recovery, assuming that the engineer failed in his duty to keep a proper lookout; but that, if his helplessness was due to intoxication, he could not recover. As shown by the cases already cited, there is room for a difference of opinion as to the effect of voluntary intoxication upon the continuance of the negligence of the plaintiff, or deceased, under such circumstances; yet it is clear that this case makes the application of the doctrine of last clear chance, assuming negligence on the part of defendant in failing to discover the peril, conditional upon non-continuance of the original negligence of the plaintiff or deceased. The distinction made in the last case between helplessness caused by voluntary drunkenness and helplessness

36 C. C. A. 574, 94 Fed. 946; *Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 349, 31 S. W. 6; *Elliot v. Chicago, M. & St. P. R. Co.* 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758, 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *McCadden v. Abbot*, 92 Wis. 551, 66 N. W. 694; *Lynch v. Boston & A. R. Co.* 159 Mass. 536, 34 N. E. 1072; *Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *Schaible v. Lake Shore & M. S. R. Co.* 97 Mich. 318, 21 L.R.A. 660, 56 N. W. 565; *St. Jean v. Boston & M. R. Co.* 170 Mass. 213, 48 N. E. 1088; *Roskoyek v. St. Paul & D. R. Co.* 76 Minn. 28, 78 N. W. 872; *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, 76 N. W. 901; *Metropolitan Street R. Co. v. Agnew*, 65 Kan. 478, 70 Pac. 345; *1 Bailey, Personal Injuries Relating to Master and Servant*, 1270; *Kenna v. Central P.*

R. Co. 101 Cal. 26, 35 Pac. 332; *Collins v. Burlington, C. R. & N. R. Co.* 83 Iowa, 346, 49 N. W. 848; *Nixon v. Chicago, R. I. & P. R. Co.* 84 Iowa, 331, 51 N. W. 157; *Gardner v. Detroit, L. & N. R. Co.* 97 Mich. 240, 56 N. W. 603; *Stacklie v. St. Paul & D. R. Co.* 73 Minn. 37, 75 N. W. 734.

As he voluntarily and unnecessarily placed himself in a dangerous position, he was guilty of contributory negligence.

Union P. R. Co. v. Estes, 37 Kan. 715, 16 Pac. 131; *Carrier v. Union P. R. Co.* 61 Kan. 447, 59 Pac. 1075; *Atchison, T. & S. F. R. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12.

Mason, J., delivered the opinion of the court:

Charles W. Dyerson was run into by an engine and tender of the Union Pacific Rail-

road caused by disease is recognized in Southwestern *R. Co. v. Hankerson*, 61 Ga. 114, though the decision seems to have turned upon the provisions of the local Code.

The effect of the continuance of the plaintiff's negligence to prevent the application of the doctrine in his favor is also shown in *Texas & N. O. R. Co. v. McDonald* (Tex.) 88 S. W. 201, where the court said that it was settled that the act of sitting upon a railroad track over which cars are expected to pass is a negligent one which precludes a person guilty of it, when hurt, from complaining of mere negligence on the part of those operating the cars in failing to discover his presence and avoid injuring him. The plaintiff in this case had seated himself near the track for the purpose of getting in the shade of the cars, and, so far as appears, he was neither asleep, intoxicated, nor otherwise incapacitated at the time of the accident.

The importance of this point in the application of the doctrine of last clear chance is clearly apprehended by the Maine supreme judicial court, as is apparent from the excerpt from the opinion in *O'Brien v. McGlinchy*, 68 Me. 552, quoted in *DYERSON v. UNION P. R. Co.*, and from the opinions in *Ward v. Maine C. R. Co.* 96 Me. 136, 51 Atl. 947, and *Butler v. Rockland, T. & C. Street R. Co.* 99 Me. 149, 100 Am. St. Rep. 267, 58 Atl. 775.

In the last case the court said that the language of the doctrine of prior and subsequent negligence (which is another form of stating the doctrine of last clear chance) implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous. In that case plaintiff was injured by a collision between the vehicle in which he was riding and a motor car, as he attempted to cross the track. The court said that, even if the brakeman on the car failed seasonably to take the necessary steps to prevent a collision, which was apparently likely to happen because of the negligence or ignorance of the plaintiff, yet it could not be 7 L.R.A. (N.S.)

said that the brakeman's negligence in that respect was subsequent to and independent of the plaintiff's contributory negligence; on the other hand, upon that assumption, the brakeman's negligence was only contemporaneous, not subsequent; that it operated to produce the result in connection with the plaintiff's negligence, and not independently of it; that the plaintiff's negligence actively continued from the corner of the house which obstructed the view of the track to the point of collision; that it was operative to the last moment, and contributed to the injury as a proximate cause. The court seems to have taken this position, even upon the assumption that the brakeman actually saw the situation and ought to have realized the danger. As subsequently shown, there is reason to doubt the correctness of this view as applied to a case where the plaintiff's negligence consisted merely of the failure to discover the danger, and the defendant's negligence consisted of the failure to take proper precautions after discovering the danger. However that may be, the reasoning is unanswerable as applied to the case where the negligence on both sides consists merely of the failure to discover the danger.

The opinion in *Little v. Boston & M. R. Co.* 72 N. H. 502, 57 Atl. 920, evinces a just appreciation and a clear conception of the importance of the question as to the relative duration of the negligence of the plaintiff and of the defendant in the application of the doctrine. In that case the plaintiff was injured by a collision with an electric car while driving across the track. The court, after alluding to the figures tending to show the space covered by the plaintiff's team and vehicle and the respective rates of speed of the vehicle and car, said that it was apparent that impartial men might reasonably find that, after the plaintiff's negligence in approaching the track had brought him to a situation of actual danger, he might have been unable to avoid a collision with the approaching car by the exercise of ordinary care if he saw the car

road Company and severely injured. He sued the company for damages, alleging that his injury was occasioned by the defendant's negligence. At the trial the court rendered judgment against him upon his petition and his preliminary statement to the jury. He prosecutes error.

The material facts disclosed by the plaintiff's pleading and statement may be thus summarized: He had for some time been employed by the company in the Kansas City yards. At the time of his injury he was known as a "car repairer" and one of his duties was to supply cars with ice. Ice for this use was kept in a box four feet high, 4 feet wide, and 8 feet long, placed parallel with a double track, 4 or 5 feet north of the northernmost rail. Between the box and the track were three steps, each 8 inches high;

and was conscious of its approach all the time; and that the motorman, by the exercise of like care, might have avoided the collision after he discovered that the plaintiff was in such situation.

Again, in *Vizacchero v. Rhode Island Co.* 26 R. I. 392, 69 L.R.A. 188, 59 Atl. 105, the court, in denying that the doctrine of last clear chance applied so as to enable the plaintiff to recover for the death of his intestate, who was struck and killed by an electric car while upon his hands and knees upon the track, even assuming that the motorman was guilty of negligence in running the car at an excessive speed, said that the negligence of intestate did not consist in walking upon the track, which he had a right to do, until the car approached, but in remaining upon it after the car was plainly visible, and that this negligence continued until the car struck him. The court also said that the fact that the intestate had impaired his ability to take care of himself by getting intoxicated in no wise affected the case; that intoxication does not relieve one from the degree of care required of a sober man in the same circumstances.

In *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 888, the court said that the general rule as to contributory negligence is subject to the qualification that, where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury and not the remote which may have antecedently contributed to it; in such a case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate, proximate, and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff. This clearly implies that, in order to make the doctrine applicable in favor of the plaintiff, his neg-

ligence must have ceased prior to the defendant's negligence. And that this is a condition of the applicability of the doctrine is also clearly implied in *Richmond Pass. & Power Co. v. Gordon*, 102 Va. 498, 46 S. E. 772, where the court, while approving an instruction permitting plaintiff to recover, notwithstanding a want of reasonable care in attempting to cross the track in front of a car, if the motorman, by the exercise of ordinary care in keeping a proper lookout could have avoided the accident, also held it error to refuse an instruction requested by the defendant to the effect that, if the act was caused by the concurrent negligence of the motorman and of the plaintiff, due to each failing to keep a proper lookout, the jury must find for the defendant.

Many of the cases, however, in stating, if not in applying, the doctrine of last clear chance, seem to ignore the question whether the negligence of the plaintiff or deceased and the defendant was concurrent.

For example, the Missouri supreme court, in *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900, thus declares the rule in that state: "When a defendant sees, or by the exercise of ordinary care can see, the peril of a plaintiff, caused by the latter's contributory negligence, in time to avoid injuring him, then plaintiff can recover notwithstanding his contributory negligence." This is undoubtedly a correct statement of the rule, upon the assumption that the plaintiff's negligence was not concurrent with that of defendant up to the time of the accident, but culminated and ceased before the defendant's negligence. For the purposes of the first alternative, i. e., when the defendant saw the peril of the plaintiff, the statement perhaps needs no qualification; but, for the purposes of the second alternative, i. e., when the defendant did not see plaintiff's peril, but by the exercise of ordinary care might have discovered it, it seems clear that the statement should be qualified by the condition that the plaintiff's negligence culminated before defendant's. As

there was a rack for the purpose, and crushed a quantity of ice with which he filled a bucket, placing it in or near the box. He then walked to a point a little west of the box and waited for the car to arrive. While standing there, his foreman beckoned him from a place south of the tracks and east of where he stood, and pointed to the car which was to be iced. He walked between the ice box and the track to get his bucket of ice, reached it, took hold of it and started to carry it to the car, and while on the lowest step and about to proceed across the track he was struck by the tender of a locomotive which was backing east on the north track at the rate of 15 or 20 miles an hour without giving a signal of its approach and without keeping a lookout along the track.

suggested in the note in 55 L.R.A. 418, 451, the Missouri courts, by failing to pay proper attention to this condition, have applied the doctrine of last clear chance in some cases so as to support a recovery, notwithstanding that, upon the facts, the plaintiff, or deceased, and not the defendant, would seem but for his own negligence, to have had the last clear opportunity to avoid the injury. In *Morgan v. Wabash R. Co.* 159 Mo. 282, 60 S. W. 195, for instance, the majority of the court applied the doctrine so as to uphold a recovery against a railroad company for the death of a person who was guilty of gross negligence in walking upon the track, although the employees in charge of the train did not see him, upon the ground that, in view of the fact that persons were accustomed to walk on the track at the point where the accident occurred, they were bound to keep a lookout even for trespassers. Conceding the duty on the part of the defendant's employees to keep a lookout for trespassers, and their failure to perform that duty, it would seem that, under the facts of that case, there was a corresponding duty upon the part of the deceased to keep a lookout for trains, and that his breach of duty in that respect continued, at least, as long as the breach of duty on the part of the defendant's employees to keep a lookout for him. If so, the case was not one of prior negligence on the part of deceased and subsequent negligence on the part of defendant, but of concurring negligence on the part of both up to the very instant of the accident. This was apparently the position taken by Marshall, J., in his dissenting opinion in this case; and also in his opinion in the case of *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 216, 50 L.R.A. 850, 57 S. W. 770, although there are expressions in the latter opinion which, considered apart from the facts, might be understood as denying altogether the doctrine of last clear chance where the defendant's negligence consisted merely of an omission of a duty to keep a proper lookout. The situation presented in the *Morgan* Case would have been materially different, so far 7 L.R.A. (N.S.)

The track was straight for a quarter of a mile west. It was a clear day, and there was nothing to have prevented the plaintiff from seeing the engine and tender if he had looked. It is therefore manifest that the plaintiff's omission to exercise due caution in his own behalf was fatal to his recovery, unless there was something in the peculiar circumstances of the case to take it out of the general rule, which is thus stated in 23 Am. & Eng. Enc. Law, 2d ed. p. 765: "Any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains; and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening, . . . he is guilty of such negli-

as this point is concerned, if it had appeared that for any reason the deceased was laboring under a disability which rendered him incapable of caring for himself, since in that case it might be held that, while he was negligent in the first instance in going upon the track, his negligence culminated at that time, and did not continue up to the time he was struck.

The following are illustrations of a class of cases that have stated and applied the doctrine of last clear chance so as to uphold a recovery, although the negligence charged against defendant consisted merely of the omission to keep a proper lookout or some other duty prior to the discovery of the danger in which the plaintiff or deceased had placed himself by his own negligence, without expressly qualifying the doctrine by the condition that the negligence of the defendant must have continued after the culmination of the negligence of plaintiff or deceased: *Kolb v. St. Louis Transit Co.* 102 Mo. App. 143, 76 S. W. 1050 (collision between street car and vehicle); *Barrie v. St. Louis Transit Co.* 102 Mo. App. 87, 76 S. W. 706 (Collision between street car and vehicle); *Indianapolis Street R. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478 (collision between street car and vehicle); *Lassiter v. Raleigh & G. R. Co.* 133 N. C. 244, 45 S. E. 570 (employee struck by car while standing on track giving directions about another train; this decision may have rested upon the theory that, because of his absorption in his duty, his negligence was not to be regarded as continuing); *Reid v. Atlanta & C. Air Line R. Co.* 140 N. C. 146, 52 S. E. 307 (person on track, not a trespasser, struck by engine); *Birmingham R. Light & P. Co. v. Brantley*, 141 Ala. 614, 37 So. 698 (vehicle struck by street car); *Turnbull v. New Orleans & C. R. Co.* 57 C. C. A. 151, 120 Fed. 783 (child on track run over by car); *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (person struck by street car while crossing or driving along track).

The failure of a court which applies the doctrine of last clear chance to refer ex-

gence as to bar an action for the injury." One of the exceptions of the rule is stated by the same authority in these terms (Id., p. 768): "Nor does the principle apply to employees whose duties require their presence upon the track, the performance of which duties necessarily precludes their paying the strictest attention to the approach of trains."

It is argued that the plaintiff in error falls within this exception. If he had been injured while standing upon the steps and engaged in breaking ice, this might be true, for the performance of that duty might have rendered it impracticable for him to keep a strict watch for passing trains, and if, while so engaged, any part of his body could come within the overhang of the cars or locomo-

pressly to the question whether or not the negligence of the two parties was concurrent up to the time of the accident does not necessarily imply that, in its opinion, the doctrine is not dependent upon nonconcurrency,—for the reason that the circumstances may have shown that the defendant, if it had performed the duty resting upon it to discover the plaintiff's peril, could have averted the accident, even after it would have been too late for the plaintiff, by the performance of his duty, to have extricated himself. The facts in *Kolb v. St. Louis Transit Co.* supra, presented a case of this kind. There it appeared that, as the front wheels of the plaintiff's wagon struck the first rail of the defendant's track, he saw a car about 200 feet away approaching him; that he whipped up his horses in an attempt to clear the track, but the car struck the hind wheel of his wagon; it also appeared that the car could have been stopped within a shorter space than 200 feet, and that, if the motorman had seen the team as soon as it entered upon the track, he could have stopped the car in time to have avoided the accident. It is clear that such a state of facts presented a clear case for the application of the doctrine of last clear chance, assuming the duty of the motorman to keep a proper lookout and his neglect of that duty, and conceding that the plaintiff was originally guilty of contributory negligence in getting into the dangerous position, since the performance of the motorman's duty to keep a proper lookout, even after the plaintiff had put himself in a position from which he could not extricate himself, would have afforded him (the motorman) an opportunity to avert the accident; in other words, upon this state of facts, the motorman had the "last clear chance" to avoid the injury. There seems to be a clear distinction between such a case and one where the plaintiff, if he had performed his duty to keep a lookout, could have escaped from his perilous position after it would have been impossible to have stopped the car in time to avert the accident. In the latter case it is clear that the plaintiff, and not

tives, the place was not a safe one to work in. But such was not the case. Whatever danger he might have been subjected to while filling his bucket with ice had passed. He had moved to a place of entire safety west of the ice box, and was awaiting an order to carry the ice to a car. When the order came, he had no duty for the time being but to get the bucket and carry it across the track to where the car stood. However great a degree of promptness or haste might have been expected of him, it was not essential that he should cross the track at any particular point nor could his delaying until the engine and tender had passed have been material. He was simply in the position of one having occasion to get from one side of the track to the other. The necessity of his

the defendant, had the last clear chance to avoid the accident; and even if the circumstances were such that either, by the performance of his duty the instant before the accident, could have averted it, still the negligence is concurring, and the case therefore lacks an essential prerequisite of the doctrine of last clear chance.

The failure of the courts to pay proper attention to this important feature in the application of the doctrine may, perhaps, in some instances, be due to the fact that the defendant's breach of duty is stated in the alternative, as the failure to exercise due care after the plaintiff's danger was discovered, or, by the exercise of reasonable care, might have been discovered. As subsequently pointed out, it is not unreasonable to hold the defendant liable in spite of the continuance of the plaintiff's negligence up to the very instant of the accident, if defendant actually discovered the situation and ought to have realized the danger. And, in passing from that alternative to the other, i. e., where the defendant did not discover the danger, but could have done so by the exercise of due care, the importance of the change in the situation as affecting the doctrine of last clear chance is apt to be overlooked. In the first alternative the plaintiff's negligence in failing to discover the danger stands over against the defendant's negligence in failing to avert the danger after discovering it; whereas, in the second alternative, the plaintiff's negligence in failing to discover the danger stands over against the corresponding negligence of the defendant in failing to discover the danger. Assuming in the last case that the negligence of both parties is concurrent up to the very instant of the accident, there seems to be no more reason for holding the defendant's negligence to have been the responsible cause of the accident than the plaintiff's.

It is believed that, if proper attention is paid to the question whether or not the negligence is concurrent, the application of the doctrine of last clear chance in the class of cases where the negligence charged against defendant consists of the omission of a duty

picking up the bucket before crossing did not preclude his glancing up the track to see if it was clear. The mere fact that he had habitually worked near the track and was under the frequent necessity of crossing it did not justify any relaxation of vigilance on his part. The tendency of the authorities seems rather to be to regard such circumstances as calling for the exercise of a higher degree of diligence than is expected of a pedestrian who is not an employee. In *Wabash R. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576, it is said: "It has been laid down as the law that passengers who are required to cross railroad tracks in getting upon or alighting from trains have the right, from the nature of their contract, to expect a safe place for that purpose, and may gov-

ern themselves accordingly; but such immunity has never been conceded to travelers upon a railroad crossing having equal rights there with the railroad company, and still less to employees in the yards or depots of the company. The latter have no invitation or implied contract, as passengers do have, to perform their duties in a safe place. The very nature of employment about the tracks of a railroad involves notice of the danger of it, and nobody knows better than an employee that other employees are liable to be careless in the observance of rules, and lax in the performance of duty. Therefore he cannot be permitted to shut his eyes to obvious dangers, and to act with 'full reliance' that rules will be observed, and a safe passage kept for him, whenever his duties call upon

before the discovery of the peril will be very materially restricted, and that the objection, sometimes made to the doctrine, that it in effect abrogates the doctrine of contributory negligence, will be correspondingly weakened. The possible variation of conditions and circumstances attending different accidents of the same general character prevents any sweeping generalization on the subject; but it would seem that, if proper attention is paid to the question as to the continuance of the negligence of the plaintiff or deceased, there will be comparatively few cases in which the doctrine of last clear chance can be properly applied so as to support a recovery where a person is injured or killed while walking along a railroad or street railway track, if the negligence on the part of the defendant consisted merely in the failure to discover the danger, since ordinarily in that class of cases the negligence of the person injured or killed in failing to discover his peril must be regarded as having continued up to the time of the accident, or at least as long as the defendant's negligence. (See, however, *Indianapolis Traction & Terminal Co. v. Kidd*, post, 143.)

Cases of a collision between a railroad train or a street car and a person attempting to drive across the track afford a greater opportunity for the application of the doctrine against the defendant, since it not infrequently happens in such cases that the defendant, by the exercise of its duty to keep a proper lookout, would have had an opportunity to prevent the accident after any effort in that direction on the part of the driver would have been ineffectual.

The inherent difficulty in cases where the entire transaction covers but a very brief period in determining whether the defendant's negligence continued or intervened after the negligence of the plaintiff had culminated is well illustrated by the case of *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836, where the court, dividing four against three, held that evidence tending to show that a street car might have been stopped within 8 feet after it first struck a wagon crossing the

track, but that it did not stop until it had shoved the wagon for at least 20 feet, the wagon being then tipped over and the decedent thrown therefrom and killed, did not justify the submission of the case to the jury under the doctrine of last clear chance. The decision was rendered upon the assumption that the act of the deceased in driving upon the track was negligent, and that the circumstances were such that there could have been no recovery if the injury had resulted from the first contact of the car with the wagon. The majority's view on this point seems to have been dictated by practical difficulties attending the attempt to divide such a transaction into fragments, and impute one part of it to the negligence of both parties and another part to the defendant's negligence alone. On this point the majority opinion says: "This involves a refinement of reasoning and a process of speculation that is scarcely possible or practical in the determination of the rights of parties in controversies of this character." Vann, J., in a vigorous dissenting opinion, concurred in by two of his associates, after stating the circumstances, said: "Can we say, as matter of law, that the motorman was justified in not stopping the car, when a human life was in such imminent peril and he could have stopped it in time to prevent the fatal result. Such a rule would be a reproach to jurisprudence and an encouragement to reckless conduct. As I understand it, our law is not subject to this imputation; but, on the other hand, the humane rule is in force that, notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury."

What has been thus far said (except in connection with a few of the cases above cited) on this subject is upon the assumption that the negligence on the part of the defendant consisted merely of the omission of a duty before the discovery of the peril, and not of a duty after the discovery of the peril. Although few cases have expressly

him to cross the tracks. He cannot be excused from the rule that ordinary prudence requires that a person in the full enjoyment of the faculties of seeing and hearing should use them when about to pass over a railroad track, and that the omission to do so is contributory negligence when it immediately results in an injury which might have been avoided if the injured person had looked or listened." Among other cases bearing more or less directly upon this proposition may be cited *Grand Trunk R. Co. v. Baird*, 36 C. C. A. 574, 94 Fed. 946; *Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 349, 31 S. W. 6; *Elliot v. Chicago, M. & St. P. R. Co.* 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758, 150 U. S. 245, 37 L. ed. 1088, 14 Sup. Ct. Rep. 85; *Abbot v. McCadden*, 81 Wis. 563, 29 Am.

St. Rep. 910, 51 N. W. 1079; *Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *St. Jean v. Boston & M. R. Co.* 170 Mass. 213, 48 N. E. 1088; *Roskoyek v. St. Paul & D. R. Co.* 76 Minn. 28, 78 N. W. 872; *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, 76 N. W. 901.

It is claimed that negligence cannot be imputed to the plaintiff for his failure to look along the track to the west, because, having had no notice of any change, he had a right to suppose that the old rule of using it under ordinary circumstances only for west-bound trains was still in force and would be observed. This consideration, however, did not relieve him from the burden of watchfulness on his own part. It is doubtful whether there was an obligation on the

made the distinction, and, as already shown, some of the courts have expressly held that, even in the latter case, the continuance of the plaintiff's negligence up to the time of the accident is fatal to the application of the doctrine in his favor, yet there seems to be opportunity for a sound distinction between these two classes of cases so far as the question under discussion is concerned. Under some circumstances, at least, the failure of the defendant to exercise due care to avert the accident after the discovery of the danger amounts to a wanton or wilful injury, to which even contributory negligence is not a defense. But, even when the gravamen of the action is negligence, it would seem that the defendant's duty ought to be determined in view of his actual knowledge of the situation produced by the plaintiff's continuing negligence as an element. It is one thing to hold that the continuing negligence of the plaintiff will prevent a recovery for a negligent omission of defendant to discover his peril, and quite another to hold that the plaintiff's continuing negligence will prevent a recovery for the negligence or the defendant in failing to take proper care to avert the accident after the plaintiff's danger had been discovered and ought to have been appreciated. If there is no question of negligence on the part of the plaintiff or deceased it is immaterial for the purposes of the case whether the defendant's negligence consisted of a breach of duty to discover the peril or a breach of duty to exercise due care to avert the accident after the discovery of the peril; but this difference becomes material in determining the liability of the defendant when it appears that the plaintiff or deceased was also negligent.

In the following cases, where the doctrine of last clear chance is stated and applied without referring to the question whether or not the negligence was concurring, it appeared that the defendant actually discovered the peril of the plaintiff or deceased, and not merely that it might have discovered such peril by the exercise of due care: *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 L.R.A. (N.S.)

Pac. 15; *Rawitzer v. St. Paul City R. Co.* 93 Minn. 84, 100 N. W. 664; *Green v. Southern R. Co.* 102 Va. 791, 47 S. E. 819; *Robards v. Indianapolis Street R. Co.* 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953.

It is frequently difficult, when the court refuses to apply the doctrine of last clear chance in a case in which it does not appear that the defendant discovered the plaintiff's peril, to determine whether the decision was upon the ground that no breach of duty on the part of the defendant had been established, or upon the ground that the negligence of plaintiff or deceased continued up to the time of the accident. In some instances it seems necessary, in order to reconcile apparently conflicting decisions in the same state, to suppose that in one case the negligence of the plaintiff or deceased continued up to the time of the accident, and that in the other it was, for some reason, interrupted before the defendant's negligence had ceased. See, on this point, the opinion in *Frazer v. South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85.

Although the point does not fall within the scope of this note, it is not improper to call attention here to the fact that it is essential to the application of the doctrine of last clear chance that the defendant shall have been guilty of some negligence, either before or after the discovery of the peril, constituting a proximate cause of the accident. The mere fact, therefore, that an engineer, for instance, sees a person on or near the track, and fails to take any measures to stop the train, or otherwise to avert an accident, does not necessarily make the doctrine of last clear chance applicable, even if it be assumed that the plaintiff's negligence was not continuing; since the circumstances may have been such as to justify the engineer in acting upon the assumption that the person would of his own accord get out of the way and avoid the danger (see note to 2 L.R.A. (N.S.) 498); and this, of course, is true, assuming that the circumstances are otherwise the same, if the engineer did not actually see the plaintiff, but might, by the exercise of due care, have seen him.

part of the company to give notice to the plaintiff of such a change. The information he had regarding the former rule was shown to have been acquired incidentally, and not to have been officially communicated to him as an employee. Of a somewhat similar question it is said in *Lake Shore & M. S. R. Co. v. Hart*, 87 Ill. 529: "In excuse for not using any precaution to ascertain whether there was any train approaching from the north, appellee urges the practice of the roads to run all trains south from Chicago on the Rock Island track, and all trains north, towards Chicago, on the Lake Shore track; and that therefore, in going upon the Lake Shore track, he was only bound to look south to see if any train was coming from that direction. Appellee was not justified in relying upon any such practice, as the result showed. The companies had the right to change such practice at any time, and to run their trains at all times in either direction, and any dependence upon such former practice was at appellee's risk. This practice before did not excuse the exercise of caution and vigilance in looking for approaching trains in both directions." But, if it was negligence to reverse the method of using the tracks without giving notice, the situation was no different from that presented by the company's sending an engine down the track in disregard of any existing rule, whether relating to direction, or speed, or lookout, or signal of warning, or of any precaution which a due regard for the safety of those about the yards might demand irrespective of formal regulations. If one about to cross a railroad track could rely implicitly upon the company's employees performing their full duty, and if such reliance would excuse the use of precaution for one's own protection, then there could be no room whatever for the application of the doctrine of contributory negligence. It is only when it has been established that the company has been negligent—that is, that some agent has omitted to do something which he should have done and which in a sense everyone has a right to expect him to perform—that any occasion arises to consider whether a person injured has himself been at fault.

Finally, it is contended in behalf of the plaintiff that, even admitting his own want of care to have been such as would ordinarily bar a recovery, still he had a right to submit to the jury the question whether the employees in charge of the engine, by the use of reasonable diligence, could not have discovered his negligence in time to avert the accident; and that an affirmative answer would have entitled him to a verdict. There 7 L.R.A. (N.S.)

is a general agreement in the authorities that, where an engineer actually sees a person in a position of danger and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. A logical and sufficient reason for this holding is that such conduct on the part of the company's agent amounts to recklessness and wantonness, and is analogous to a wilful and intentional wrong, and like a wrong of that character establishes a cause of action to which negligence of the injured party is no defense. This reason is not always given in decisions upon the point, perhaps not even generally, but it sometimes is. For example, in *Labarge v. Pere Marquette R. Co.* 134 Mich. 139, 95 N. W. 1073, it is thus expressed: "Where one wilfully injures another, the doctrine of contributory negligence is not involved, because the injury is not negligent, but intentional. Again, where one is seen in danger, though placed there through his own negligence, one who, thus seeing him, omits ordinary care to avert an injury to him, is not alone negligent, but is wanton, and, as wantonness of this kind is akin to wilfulness, there is an opportunity for applying the same rule."

In a number of cases it has been held that, if the engineer, by the exercise of reasonable diligence, could have learned that danger was imminent, but did not do so, the liability of the company will be determined in all respects as though he had in fact become aware of it; the constructive knowledge being apparently deemed the equivalent of actual knowledge. It is difficult or impossible to reconcile the decisions upon this and related questions, or to derive from them any generally accepted statement either of principle or result. Many of them are collected and discussed in chapter 9 of Thompson's *Commentaries on the Laws of Negligence*, especially in §§ 222-247. There seems, however, to be no sufficient reason why the mere fact that a defendant is negligent in failing to discover a plaintiff's negligence, or his danger, should in and of itself exclude all consideration of contributory negligence. Take the not unusual situation of a train being negligently operated, let us say by being run at too high a speed and without proper signals of warning being given. Now, anyone injured as a result of such negligence has *prima facie* a right to recover; but, if his own negligence has contributed to his injury, then ordinarily his right is barred. How is the situation altered if the railroad employees add to their negligence in regard to speed and signals the negligence

of failing to keep a sufficient lookout? The negligence is of the same sort; and, if the contributory negligence of the person injured prevents a recovery when but the two elements of negligence are present, consistency requires that it should have the same effect, although a third element is added. If in the present case the plaintiff was entitled to recover in spite of his own negligence, it must be because the order of its occurrence with respect to that of the defendant made the latter the proximate cause of the injury. This, indeed, is his contention, and to support it reliance is placed upon the following text, which was quoted with approval in *Metropolitan Street R. Co. v. Arnold*, 67 Kan. 260, 72 Pac. 857, and the substance of which is to be found also in volume 7 of the *Encyclopædia*, at page 387: "And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that, if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice, and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of a following injury." 7 Am. & Eng. Enc. Law, 2d ed. p. 387. This may be accepted as a correct statement of a principle of universal application, according with both reason and authority, provided the words "after its occurrence" be interpreted to mean after the person concerned had ceased to be negligent. The rule that under the circumstances stated the neglect of one party to discover the omission of the other is to be held to be the sole proximate cause of a resulting injury is not an arbitrary, but a reasonable, one. The test is, What wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other. As is said in the paragraph from which the foregoing quotation is made: "It is only when the negligence of one party is subsequent to that of the other that the rule can be invoked." In a note printed in volume 2 of the supplement to the *American and English Encyclopædia of Law*, 2d ed. at page 64, many recent cases are cited bearing 7 L.R.A. (N.S.)

upon the subject, and it is said: "This so-called exception to the rule of contributory negligence (i. e., the doctrine of the last clear chance) will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence."

In the present case it may be granted that the negligence of the plaintiff began when he walked between the track and the ice box on the way to get the bucket, and that the employees in charge of the engine were themselves negligent in not discovering this negligence on his part, and the peril to which it exposed him, and taking steps to protect him. But his negligence, as well as theirs, continued up to the moment of the accident, or until it could not possibly be averted. His opportunity to discover and avoid the danger was at least as good as theirs. His want of care, existing as late as theirs, was a concurring cause of his injury, and bars his recovery. This determination is entirely consistent with what Mr. Thompson in his work above cited (§ 240) has styled the "last clear chance" doctrine, as is obvious from a consideration of the terms in which it is stated. As originally announced it was thus phrased: "The party who has the last opportunity of avoiding accident is not excused by the negligence of anyone else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." Mr. Thompson rewords it as follows: "Where both parties are negligent, the one that had the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it,—his negligence being deemed the direct and proximate cause of it." Expressions are to be found in the reports seemingly at variance with the conclusion here reached, but for the most part the decisions holding a defendant liable for failure to discover and act upon the plaintiff's negligence were made in cases which were, in fact, like *Metropolitan Street R. Co. v. Arnold*, supra, or were decided upon the theory that they fell within the same rule. There the plaintiff's decedent while riding a bicycle was, through his own fault, run into by a street car. He clung to the fender, was carried some 75 feet, then fell under the wheels, and was killed. A judgment against the street car company was upheld only upon the theory that after he had reached a position of danger from which he could not extricate himself—that is, after his negligence

had ceased—the defendant's employees were negligent in failing to discover his peril and stop the car. In *Robinson v. Cone*, 22 Vt. 213, 223, 54 Am. Dec. 67, the writer of the opinion says: "I should hesitate to say that, if it appeared that the want of ordinary care on the part of the plaintiff, at the very time of the injury, contributed either to produce or to enhance the injury, he could recover because it seems to me that is equivalent to saying that the plaintiff, by the exercise of ordinary care at the time, could have escaped the injury."

The principle thus intimated was embodied in a decision in *French v. Grand Trunk R. Co.* 76 Vt. 441, 58 Atl. 722, where it is said: "It is true that when a traveler has reached a point where he cannot help himself cannot extricate himself, and vigilance on his part cannot avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery."

To the same effect are these extracts: "There is no testimony suggesting negligence on the part of the driver that does not convict Doyle of an equal or greater degree of negligence. One had no better opportunity to anticipate the accident nor any better means of preventing it than the other. If, therefore, there was negligence, it was concurring negligence, continuous and mutual up to the instant of the accident, which disentitles the plaintiff to recover." *Consumers' Brewing Co. v. Doyle*, 102 Va. 403, 46 S. E. 391. "In numerous cases it has been held that the plaintiff's conduct is not contributory negligence, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care by the defendant. That rule prevails when the plaintiff is in a position of threatened contact with some agency, under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. It does not

apply where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. . . . The rule does not apply where, as in the case before us, the negligence of the party injured continues up to the moment of the injury, and was a contributing cause thereof." *Robards v. Indianapolis Street R. Co.* 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953. "The plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be the proximate cause of the injury. . . . The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous." *Butler v. Rockland, T. & C. Street R. Co.* 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775.

In *Green v. Los Angeles Terminal R. Co.* 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724, it is said of the rule holding the defendant liable notwithstanding the contributory negligence of plaintiff: "It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it." Of the same rule it is said in *O'Brien v. McGlinchy*, 68 Me. 552: "This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent an injury. . . . But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." In *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 755, 25 L.R.A. 287, 19 S. E. 863, 923, the general rule is thus concretely stated: "Applying the rule which we have stated to accidents upon railroad tracks it may be illustrated as follows: First, there must be a duty imposed upon the engineer, as otherwise there can be no negligence

to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout . . . in order to discover and avoid injury to persons who may be on the track and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A, being on the track and after this decisive negligence, fails to look and listen, and is in consequence run over and injured, his negligence is not concurrent merely, but really subsequent, to that of the engineer, and he cannot recover, as he, and not the engineer, has 'the last clear opportunity of avoiding the accident.' If, however, A is on the track, . . . and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A would be previous to that of the engineer, and the engineer's negligence would be the proximate cause; he, and not A, having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it; and there are other cases to which the principle is applicable." The principle running through these cases is reasonable, is consistent with the general rules that have met with practically universal acceptance, and, if adhered to, will correct a part of the confusion now attending the application of the law of contributory negligence.

The judgment is affirmed.

All the Justices concur.

INDIANA SUPREME COURT.

INDIANAPOLIS TRACTION & TERMINAL
COMPANY, Appt.,

v.

LULU KIDD.

(— Ind. —, 79 N. E. 347.)

Appeal—uncertain complaint—verdict.

1. Want of certainty in a complaint
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may be remedied by the evidence and verdict, as against an attack for the first time on appeal.

Negligence—walking on car track—proximate cause.

2. Whatever negligence exists on the part of one in walking along a street car track in the direction in which the cars move, without constantly watching for the approach of cars, is not the proximate cause of his being run down by a car running at high speed, with no attention by the motorman to the track in front of his car, where the pedestrian is guilty of no negligence in failing to hear the car because of noise made by a car on a parallel track.

Street car company—injury to one on track.

3. A street car company is liable for injury to a person walking on its track, by the propelling against him of a car running at high speed, with no watchfulness on the part of the motorman for persons on the track, notwithstanding he may be guilty of some negligence in being on the track, if he is not negligent in failing to discover the approach of the car, so that his negligence is merely a remote cause of the accident.

Evidence—opinion.

4. A witness cannot be asked for his opinion upon facts and conditions which must be determined by the jury, and which can be fully placed before them.

Same—exclusion—harmless error.

5. The exclusion from evidence of the opinion of a witness as to a fact in controversy in a case is immaterial if the jury finds in accordance with the contention of the party offering it.

Instruction—error—right to complain.

6. One who procures the giving of an instruction in conflict with a correct statement of the law which has been previously given cannot complain of the error of the court in that regard.

Damages—married woman—medical expenses.

7. The damages recoverable by a married woman for personal injuries may include expenses for medical attendance which

Note.—The statement in the foregoing opinion, that the plaintiff "is not shown to have been at fault at and immediately before the time of the accident," seems to indicate that the court regarded the interruption of the plaintiff's negligence before the termination of defendant's negligence as a necessary condition of the application of the doctrine of last clear chance, and to that extent the case is in accord with the view taken in *Dyerson v. Union P. R. Co.* ante, 132, and the note to that case. It is somewhat difficult, however, to understand how that statement can be reconciled with the assumption, also made by the court for

have been actually paid or contracted by her, although the primary duty to make the payment was upon her husband.

(November 27, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Hamilton County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. F. W. Winter, W. H. Latta, and W. S. Christian, for appellant:

Appellee assumed the risk of the accident in which she was injured.

Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; First Baptist Church v. Utica & S. R. Co. 6 Barb. 313.

Plaintiff was guilty of contributory negligence.

Robards v. Indianapolis Street R. Co. 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953.

Plaintiff's negligence directly and materially contributed to the injuries she sustained, and she cannot recover.

Indianapolis & C. R. Co. v. Wright, 22 Ind. 376; Newhouse v. Miller, 35 Ind. 463; Hathaway v. Toledo, W. & W. R. Co. 46 Ind. 25; St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 65; Pennsylvania Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Evans v. Adams Exp. Co. 122 Ind. 362, 7 L.R.A. 678, 23 N. E. 1039; Korrady v. Lake Shore & M. S. R. Co. 131 Ind. 261, 29 N. E. 1069; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Louisville & N. R. Co. v. Eves, 1 Ind. App. 224, 27 N. E. 580; Stewart v. Patrick, 5 Ind. App. 50, 30 N. E. 814; Indiana Stone Co. v. Stewart, 7 Ind.

App. 563, 34 N. E. 1019; Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430; Trout v. Elkhart, 12 Ind. App. 343, 39 N. E. 1048; Wahl v. Shoulders, 14 Ind. App. 665, 43 N. E. 458; East Chicago Foundry Co. v. Ankeny, 19 Ind. App. 150, 47 N. E. 936, 49 N. E. 186; Phillips v. Romona Oolitic Stone Co. 19 Ind. App. 341, 49 N. E. 467.

This is not a case of last clear chance.

Robards v. Indianapolis Street R. Co. supra.

The street car has the right of priority over travelers, to that portion of the street over which it travels.

Indianapolis Street R. Co. v. O'Donnell, 35 Ind. App. 312, 73 N. E. 163, 74 N. E. 253; De Lon v. Kokomo City Street R. Co. 22 Ind. App. 377, 53 N. E. 847; Young v. Citizens' Street R. Co. 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

Messrs. W. A. Ryan and Gavin & Davis for appellee.

Montgomery, Ch. J., delivered the opinion of the court:

This is an action for damages resulting to appellee from appellant's alleged negligence in running one of its cars without warning at a high rate of speed against and over her while walking along its track. A reversal of the judgment is sought for the reasons: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling appellant's motion for judgment in its favor on the answers of the jury to interrogatories; and (3) for error in overruling appellant's motion for a new trial.

The complaint was not challenged in the trial court. It is contended that the complaint upon its face discloses an assumption of the risk and contributory negligence on

the purposes of the argument, that the plaintiff's conduct in walking with her back to the westward without a constant watch for the approach of a car from that direction constituted negligence. If the failure to keep a constant lookout for a car constituted negligence at all, it is not apparent why that negligence should be regarded as having ceased until the very instant before she was struck, since, if she had looked back the instant before, she would have discovered the car and escaped the danger. The facts in the case indicated that the plaintiff, if negligent at all, was guilty of only slight nonfeasance, whereas the motorman was guilty of gross misfeasance and nonfeasance, and the court would therefore naturally be inclined to sustain a judgment in favor 7 L.R.A. (N.S.)

of the plaintiff if possible. Perhaps the decision would have rested upon firmer ground if the court had held that, while the plaintiff was bound to pay some attention to her surroundings, and take some precautions to ascertain the conditions behind her, it was not her duty to keep a constant lookout, and that the mere failure on her part to keep a constant lookout could not be imputed to her as negligence. Or, possibly, the same result might have been reached by holding that the negligence of the motorman in running the car at an excessive speed through a street where he had reason to expect persons would be on the track, without keeping any lookout, was so gross as to amount to wantonness or wilfulness, to which contributory negligence is not a defense.

the part of the appellee, notwithstanding the allegations that appellee exercised due care and precaution for her safety, and that she was without fault. It is well settled that when a complaint is attacked for the first time in this court, it will be upheld if the facts alleged are sufficient to bar another suit for the same cause of action. We do not find the suggested defects to be real, and any want of certainty in the pleading was cured by the evidence and verdict, and we accordingly hold the complaint sufficient as against the present assault, upon numerous decided cases. *Lengelsen v. McGregor*, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248; *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271; *Shoemaker v. Williamson*, 156 Ind. 384, 59 N. E. 1051; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Citizens' Street R. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 627; *Loeb v. Tinkler*, 124 Ind. 331, 24 N. E. 235; *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95; *Smith v. Smith*, 106 Ind. 43, 5 N. E. 411. In answer to special interrogatories the jury found the following facts: That, at the time of the accident, appellant had a standard-gauge double-track street railroad on East Tenth street in the city of Indianapolis, extending two or three squares to the east of the place of the accident and for a long distance westward, the tracks being 5 feet apart; that the street was paved with brick; that east-bound cars ran on the south track and west-bound cars on the north track; that appellee had lived in the neighborhood of the accident for four years, and was familiar with the location of the tracks and the manner in which cars were operated thereon; that the accident occurred in daylight on a clear day, and appellee at the time was forty-seven years of age, possessed of ordinary intelligence, and of good eyesight and hearing, and of the use of all her faculties and powers of locomotion; that appellee lived on the south side of Tenth street and her daughter lived on the same side, east of her residence; that appellee started on foot to her daughter's home, and had walked about 500 feet along appellant's track eastwardly before the accident occurred; that the car could have been seen by appellee, had she looked, for a distance of from $\frac{1}{4}$ to $\frac{1}{2}$ mile before it reached her, and she could have gotten out of the way by stepping 5 or 6 feet to either side had she known the car was approaching; that there was no evidence to show whether any noise was made by the approaching car, or whether appellee could have heard it approach with ordinary care; that appellant's tracks had been swept practically clean of ice and snow, and on the south

side of the tracks there was, at the time and place of the accident, from 6 to 14 inches of melting snow and ice, and about the same depth between the tracks; appellee's view westward of the place of the accident for 1,000 feet was unobstructed, and by looking westward she could have seen the approaching car when that distance away, and for a distance of 100 feet she could at any point have stepped out of the way of the car had she known it was approaching, but the noise of a west-bound car prevented her from hearing its approach; that on entering upon the tracks, and again after she had proceeded about half a square, appellee looked westward to ascertain whether or not a car was coming, but no car was then in sight; that the car was operated by electricity, and was traveling at a rate of from 20 to 25 miles per hour, and the motorman did not see appellee, or know that she would not leave the track, until he was within 10 feet of her, and that, under existing conditions, the car could have been stopped in a distance of from 150 to 175 feet; that appellee looked and continuously listened, and used ordinary care to avoid the accident.

Appellant's counsel argue that judgment should have been rendered in favor of appellant upon these facts notwithstanding the general verdict, because appellee is shown to have been guilty of contributory negligence. This contention appears to be predicated upon a misconception of the rights of the respective parties to the use of the street. It is a familiar principle, frequently reiterated by the courts, that street railway companies have no superior and predominant right to the use of the streets upon which their tracks are located over the rights of other users, except the right of way when they require it. *Indianapolis Street R. Co. v. Darnell*, 32 Ind. App. 687, 695, 68 N. E. 609; *Indianapolis Street R. Co. v. O'Donnell*, 35 Ind. App. 312, 317, 73 N. E. 163, 74 N. E. 253; *Buttelli v. Jersey City. H. & R. Electric R. Co.* 59 N. J. L. 302, 304, 30 Atl. 700; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 266, 39 Atl. 859; *Rapp v. St. Louis Transit Co.* 190 Mo. 144, 161, 88 S. W. 865. The highways are laid out for passage, and each passer in a vehicle or on foot has a right of passage over the same, subject to the condition that he does not unnecessarily interfere with the lawful exercise of a similar right by others. Pedestrians have a right to use any part of such highways, but the question whether a particular use is such as a reasonably prudent person would make must depend upon the attendant circumstances. When a certain portion of the highway has been

paved as a sidewalk, or otherwise reserved for the exclusive use of foot passengers, and the same is unobstructed and in suitable condition for such use, it may not be prudent to walk in the roadway set apart for the use of vehicles. In considering the question of appellee's alleged contributory negligence, due regard for the reciprocal rights, duties, and obligations of appellant must be observed. Appellant had no right to exclude appellee from its track upon the street, but had the right merely to require her to remove therefrom when she ascertained or was notified that the same was needed for the passage of one of its cars. It appears, from the facts specially found by the jury, that the street along which appellee was passing was covered with melting snow and ice to a depth of from 6 to 14 inches, except the space between the rails of appellant's tracks, which was paved with brick and was practically free from all obstructions. This condition of the street explains appellee's use of the track. She was required to use ordinary care for her safety, and the duty which she owed to the company was to vacate the track when apprised that the same was required for the passage of a car. It must be borne in mind, as against this motion, that the jury were authorized to find that she had a right to assume that appellant's cars would not be run at an excessive rate of speed, and that she was not required to anticipate that a car upon a straight track in broad daylight would run her down from the rear without any warning. *Indianapolis Street R. Co. v. Marschke* (Ind.) 77 N. E. 945; *Indianapolis Street R. Co. v. O'Donnell*, 35 Ind. App. 312, 320, 73 N. E. 163, 74 N. E. 253; *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374, 379; *Polacci v. Interurban Street R. Co.* 90 N. Y. Supp. 341; *Kolb v. St. Louis Transit Co.* 102 Mo. App. 143, 149, 76 S. W. 1050.

Appellant's servants in charge of the operation of its cars were required to exercise diligent and constant watchfulness for persons who might be upon or approaching the track. Such servants are required to take notice of obvious obstructions to the ordinary and free use of the street. The drivers of such cars are chargeable only with the exercise of ordinary care for the safety of other users of the street, but ordinary care in law implies a high degree of watchfulness and vigilance when propelling a car at a speed of 20 to 25 miles per hour through the streets of a populous city, where persons on foot and in vehicles are constantly passing and repassing, including the aged, infirm, and crippled, as well as children thoughtless and wanting in pru-

dence and discretion. The accident to appellee occurred in daylight and at a point where the track from the west was straight, and she could have been seen by the most casual attention on the part of the motor-man when the car was 1,000 feet distant. Appellee looked westward when she entered upon the track, and again when she had proceeded half a square on her journey, but no car was then in sight. She listened continuously as she advanced, but failed to discover the approach of the car; and, under the circumstances shown, we are unable to say that she did not have a right to expect that she would be notified of its coming by the customary alarm signal. The jury specially found that the precautions taken for her safety by so looking and listening constituted ordinary care and prudence. We need not decide whether this is a conclusion or not. The rule is well settled that such special findings override the general verdict only when both cannot stand, and the antagonism is apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser* (Ind.) 78 N. E. 1033; *Indianapolis Union R. Co. v. Ott*, 11 Ind. App. 564, 568, 38 N. E. 842, 39 N. E. 529. We cannot say that there is any conflict between the general verdict and the facts specially found by the jury in this case, or, in other words, that it affirmatively appears from such facts that appellee was guilty of contributory negligence. A right of action in favor of a person injured by the negligence of another is denied only where his own negligence proximately contributes to produce such injury. It should appear that the complaining party was actively and contemporaneously at fault at the time the injury of which he complains was wrongfully inflicted to preclude a recovery of damages. *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; 1 *Shearm. & Redf. Neg.* § 99. In this case it is manifest that appellee exercised special care and precaution for her safety when entering upon the track, and for some distance as she proceeded eastward. Immediately preceding the accident her back was toward the approaching car and she was prevented from hearing the noise ordinarily made by its approach by the running of a car westwardly on the north track, and no alarm was sounded to notify her of the impending danger. It follows, therefore, that, although appellee's conduct in walking with her back to the westward without a constant watchout for the approach of a car from that direction be characterized as negligent in some

degree, yet she is not shown to have been at fault at and immediately before the time of the accident, and her so-called negligence in being in a place of danger under the circumstances shown was not a proximate, but only the remote, cause of her injuries. *Indianapolis Street R. Co. v. Schmidt*, 35 Ind. App. 202, 211, 71 N. E. 663, 72 N. E. 478; *Birmingham R. Light & P. Co. v. Brantley*, 141 Ala. 614, 37 So. 698.

This case falls clearly within the rule that, where the negligence of the defendant is the proximate cause of the injury for which suit is brought, and that of the plaintiff only the remote cause, the plaintiff may recover notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. This principle has been styled the doctrine of "last clear chance," and is regarded as an exception to the general rule forbidding recovery by a plaintiff guilty of contributory negligence. It is no departure from just principles, but a wholesome and humane doctrine, to hold that, if, after the defendant knew, or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident but failed to do so, the plaintiff can recover. In cases of this class the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff. The principle that the plaintiff's act or omission when only a remote cause, antecedent occasion, or condition of the injury does not constitute such contributory negligence as precludes a recovery, is quite generally accepted, and has been declared by many courts. 7 *Am. & Eng. Enc. Law*, p. 375; *Indianapolis Traction & Terminal Co. v. Smith*, 36 Ind. App. —, 77 N. E. 1140; *Southern Indiana R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589; *Indianapolis Street R. Co. v. Bolin*, 36 Ind. App. —, 78 N. E. 210; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 427, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; *Birmingham R. Light & P. Co. v. Brantley*, supra; *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 442, 26 Atl. 518; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 268, 39 Atl. 859; *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886; *Kolb v. St. Louis* 7 L.R.A. (N.S.)

Transit Co. 102 Mo. App. 143, 149, 76 S. W. 1050; *Jett v. Central Electric R. Co.* 178 Mo. 664, 673, 77 S. W. 738; *Rapp v. St. Louis Transit Co.* 190 Mo. 144, 161, 88 S. W. 865; *Di Prisco v. Wilmington City R. Co.* 4 Penn. (Del.) 527, 57 Atl. 906; *Orr v. Cedar Rapids & M. C. R. Co.* 94 Iowa, 423, 62 N. W. 851; *Flynn v. Louisville R. Co.* 110 Ky. 662, 62 S. W. 490; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; *Harrington v. Los Angeles R. Co.* supra; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Little v. Boston & M. R. Co.* 72 N. H. 61, 55 Atl. 190; *Coombs v. Mason*, 97 Me. 270, 54 Atl. 728; *El Paso Electric R. Co. v. Kendall* (Tex. Civ. App.) 85 S. W. 61.

It is clear, from the facts found, that the driver of the car which was run upon appellee, by the exercise of ordinary care while giving attention to his duties, could have discovered her presence and apparent ignorance of the impending danger, and is accordingly chargeable with such knowledge, in ample time to have prevented the accident; and it follows that the court rightly overruled appellant's motion for judgment in its favor.

Appellant's motion for a new trial alleged that the verdict is not sustained by sufficient evidence and is contrary to law, and that the court erred in refusing to permit witnesses for appellee, upon cross-examination, to answer the following questions: "That would not prevent it, would it?" and, "She could step off, could she not, and prevent the collision?" and also in giving each of the instructions given at the request of appellee. The questions excluded related to the condition of the street adjacent to the track upon which appellee was walking at the time of the accident. The questions were objectionable in form, and called for an opinion of the witness upon facts and conditions which could be fully placed before the jury. *American Teleph. & Teleg. Co. v. Green*, 164 Ind. 349, 354, 73 N. E. 707, and cases cited. It also affirmatively appears that no harm resulted to appellant from these rulings, even though they were conceded to be erroneous. In answer to interrogatory No. 30, the jury expressly found that, within 100 feet of the place of the accident, there was nothing to prevent appellee from stepping far enough from the track to be out of the way of the passing car, if she had known it was coming. The jury, therefore, found the fact and conclusion upon this point in accord with appellant's contention, and left no room for complaint.

The court gave 21 instructions at the request of appellee. Their number forbids detailed discussion, but they were applicable to the case, and in the main embodied legal principles declared in the cases of *Indianapolis Street R. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478, and *Indianapolis Street R. Co. v. Darnell*, 32 Ind. App. 687, 68 N. E. 609, and were in accord with the law as announced and approved in the preceding part of this opinion.

The court gave 13 instructions at the request of appellant, and it is now insisted that some of them were in conflict with instructions given at the request of appellee. The instructions given at appellee's request were correct statements of the law applicable to the facts established by the evidence. The instructions given at appellant's request are not set out, either in full or in substance, in appellant's brief, and we are precluded by our rules from searching the record in order to make the comparison suggested. It is clear, at all events, that, if the instructions given by the court independently of appellant's request were correct, as we have found them to be, appellant could not be allowed to procure the giving of an inapplicable, inconsistent, or erroneous instruction, and thereupon be heard to complain of such error. *Elliott*, App. Proc. § 626.

The complaint alleged that, in attempting to cure herself and to heal her wounds, appellee had expended the sum of \$200 for doctor bills and medicine. The evidence showed that she had personally incurred a medical bill of \$170 on account of her injuries. The court charged the jury, in one of the instructions of which complaint is made, that, if they found for plaintiff, in estimating her damages, they might take into account the amount of money she had been compelled to expend, if any, in attempting to cure herself. It appears that she was a married woman, but, under the averments of the complaint and the proof adduced in support of the same, the instruction was proper. Ordinarily the husband is chargeable with the payment of the medical bills of the wife, but he is not so chargeable under all circumstances; and, even in cases where the husband may be legally liable for such debts, that fact will not deprive the wife of the right and power to bind herself therefor, if she chooses to do so. If appellee personally contracted to pay these bills, as alleged and proved, she may recover the same in case she has a right of the recovery for the physical injury to which they were incident. *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168.

It appears from the evidence that there was no sidewalk along East Tenth street 7 L.R.A. (N.S.)

where the accident occurred, but the space intended for a sidewalk was covered with mud and gravel thrown from the street in making excavations for street improvements. There was a space of 8 feet between the south rail and the curb, covered with melting snow and ice from 6 to 14 inches in depth, unbroken either by pedestrians or vehicles. Pedestrians had been and were using the space between the rails in traveling east or west along that part of the street. Two other persons besides appellee were so using the street in that vicinity, at the time of the accident. The track westward was straight and substantially level for half a mile. The day was clear and the sun shining. The car approached at a speed at from 20 to 30 miles per hour, without sounding the gong or giving any warning, and ran from 185 to 200 feet, as given by one witness, after striking appellee, before it could be stopped. No reason was advanced by the motorman for his failure to observe appellee sooner than he did. It is apparent from these conditions that the motorman was required to be on the lookout for pedestrians using the track, and to have his car under such control as to avoid collision under ordinary circumstances. In the exercise of ordinary care he would have discovered appellee and her manifest peril and apparent unconsciousness of danger when far away, and, by the exercise of like care thereafter, he could have given her due warning or stopped the car and avoided the accident. The motorman testified that he observed appellee talking to a Mr. Patterson, and that she stepped from the side of the track immediately in front of the car when it was within 15 feet of her. The jury did not accept this explanation, and we cannot disturb their conclusion upon the weight of the evidence. The verdict is sustained by evidence, and is not contrary to law, and no error was committed in overruling appellant's motion for a new trial.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOSEPH BLACK

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(— Mass. —, 79 N. E. 797.)

Carrier—intoxicated passenger—care.

1. Train men who attempt to assist an intoxicated passenger from the train are

Note.—It will be observed that several of the cases cited in the note to *Dyerson v.*

bound to use ordinary care to leave him where he will be reasonably safe in view of his condition.

Same—negligence of passenger.

2. The intoxication of a passenger may be found by the jury not to be a direct and proximate cause of his injury, so as to relieve the carrier from liability for injury to him in consequence of his being removed from the train by employees and left upon a slight of steps, down which he falls to his injury because of his inability to care for himself.

(January 3, 1907.)

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Suffolk County directing a verdict in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Sustained.

The facts are stated in the opinion.

Messrs. Powers & Hall and H. W. Dunn, for plaintiff:

Defendant's servants assumed full charge and control of plaintiff's person, and, having done so, they were bound to use due care in respect to what they did with him.

Moody v. Boston & M. R. Co. 189 Mass. 277, 75 N. E. 631; Mackin v. People's Street R. & Electric Light & P. Co. 45 Mo. App. 82; Columbus, C. & I. C. R. Co. v. Powell, 40 Ind. 38.

Plaintiff's negligence is a bar only if a contributing cause.

Cooley, Torts, 2d ed. p. 807; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Horton v. Ipswich, 12 Cush 488; Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390; Lane v. Crombie, 12 Pick. 177; Wheelwright v. Boston & A. R. Co. 135 Mass. 225.

When the plaintiff's negligence or wrong-

doing has placed his person or property in a dangerous situation, which is beyond the plaintiff's immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, is nevertheless negligent so that injury results, the defendant is liable for the injury.

Davies v. Mann, 10 Mees. & W. 546; Radley v. London & N. W. R. Co. L. R. 1 App. Cas. 754; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Shumacher v. St. Louis & S. F. R. Co. 39 Fed. 174; Memphis & C. R. Co. v. Martin, 131 Ala. 269, 30 So. 827; St. Louis, I. M. & S. R. Co. v. Freeman, 36 Ark. 46; Green v. Los Angeles Terminal R. Co. 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724; Denver & B. P. Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Isbell v. New York & N. H. R. Co. 27 Conn. 393, 71 Am. Dec. 78; Maxwell v. Wilmington City R. Co. 1 Marv. (Del.) 199, 40 Atl. 945; Savannah, F. & W. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697; Western & A. R. Co. v. Meigs, 74 Ga. 857; Chicago West Div. R. Co. v. Ryan, 131 Ill. 474, 23 N. E. 385; Indianapolis & C. R. Co. v. Wright, 22 Ind. 376; Indianapolis Street R. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; Tennis v. Inter-State Consol. Rapid Transit R. Co. 45 Kan. 503, 25 Pac. 876; Louisville & N. R. Co. v. Vittitoe, 19 Ky. L. Rep. 612, 41 S. W. 269; Atwood v. Bangor, O. & O. T. R. Co. 91 Me. 399, 40 Atl. 67; Baltimore & O. R. Co. v. State, 33 Md. 542; Pierce v. Cunard S. S. Co. 153 Mass. 87, 26 N. E. 415; Buxton v. Ainsworth, 138 Mich. 532, 101 N. W. 817; Ra-

Union P. R. Co. ante, 132, considered the effect of intoxication to interrupt the antecedent negligence of the person killed or injured, and thus to permit the application of the doctrine of last clear chance. There is some conflict among those cases on the point, but they are all distinguishable from the case at bar for the reason that in each of them the intoxicated person placed himself in a position of peril without any responsibility on the part of the defendant in the first instance, and the breach of duty on the part of the defendant that subsequently intervened was nonfeasance merely, and not misfeasance; whereas in the case at bar the defendant's employees put the plaintiff in a perilous position, and were chargeable with misfeasance, and not merely with nonfeasance. It may be fairly open to question whether voluntary intoxication ought to be regarded as interrupting the negligence of one who, without any responsibility on the part of the defendant in the first instance, 7 L.R.A. (N.S.)

has placed himself in a position of peril, thereby relegating the antecedent negligence to the category of a remote cause or a mere condition, and thus permitting the application of the doctrine of last clear chance to the mere subsequent nonfeasance of defendant, *e. g.*, the omission of train men to keep a proper lookout. But when, as in the case at bar, an intoxicated person, as a mere inert body, is placed in a position of peril without any volition on his part, and by the positive misfeasance of the defendant's servants, there seems to be no difficulty whatever in regarding his negligence in becoming intoxicated in the first instance, or in boarding the train in that condition, as a mere condition, and not a proximate cause of his injury; thus creating one of the necessary conditions of the application of the doctrine of last clear chance, or, as it is sometimes termed, the doctrine of antecedent and subsequent negligence.

witzer v. St. Paul City R. Co. 93 Minn. 84, 100 N. W. 664; Christian v. Illinois C. R. Co. 71 Miss. 237, 15 So. 71; Swigert v. Hannibal & St. J. R. Co. 75 Mo. 475; Omaha Street R. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Bunting v. Central P. R. Co. 16 Nev. 277; State v. Manchester & L. R. Co. 52 N. H. 528; Camden, G. & W. R. Co. v. Young, 60 N. J. L. 193, 37 Atl. 1013; Green v. Erie R. Co. 11 Hun, 333; Styles v. Richmond & D. R. Co. 118 N. C. 1084, 24 S. E. 740; Bostwick v. Minneapolis & P. R. Co. 2 N. D. 440, 51 N. W. 781; Cincinnati, H. & D. R. Co. v. Kassen, 49 Ohio St. 230, 16 L.R.A. 674, 31 N. E. 282; Woekner v. Erie Electric Motor Co. 176 Pa. 451, 35 Atl. 182; Prue v. New York, P. & B. R. Co. 18 R. I. 360, 27 Atl. 450; St. Louis Southwestern R. Co. v. Jacobson, 28 Tex. Civ. App. 150, 66 S. W. 1111; Thompson v. Salt Lake Rapid Transit Co. 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; Willey v. Boston & M. R. Co. 72 Vt. 120, 47 Atl. 398; Richmond Traction Co. v. Martin, 102 Va. 209, 45 S. E. 886; Carrioco v. West Virginia C. & P. R. Co. 35 W. Va. 389, 14 S. E. 12; Little v. Superior Rapid Transit R. Co. 88 Wis. 402, 60 N. W. 705; Murphy v. Deane, supra; Hibbard v. Thompson, 109 Mass. 286.

As between two persons guilty of negligence or fault, followed by injury either to one of themselves, or to a third person, one is solely responsible when he had knowledge of the situation created by the other's fault, and full opportunity to control its consequences.

Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Planz v. Boston & A. R. Co. 157 Mass. 377, 17 L.R.A. 835, 32 N. E. 356.

No case could present a clearer occasion for the application of this rule than one in which the plaintiff's negligence or fault consists in intoxication which renders him incapable of taking care of himself, and the defendant has knowledge of his condition.

Isbell v. New York & N. H. R. Co. supra; Wheeler v. Grand Trunk R. Co. 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103; Fox v. Michigan C. R. Co. 138 Mich. 433, 68 L.R.A. 336, 101 N. W. 624; Cincinnati, I. St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 6 L.R.A. 241, 16 Am. St. Rep. 334, 22 N. E. 340; Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 31 L.R.A. 372, 19 So. 51; St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541; Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Kean v. Baltimore & O. R. Co. 61 Me. 154; Gill v. Rochester & P. R. Co. 37 Hun, 107; Kingston 7 L.R.A. (N.S.)

v. Ft. Wayne & E. R. Co. 112 Mich. 40, 40 L.R.A. 131, 70 N. W. 315, 74 N. W. 230; Louisville & N. R. Co. v. Ellis, 97 Ky. 330, 30 S. W. 979; Louisville, St. L. & T. R. Co. v. Gatewood, 14 Ky. L. Rep. 108; St. Louis, A. & T. H. R. Co. v. Carr, 47 Ill. App. 353; Central R. Co. v. Glass, 60 Ga. 441; Pennsylvania R. Co. v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520; Holmes v. Oregon & C. R. Co. 6 Sawy. 275, 5 Fed. 539; Conolly v. Crescent City R. Co. 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526; Burke v. Chicago & N. W. R. Co. 108 Ill. App. 565; Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66.

Mr. C. H. Walker also for plaintiff.

Messrs. Choate, Hall, & Stewart for defendant.

Knowlton, Ch. J., delivered the opinion of the court:

This action was brought to recover for an injury alleged to have been caused by the negligence of the defendant's servants. The plaintiff was a passenger on the defendant's train which ran from Boston through Ashmont on the evening of February 7, 1903. He testified to having become so intoxicated that he had no recollection of anything that occurred after leaving a cigar store in Boston, until he awoke in the Boston City Hospital, about 4 o'clock the next day. One Thompson testified "that he took the 9:23 train on the evening of February 7, 1903, at the South Station in Boston, for Ashmont, and occupied a seat near the rear of the last car of the train; that there were about 20 passengers in the car, and he noticed Black sitting in the seat opposite, very erect, with his eyes closed. When the conductor came through Mr. Black went through his pockets as if he were looking for a ticket, and not being able to find it, tendered a 50-cent piece in payment for his fare. The conductor began to name off the stations, from Field's Corner first, and then Ashmont, and when he said Ashmont Mr. Black nodded his head. The conductor gave him his change and his rebate check. At Ashmont, where the train stops, there is a gravel walk running the whole length as a platform, then there is a flight of steps—10 or 12—that leads up to the asphalt walk around the station; so when you go up from the steps you have to walk along this walk. The conductor and brakeman took Black out of the car, one on each side. The distance from the steps of the car to the steps that lead up to the station was 25 feet. As they went along the platform the conductor and train man were on each side of him. They tried to stand him up, but his legs would sink away from him. They sort of helped

him up, and carried him to the bottom of the steps. When they went to the bottom of the steps they continued one on each side of him. Then one of the men got on one side with his arm around him, and the other back of him, sort of pushing him, and they took him up about the fifth or sixth step, and after they got him up there they turned around and left him and went down the steps. Mr. Black sort of balanced himself there, just a minute, and then fell completely backward. He turned a complete somersault, and struck on the back of his head. The railroad men just had time to get down to the foot of the steps. There was a railing that led up those steps and the steps were about 10 feet wide. Mr. Black was upon the right-hand side, going up, and he was left right near the railing. When he fell he did not seize hold of anything. His arms were at his side."

On this testimony the jury might find that the plaintiff was so intoxicated as to be incapable of standing, or walking, or caring for himself in any way, and that the defendant's servants, knowing his condition, left him near the top of the steps, where they knew, or ought to have known, that he was in great danger of falling and being seriously injured. They were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition. The jury might have found that they were negligent in leaving him on the steps where a fall would be likely to do him much harm. *Moody v. Boston & M. R. Co.* 189 Mass. 277, 75 N. E. 631.

The defense rests principally upon the fact that the plaintiff was intoxicated, and was incapable of caring for himself after he was taken from the train, and therefore was not in the exercise of due care. If his voluntary intoxication was a direct and proximate cause of the injury, he cannot recover. The plaintiff contends that it was not a cause, but a mere condition, well known to the defendant's servants, and that their act was the direct and proximate cause of the injury, with which no other act or omission had any causal connection. The distinction here referred to is well recognized in law. Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other, unless it was a direct, contributing cause to the injury, as distinguished from a mere

condition, in the absence of which the injury would not have occurred. This is pointed out in *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191, and *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390. It is also considered at some length in *Newcomb v. Boston Protective Department*, 146 Mass. 590, 4 Am. St. Rep. 354, 16 N. E. 555. See also *Marble v. Ross*, 124 Mass. 44; *Spofford v. Harlow*, 3 Allen, 176; *Hall v. Ripley*, 119 Mass. 135; *Stone v. Boston & A. R. Co.* 171 Mass. 536-544, 41 L.R.A. 794, 51 N. E. 1.

The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it. The principle was recognized by Mr. Justice Wells in *Murphy v. Deane*, supra, in these words: "The last part of the instructions prayed for suggests another question which, in certain conditions of facts, may require care and consideration; to wit: How far the obligations and liabilities of one party are modified towards the other, after knowledge of a negligent exposure by the latter, to danger from the acts or neglect of the former. In such case, what would otherwise have been mere negligence may become wilful or wanton wrong, or may take the place of the sole, direct, or proximate cause, the negligence of the other party being then regarded as a remote, and not a contributory, cause." In *Hibbard v. Thompson*, 109 Mass. 286, we find this language: "A physician may be called to prescribe for cases which originated in the carelessness of the patient, and, though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence and the separate injury occasioned thereby. . . . In such cases the plaintiff's fault does not directly contribute to produce the injury sued for." So in *Pierce v. Cunard S. S. Co.* 153 Mass. 87, 26 N. E. 416, this court said: "But here the ground is not the fire, but an act done by the defendant after Pierce had got into the dangerous position. . . . The plaintiff's previous negligence is not a sufficient excuse for knowingly inflicting an injury upon him, or, short of that, for omit-

ting the use of such care as is reasonable under the circumstances, to avoid injuring him, even when the harm is not expected in terms."

The rule applies, in like manner, where the plaintiff's act is illegal as distinguished from negligent, so that the defendant's liability is only for wanton and reckless conduct to the plaintiff's injury. *McKeon v. New York, N. H. & H. R. Co.* 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329; *Palmer v. Gordon*, 173 Mass. 410, 73 Am. St. Rep. 302, 53 N. E. 909; *Lovett v. Salem & S. D. R. Co.* 9 Allen, 557-563. In this latter class of cases, where the negligence is wanton and reckless to such a degree as to be in its nature a wilful wrong, it is held that, although the plaintiff makes an averment of due care on his part, this means only due care in reference to the direct and proximate cause of the injury, and, such a gross wrong of the defendant being shown to be the cause, it prima facie so far excludes participation in it by the plaintiff as to relieve him from the necessity of offering affirmative evidence of his care. *Aiken v. Holyoke Street R. Co.* 184 Mass. 269, 68 N. E. 238; *Bjornquist v. Boston & A. R. Co.* 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. The fundamental principle is the same in both classes of cases. It is that the plaintiff's condition, resulting from his prior negligence or wrong, is not a direct and proximate cause of the latter injury, inflicted by one who acts independently, with knowledge of this condition and in reference to it. The principle has been generally recognized, both in England and America. *Davies v. Mann*, 10 Mees. & W. 546; *Radley v. London & N. W. R. Co.* L. R. 1 App. Cas. 754; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Memphis & C. R. Co. v. Martin*, 131 Ala. 269, 30 So. 827; *Green v. Los Angeles Terminal R. Co.* 143 Cal. 31-41, 101 Am. St. Rep. 68, 76 Pac. 719; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Indianapolis & C. R. Co. v. Wright*, 22 Ind. 376; *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; *Atwood v. Bangor, O. & O. T. R. Co.* 91 Me. 399, 40 Atl. 67; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817; *Rawitzer v. St. Paul City R. Co.* 93 Minn. 84, 100 N. W. 664; *State v. Manchester & L. R. Co.* 52 N. H. 528; *Cincinnati, H. & D. R. Co. v. Kassen*, 49 Ohio St. 230, 16 L.R.A. 674, 31 N. E. 282; *Willey v. Boston & M. R. Co.* 72 Vt. 120, 47 Atl. 398; *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781.
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The rule has often been applied in favor of plaintiffs whose intoxication prevented them from using care to protect themselves from the consequences of a subsequent act of negligence of another person, done with knowledge of their intoxication. *Wheeler v. Grand Trunk R. Co.* 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103; *McKean v. Baltimore & O. R. Co.* 61 Md. 154; *Fox v. Michigan C. R. Co.* 138 Mich. 433, 68 L.R.A. 336, 101 N. W. 624; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 6 L.R.A. 241, 16 Am. St. Rep. 334, 22 N. E. 340.

The question that we have been discussing was not considered in *Holland v. West End Street R. Co.* 155 Mass. 387, 29 N. E. 622. It does not appear that there was evidence of negligence on the part of the defendant in that case, or that anything was done in reference to the plaintiff with knowledge of his intoxication.

Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66, is not at variance with this rule. In that case it was held by a majority of the court that the rule applicable to a suit brought by one injured by a wanton and reckless act of negligence of another, which permits him to recover without affirmative evidence to sustain his averment that he was in the exercise of due care, is inapplicable to an action for death caused by such an act, brought under Rev. Laws, chap. 111, § 267. The decision rests upon the construction of the words "due care," used in that statute.

We are of opinion that the jury in the present case might have found that the plaintiff was free from any negligence that was a direct and proximate cause of the injury.

Exceptions sustained.

KENTUCKY COURT OF APPEALS.

LOUISVILLE CITY RAILWAY COMPANY,
Appt.,
v.

MAUD HUDGINS.

(— Ky. —, 98 S. W. 275.)

Street car—alighting from car—injury.

1. That a passenger alighting from a street car and passing back of it to cross the street is negligent in stepping upon the parallel track without looking for an ap-

Note.—This case furnishes another illustration of a recent tendency on the part of the courts to permit a recovery where one is injured by a street car, run at an excessive speed and without a proper lookout, through a city street, notwithstanding the negligence of the person injured. In *In-*

proaching car does not relieve the street car company from liability for injuries inflicted by such car, if those in charge of it, by the exercise of ordinary care, could have discovered the peril and prevented the injury. Same—control of car.

2. The motorman in charge of a car approaching one discharging passengers at a street crossing is bound to keep a sharp lookout for passengers who may attempt to cross the tracks behind the standing car and have his car under such control that he can stop it at a moment's warning upon the appearance of danger.

(December 12, 1906.)

A PPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal in-

dianapolis Traction & Terminal Co. v. Kidd, ante, —, the decision in favor of the person injured was expressly referred to the doctrine of last clear chance. The difficulty of upholding a recovery in such a case under that doctrine is pointed out in the note to that case and in the note to Dyerson v. Union P. R. Co. ante. 132. For aught that appears, the plaintiff in LOUISVILLE CITY R. CO. v. HUDGINS could, if she had kept a proper lookout for cars, have avoided the danger the instant before she was struck. Assuming, therefore, as the court does, that she was guilty of negligence in the first instance, it is not apparent why that negligence did not continue up to the very instant of the accident, and if so she, and not the motorman, would seem to have had the last clear chance to avoid the accident, or at least their negligence would seem to have been concurrent up to the very instant of the accident. According to the position taken in Dyerson v. Union P. R. Co. and the note to that case, either alternative would be fatal to the application of the doctrine of last clear chance in her favor. It will be observed that the court, in LOUISVILLE CITY R. CO. v. HUDGINS, does not expressly refer the decision to this doctrine. In effect this decision seems to involve a partial revival of the doctrine of comparative negligence which formerly prevailed to some extent, but which is now, in form at least, very generally repudiated. The distinction between the doctrine of comparative negligence and the doctrine of last clear chance is that the former weighs in the balance the comparative negligence of the two parties, and in some cases, when the defendant's outweighs the plaintiff's, permits a recovery notwithstanding that the plaintiff was guilty of contributory negligence, i. e., that negligence constituting one of the proximate causes of the injury, whereas the doctrine of last clear chance does not permit a recovery in spite of contributory negligence, but regards the antecedent negligence of the

, L.R.A. (N.S.)

juries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Fairleigh, Forcht & Field, and Greene & Van Winkle, for appellant:

Appellee's contributory negligence barred the action.

Louisville R. Co. v. Colston, 117 Ky. 804, 79 S. W. 243; Trauber v. Third Ave. R. Co. 80 App. Div. 37, 80 N. Y. Supp. 231; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836.

Mr. Chesley H. Searcy for appellee.

Carroll, C., filed the following opinion:

The appellee, a passenger on one of appellant's cars going west, got off at Twenty-second street and Portland avenue, on the north side of the street, and, after alighting, passed behind the car for the purpose of go-

plaintiff merely as a remote cause or a condition, and not a proximate cause, of the injury, if for any reason it ceased or was interrupted before the termination of the defendant's negligence. Had the condition in the case at bar been such that, after plaintiff, by her own negligence, had placed herself in a position of peril, she could not escape therefrom even by the exercise of due care, and, being in that situation, might have been saved by the exercise of due care on the part of the motorman, a clear case would have been made out for the application of the doctrine of last clear chance. Upon the facts as they appear, however, it would seem that her negligence in failing to discover the car, and the motorman's negligence in running the car at a dangerous speed and in failing to keep a proper lookout, were concurrent up to the very instant of the accident, so that the only ground for permitting a recovery seems to lie in the difference of degree or quality of the concurrent negligence of the respective parties; and to permit a recovery on this ground logically involves the application of the doctrine of comparative negligence, although, as already said, this doctrine has been formally repudiated in most jurisdictions. The questions of negligence and contributory negligence in case of injury under circumstances like those that appear in LOUISVILLE CITY R. CO. v. HUDGINS are discussed in a case note in 4 L.R.A. (N.S.) 729. The HUDGINS CASE, however, is of special interest, not because of its holding with respect to the duty of the respective parties in the premises, but because of its decision that the conceded negligence of the plaintiff did not prevent a recovery on account of the conceded negligence of the defendant. Of course, if the court had, as perhaps it might have done, acquitted the plaintiff of all negligence under the circumstances, there would have been no difficulty in permitting her to recover.

ing to the south side. As she was crossing the south track a car on this track, going east, struck and seriously injured her. From a judgment and verdict in her favor, this appeal is prosecuted.

The negligence complained of as stated in the petition is that the east-bound car was running at a high and dangerous rate of speed, and, without warning to appellee, ran into and against her, and that her injuries were caused by the carelessness and negligence of appellant, its servants, and agents, in failing to give warning of the approach of the car to the crossing, and in operating and managing the car in a careless and negligent manner.

The chief, and in fact only, ground of complaint is alleged error of the court in the qualification of discovered peril added to instruction No. 2, which reads as follows: "It was the duty of plaintiff when she started across the tracks of the defendant at the place mentioned in the petition to exercise ordinary care for her own safety, and, if you shall believe from the evidence that at that time she failed to exercise ordinary care for her own safety, and, by reason of such failure, she helped to cause or bring about the injury of which she complains, and that she would not have been injured but for her failure in that respect, if any there was, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that the employees of the defendant on its east-bound car could have seen the plaintiff by the exercise of ordinary care when she came in peril from the car, and, by the exercise of ordinary care, could have prevented the injury which the plaintiff alleges she sustained; if they could, then the law is for the plaintiff, and you should so find." To understand the pertinency of the objection to this instruction, it will be necessary to state the substance of the evidence. There are two street-car tracks at Twenty-second street and Portland avenue. These tracks are 4 feet 6 inches apart, and, when the cars on each track are opposite to each other, there is a space of about 2 feet between them. The west-bound cars occupy the north track, and cars going east the south track. The car from which appellee alighted stopped at the usual place for the purpose of allowing her to alight. She got off of the rear platform on the north side of the car, and, as her home was on the south side of the street, she immediately turned and walked behind the car for the purpose of crossing the street, and in doing so, stepped on the east-bound track. There is some conflict in the testimony as to whether she was struck by the east-bound car when

she had crossed the first or the second rail, but when struck she was on the track, and there is evidence tending to establish that the east-bound car was running at a high rate of speed, that the gong or bell was not being sounded, that appellee was knocked about 20 feet, that the car ran 100 feet before being stopped, and that the motorman at the time appellee was struck was looking back at some ladies standing in a door on the side of the street, and that appellee did not see or hear the approaching car when she stepped on the east-bound track. The evidence for appellant was to the effect that the gong was being sounded, that the car was under good control, and running at a low rate of speed, and the motorman keeping a sharp lookout, his testimony being that the west-bound car prevented him from seeing the appellee until she stepped on the track immediately in front of his car, and too late to enable him to stop before striking her.

Some eyewitnesses to the injury testified that the west-bound car had just started when appellee was struck; others, that the car had gone about 10 feet. It was plainly the duty of the servants of appellant in charge of the east-bound car to have it under perfect control, to sound the gong, and run at a slower rate of speed when approaching the car that was standing on an adjacent track for the purpose of permitting passengers to alight. Where there is a double track the street cars in use are usually so constructed or arranged that passengers can only alight from the side of the rear platform that is farthest from the other track, and, if they desire to cross the street, it is usual and customary to do so immediately behind the car from which they have alighted, as the cars stop to discharge passengers at the street crossings, and, while going behind the car for the purpose of crossing the street, their view of a car approaching on the other track in an opposite direction is obstructed, nor can the person in charge of the car see them until they get from behind the car from which they have alighted, and, when they do so, they are necessarily either on or in dangerous proximity to the track upon which the other car is approaching. When a car has been stopped at the usual place for discharging passengers, it is the duty of those in charge of an approaching car on the other track to have it under such control that it may be stopped at a moment's notice, so that persons who have alighted may cross the track safely. It is manifestly dangerous, while passengers are alighting from a car, to permit another car, not under perfect control, to run by it on the adjacent track, as the motorman cannot discover the peril of the person attempt-

ing to cross the track in time to prevent injury, and it must be anticipated that persons who have alighted from a standing car at a street crossing may cross the street immediately behind it. It is said that it is the duty of the passenger, after alighting from a street car, to stand in the street until the car has gone a sufficient distance to enable him to see an approaching car, and to allow persons in charge of the approaching car to discover them; in other words, that it is the duty of passengers to exercise ordinary care for his own safety. That is true, but the passenger is not to be charged with negligence because he fails to anticipate that the company from whose car he has just alighted will place him in imminent peril from another car before he has had opportunity to reach a place of safety. The duty that persons operating street cars owe to passengers does not end immediately when the passenger has stepped safely to the ground. They are required to, and should, exercise ordinary care to prevent injury by their cars to persons who have left the car while they are attempting to reach the street or a place of safety. It was, of course, the duty of appellee, when she started to cross the tracks, to exercise ordinary care for her own safety, but, although she failed to do this and her failure may have contributed to such an extent to bring about the injury of which she complains that it would not have happened except for her failure to exercise this degree of care, will not relieve the appellant of liability if the persons in charge of the car that struck her could, by the exercise of ordinary care, have discovered the peril appellee was in, and, by the exercise of ordinary care, have prevented the injury to her. It was the duty of the motorman in charge of the car at this point and place to keep a sharp lookout for persons alighting from the car, and who might be expected to cross the street immediately behind it, and to have his car under such control that he might stop it at a moment's warning; and it is manifest that, if the motorman had exercised this degree of care, he could and should have discovered the appellee's peril in time to have prevented injuring her. It was therefore entirely proper, under the facts of this case to qualify the instruction as to contributory neglect, as was done.

The rule herein expressed as to the duty that street car companies owe to protect their passengers from being injured by cars on a track adjacent to the one from which they have alighted has been applied in substance and effect by the supreme court of Illinois in *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 4 L.R.A. 126, 11 Am. St. Rep. 87, 18 N. E. 772, where the court held that, 7 L.R.A. (N.S.)

"where street-car tracks are in close proximity, to run a car or train of cars in one direction at rapid speed and without signal or warning, over a sidewalk crossing while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, as in this case, the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinance."

Perceiving no error in the record, the judgment is affirmed.

KENTUCKY COURT OF APPEALS.

RICHMOND CEMETERY COMPANY,
Appt.,
v.

JOHN M. WALKER et al.

(— Ky. —, 97 S. W. 34.)

Cemetery—race exclusion.

A cemetery company controlled by white persons cannot, by purchasing land surrounding a lot owned by a colored person, prevent his using his property for burial purposes, or compel him to sell it.

(October 11, 1906.)

Case Note.—Forbidding burial of negro in cemetery controlled by white persons:

—The case in hand, in holding that no supposed considerations of public policy will warrant the courts in preventing the exercise by a negro of his right to use for burial purposes a lot in a cemetery intended for the use of white persons, is in line with the decision in *Mt. Moriah Cemetery Asso. v. Com.* 81 Pa. 235, 22 Am. Rep. 743 (Affirming 10 Phila. 385), in which it was held that, where one had purchased a lot in a cemetery without any restriction on his right of sepulture, the managers of the cemetery association had no power afterward to abridge such right by any unreasonable limitation thereon; and that, where the right of interment of another person was ordered by such purchaser, and was refused solely on the ground that the body was that of a colored man, it was held that the right of interment would be enforced by mandamus.

But where a restriction is attached at the time of their sale, against the use of cemetery lots for the interment of colored persons, it would seem, in view of the character of the estate or property acquired by the purchaser of such a lot (as to which see note in 67 L.R.A. 118), that such restriction might be valid.

APPPEAL by defendant from a judgment of the Circuit Court for Madison County in plaintiffs' favor in a suit to prevent interference by defendant with the use of plaintiffs' lot for burial purposes. Affirmed.

The facts are stated in the opinion.

Mr. C. H. Breck for appellant.

Messrs. J. A. Sullivan and Grant E. Lilly for appellees.

Nunn, J., delivered the opinion of the court:

The appellant, the Richmond Cemetery Company, was organized in 1856, and purchased a tract of land located on the south side of Main street in Richmond, Kentucky, in the shape of a parallelogram, containing 18 acres. South of this 18-acre tract of land, and adjoining same, were 10 acres, formerly the property of Joel J. Walker. These 10 acres were also in the shape of a parallelogram. On October 23, 1877, Joel J. Walker, in consideration of \$1 cash in hand paid, and the natural love and affection which he bore for the children of his deceased brother, Owen Walker, conveyed to the children this 10 acres of ground. The deed from Joel J. Walker to the children contained the following reservation, viz.: "Out of this conveyance the grantor reserves a lot on the cemetery line opposite the lot of Jas. Hagen, fronting the cemetery 33 feet, and running back on parallel lines 25 feet." In the month of February, 1882, Joel J. Walker died testate. In his will he devised this lot, with other property, to a former servant, Mary Jane, who had never left him, and her children, naming them. In the year 1885 the appellant company purchased this 10 acres of land from the children of Owen Walker. In the conveyance made by the children to it, the same reservation was made as in the deed from Joel J. Walker to the children. After its purchase of the 10 acres it removed the fence that was situated along the line between the two pieces of land, and inclosed the whole. In the month of December, 1903, a child of John Morgan Walker died, and the grave was dug upon the small lot above described, for the purpose of burying the child, when, it was alleged, the appellant did wilfully and wrongfully refuse to permit him and his friends to enter the cemetery for the purpose stated, and they were compelled to bury it in a lot belonging to a colored man, in the old part of the cemetery. This John Morgan Walker was a son of Mary Jane, and was one of the children named in the will of Joel J. Walker.

The appellees, by this action, sought to compel the appellant to permit the burial of this child on the lot reserved and described above, and to prevent it in the future from 7 L.R.A. (N.S.)

interfering with the burial of the persons named in the will of Joel J. Walker, on this lot. The appellant answered the petition. A demurrer was filed to it and sustained. It refused to plead further, and the court granted to the appellees the relief sought. The substance of the answer was that the cemetery of the appellant was for the burial of white persons, and that colored persons were not allowed to be buried in it; and that it had purchased $3\frac{1}{2}$ acres of ground on the opposite side of the city and donated it to the colored people in which to bury their dead, and it had offered to pay, and was willing to pay, the devisees of Joel J. Walker a full price for this plot of ground.

The appellant does not present a single legal reason why the judgment of the lower court should be reversed. Its theory and theme is one of sentiment,—that the peace and good order of the community require that the two races have separate burial places; that this is the policy of the state, as shown by it requiring separate coaches on railroads, and separate schools for the white and colored people. This was accomplished by statutes, but the general assembly has never enacted any statute requiring separate burial places for the two races, and this court is powerless to prevent any person, either white or black, from any legitimate and legal use of his property, and it has no power to force him to accept any price that may be offered for his property.

For these reasons, the judgment of the lower court is affirmed.

KENTUCKY COURT OF APPEALS.

JOHN P. SULLIVAN, Admr., etc., of Mary F. Sullivan, Deceased, et al., App'ts.,

v.

THOMAS E. SULLIVAN et al.

(— Ky. —, 92 S. W. 966.)

Evidence—admissions.

1. Statements against interest, by a party to an attempted arbitration to one of the selected arbitrators, are admissible in evidence against him, in an action growing out of the subject-matter of the controversy.

Contract to support—recovery on note.

2. One failing fully to perform his contract to support his mother in consideration of a note of a certain amount, given

Case Note.—May a promissory note executed by a parent to a child be the subject of a valid gift by the former to the latter:—While a donor's promissory note payable to the donee has been upheld as a gift *inter vivos* in some earlier deci-

him by her, is entitled to recover only the proportional value of the services actually performed.

Note—payable after death.

3. A note without consideration, payable out of the estate of the maker after his death, is void.

(May 1, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Hardin County directing payment of certain notes out of the estate of Mary F. Sullivan, deceased. Reversed.

The facts are stated in the opinion.

Mr. S. M. Payton for appellants.

Messrs. Sprigg & Holbert for appellees.

Hobson, Ch. J., delivered the opinion of the court:

Mary F. Sullivan died a resident of Hardin county, leaving surviving her ten children, and this suit was brought by her administrator for the settlement of her estate. The only question arising upon the appeal is as to the validity of three notes executed by her to three of her younger children, Thomas D. Sullivan, Samuel I. Sullivan, and Katie M. Pierce. These notes are as follows:

For value received I promise to pay Thomas D. Sullivan five hundred (\$500) dollars due twelve months after date, but if same is not paid by me no interest is to be collected until after my death. This is not an advancement made by me but money due my

sions, the weight of authority at the present time has established as a general rule of law that one cannot make his own promissory note the subject of a gift to such an extent that it can be enforced by the donee against the donor in the latter's lifetime, or against his estate after his death. That the donor and donee occupy the relation of parent and child does not alter this rule; in other words, love and affection are not sufficient consideration to support a promissory note. Upon this proposition almost all the authorities are in accord with *SULLIVAN v. SULLIVAN*.

Accordingly, in *Blanchard v. Williamson*, 70 Ill. 652, the promissory note of a mother to her daughter was held not to be valid as a gift *inter vivos*. The relationship of the parties was not considered, the court announcing the rule that when one delivers his own promissory note as a gift, it is merely a voluntary promise to pay a sum of money at a future day, and cannot be enforced either against the maker in his lifetime, or against his estate after his death, since there is no consideration to support it.

And in *Arnold v. Franklin*, 3 Ill. App. 141, a father's note to his daughter was held to have been executed and delivered without a valuable consideration, and to be incapable of supporting an action, either at law, or in equity, where it appeared that the note was executed and delivered to her as a present, because the father had no cash on hand to gratify his desire to make his daughter a gift of money.

The leading case upon the proposition under consideration is *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, in which a son brought suit upon a promissory note executed to him by his deceased father, payable in one year after the latter's death. It appeared that the note was given during the maker's last illness for the purpose of compensating the son for services previously rendered at the father's request, and for the further purpose of more effectually equalizing the distribution of the father's estate among his children than was done by his will, then previously executed, and

which was afterwards established. But there was nothing to show any agreement of the father and son, or any act or declaration of the former, as to what portion of the note was intended as a compensation for services, and what portion to equalize the distribution of the property. The opinion was delivered by Chief Justice Shaw, who considered the case from three points of view. In the first place it was held that the note, like any other contract to pay money founded upon no other consideration than that of equalizing the distribution of one's estate after death, was merely gratuitous, and therefore *nudum pactum*, given upon no sufficient legal consideration, and incapable of supporting an action or of founding a legal claim. The next question considered was whether the note could be deemed good as a gift *causa mortis*, and the court held that the donor's own promissory note, payable to the donee, could not be the subject of such a donation. "It was not an existing, available promissory note to anyone; it was not a chose in action. . . . It was not a binding contract by the promisor to the promisee; and, if it were, it would be open to another objection as a *donatio causa mortis*, namely, that it would not be revocable by the donor. It was simply a promise to pay money, and as such, and as a gift of a sum of money, it wants the essential requisite of an actual delivery." As to the third question, whether, as there was legal and valuable consideration to some extent in services performed at the father's request, and the promise was entire, the note might not be supported upon that ground, it was held that, where the note was given, not upon any one consideration going to the whole note at the time it was made, but for two distinct, independent considerations, each going to a distinct portion of the note, and one was a valid and sufficient consideration to support a contract, and the other not, there the contract should be apportioned, and the holder should recover to the extent of the valid consideration, and no further.

son for services and kindness rendered me by him. This September 25, 1896.

May F. Sullivan.

For value received of him I this day promise to pay my son Samuel I. Sullivan five hundred (\$500) dollars to be paid him out of my estate before it is divided among my other children. This note is not to bear interest until my death. Dec. 20, 1901.

May F. Sullivan.

For value received I this day promise to pay to my daughter Katie M. Pierce five hundred (\$500) dollars to be paid out of my estate before it is divided among the other children. This note is not to bear interest until my death. Aug. 28, 1902.

May F. Sullivan.

This last proposition find further support in *Shotwell v. Struble*, 21 N. J. Eq. 31, which was a bill in equity by a widow, who was also the administratrix of her intestate, praying, among other things, for a discovery of the consideration of a note executed by the deceased to his daughter, upon which the latter had brought a suit at law against her father's estate. The answer stated that certain lands had descended to the daughter from her deceased mother, and that her father, being only tenant by curtesy, had conveyed the same in fee, and had given her this note for her release of her estate therein to his grantee. It was held that an offer by a father to give his daughter a note if she would release lands worth only a portion of the sum for which the note ran could not be deemed a contract to give that amount for the lands; that the natural legal construction of such offer was that the note beyond the value of the lands was intended as a gift or advancement; and the court intimated that the note might be good to the amount of the value of the daughter's interest in such lands only, and invalid as to the residue.

Again, in *Sanborn v. Sanborn*, 65 N. H. 172, 18 Atl. 233, the promissory note of a father to his son was held not to be good as a gift *causa mortis*. It was also held that the note could not operate as a bequest, because not executed in compliance with the statute of wills. From the statement of facts in this case, it would seem that there might have been a question whether the note, even if otherwise enforceable, was ever delivered in a legal sense. The court, however, did not pass upon that point.

So, a father's promissory notes to three of his children, executed as mere expressions of his bounty and intended to operate as testamentary acts, cannot be held valid as gifts. *Smith v. Smith*, 30 N. J. Eq. 564.

And in *Fink v. Cox*, 18 Johns. 145, 9 Am. Dec. 191, a father's note to his son was held to be without sufficient consideration, where it appeared that he executed it as an

The proof shows that Thomas D. Sullivan was a bachelor, living with his mother when the note to him was executed, and cropping the farm on which she lived as her tenant. She made an arrangement with him by which he was to stay with her and take care of her as long as she lived, and, in consideration of his promise to do this, she executed the note to him. Shortly after the execution of the note, however, he married. His wife and his mother did not get along together, and about the year 1898 he left her. They then had some disagreement as to whether he should give up the note, and had, or tried to have, an arbitration about it; but he did not give it up. Afterwards the mother executed to Samuel I. Sullivan and Katie M. Pierce the other two notes as advancements. These notes the old lady declared were executed

absolute gift to his son, alleging that this son was not so wealthy as his brother, that he had met with losses, and that he and his brother had had a controversy; and the son himself testified that the note was freely given to him by his father, and was founded on the consideration of natural love and affection. See also *Hadley v. Reed*, 34 N. Y. S. R. 949, 12 N. Y. Supp. 163, in which *Fink v. Cox* was followed and natural love and affection held not to constitute a sufficient consideration to support a promissory note given by a mother to her daughter.

And in *Craig v. Craig*, 3 Barb. Ch. 116, involving a note made by a father to his son, the court said that the weight of authority was against the principle that the donor's own note, merely creating a debt against himself, could be the proper subject of a gift *causa mortis*. It was further held that, in any event, there was not sufficient delivery of the note in question to support a gift *causa mortis*.

And in *Starr v. Starr*, 9 Ohio St. 74, the court below was of the opinion that natural love and affection and a desire on the part of a father to provide for and advance his daughter were not a good and sufficient consideration to validate his promissory note to her. Upon the affirmance of this judgment, the supreme court said: "The note . . . was a gift, and its delivery was the delivery of a promise only, and not of the thing promised. The promise being unfulfilled at the death of the maker of the note, the gift failed. And, as the promise was without consideration and could not have been enforced against the maker in his lifetime, it cannot be against his executor."

To the same effect is *Priester v. Priester*, Rich. Eq. Cas. 26, 23 Am. Dec. 191, in which it was held that the consideration of love and affection was not sufficient to validate the promissory notes of a father to his children, intended to equalize the distribution of his estate after his death. It was also held that they were void as gifts *causa*

because they had received this much less than the other children and she wished them made up equal. The circuit court enforced the notes, and the administrator of the estate appeals.

The administrator introduced Joel Jackson and proposed to prove by him that he was one of the arbitrators selected by Mrs. Sullivan and her son Thomas, and that Thomas D. Sullivan told him then that he held the \$500 note, but was not entitled to retain it, because he had not done what he agreed to do as the consideration of the note, which was that he was to live with his mother and support her during the remainder of her life. This evidence should have been admitted. While a proposition of compromise passing between the parties themselves may not be proved, statements that

either of the parties may make to an arbitrator may be given in evidence, just as any other admission against interest may be. There was no consideration for this note, except the services of Thomas D. Sullivan, and in lieu of the instructions which the court gave he should have instructed the jury to whom the case was submitted for trial that, if they believed from the evidence the note was given in consideration of services rendered or to be rendered by Thomas D. Sullivan, and he failed to carry out the contract and render the services contracted for, they should find for him the fair value of the services actually rendered, the amount so found to be in the same proportion to the full amount of the note as the services which he rendered bore to the full amount of the

mortis. To quote from the opinion: "The subject of the gift was a void promise to pay after the death of the donor,—a thing having neither form, shape, nor legal existence, incapable of actual delivery or passing by delivery. It could not revert to the donor because the gift was, by the terms, not to take effect until after his death."

And in *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777, 76 S. W. 821, in which actions were brought by children against their father upon his promissory notes executed to them to secure them the amount called for out of his estate, in addition to their share therein, in case of his sudden death, and which were to take effect only in case of his death, the notes were held unenforceable, because "the gift, if it can be so called," was based wholly and solely upon love and affection.

So, in *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508, it was held that a note from a father to his daughter was void for the want of sufficient consideration, and that it could not be sustained as a gift *causa mortis*, since a mere promise to pay a sum of money could not be a gift of this nature. Here it appeared that the note had been executed and delivered by the father in his last sickness, and was as follows: "For value received, and for the consideration of love and affection that I have towards . . . [my daughter], I promise and agree that she shall have and receive out of my estate \$1,400, to be paid . . . after my decease."

And in *Smith v. Kittridge*, 21 Vt. 238, it was held that the love and affection of a father for his sons could not be deemed sufficient consideration to make his promissory note to the sons a valid obligation against the maker or his estate, either at law or in equity; and that it could not be a gift *causa mortis*, as it was merely the donor's written promise that he would give at some future time, and, in order to be available to the donee, required the interposition of law to enforce it.

Nor can a father's promissory note to his

son as the latter's share in the father's estate be enforced against the maker's estate by one who, with a knowledge of the facts, accepted the same from the son after the death of the father, as such an instrument is but a promise to make a gift in the future, and is therefore without consideration. *Conrad v. Manning*, 125 Mich. 77, 83 N. W. 1038.

Ricketts v. Scothorn, 57 Neb. 51, 42 L.R.A. 794, 73 Am. St. Rep. 491, 77 N. W. 365, is worthy of attention here, though the note in question was executed to a granddaughter, and the case finally went off upon the sufficiency of the consideration rather than the necessity thereof, and is, therefore, not strictly within the scope of this note. It appeared that the grandfather delivered the note, which was payable on demand, with interest, to his granddaughter without making any condition, requirement, or request of her,—in short, as a gratuity,—and looked for nothing in return, though he said to her at the time of its delivery that she would not have to work any more, and she had in fact ceased work for a time. It was held that the note was given without any valuable consideration, as it was "nothing more than a promise to make a gift in the future of a sum of money therein named." But the court further held that all the elements of an equitable estoppel had been established, and that the grandfather's legal representatives could not be permitted to resist payment of the note on the ground of lack of consideration, since it was the grandfather's suggestion that caused his granddaughter to abandon her employment and to rely upon the bounty he had promised her, and such action on her part had been contemplated by him as the probable consequence of the execution of the note.

And it would seem that a parent may, by will, direct that his note to his child be paid, and in this way effectuate his purpose to make the child a gift. In *Loring v. Sumner*, 23 Pick. 98, the plaintiff sued upon a note executed to him by his father, payable one year after the maker's death, and also count-

services he agreed to render under the contract with his mother.

As to the other two notes, a different question is presented. The proof taken on the trial is not sufficient to show that Samuel I. Sullivan or Katie M. Pierce in fact received \$500 less than the other children. In that event the notes would not be material. The notes executed to them are on their face testamentary dispositions of the estate. The language of both notes is the same, and while each contains a promise to pay they both provide that the \$500 is to be paid out of the estate before it is divided among the other children and is not to bear interest until her death. A testamentary disposition of the estate can only be made by will executed as provided by the statute

and regularly admitted to probate. These papers are not so executed that they may be probated as a will under the statute. A person may, by will, dispose of his estate, and thus regulate the matter of advancements between the children, whether the advancements have in fact been made or not. But, if a person dies intestate, then the question of advancements is regulated by the statute (Ky. Stat. 1903, § 1407), and the declaration or intention of the parent cannot control the fact. *Shawhan v. Shawhan*, 10 Bush, 600. In *Chitty on Contracts*, p. 27, after a quotation from *Blackstone* as to what is a sufficient consideration for a deed, it is added: "We must observe, however, that the term 'good consideration,' as thus used in the case of deeds, does not apply to

ed upon a legacy under the father's will as follows: "I have given to my son . . . \$1,000 by note for his full part of my estate. . . . I also order my executor to pay all the legacies above named. I, . . . being of sound mind and disposing memory, see fit to dispose of my estate as mentioned in the above will." The court followed *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, as to the count on the note, and held it to be *nudum pactum*, but allowed a recovery under the will upon the ground that it was clear that the testator intended that his executor should pay the son's note. To quote from the opinion: "I will that a certain note be paid or that a certain promise be performed" would be a valid legacy of the amount of the note, or of the thing promised to be done, although the note or promise were invalid. It seems to us that the language of this will is equivalent to saying 'I will that this note of \$1,000, given to . . . [my son] be paid.' And we can entertain no doubt that such would be a valid legacy."

In Pennsylvania the law is settled that the sealed note of a parent to a child is valid, in the absence, of course, of fraud or other defenses of that nature. Accordingly, in *Mack's Appeal*, 68 Pa. 231, in which it appeared that a mother, for the purpose of equalizing her estate among all her children, executed her notes under seal, payable upon her death, to some of her children, the notes were upheld upon the ground that the mother had the same power to provide for the equalization of her estate among her children in this manner as by will. The court deemed no consideration necessary because the seal imported it, and cited authorities to sustain the propositions that a voluntary bond was, both in equity and at law, a gift of money, and that, though a parol, unexecuted promise without consideration to make a gift *inter vivos* would be void, an agreement under seal to do so could be enforced. To quote from the opinion: "A man may give a present bond to pay a sum of money at his death, and a delivery of it to the obligee renders it perfect as a pres-

ent obligation though payable at a subsequent, whether a fixed or an uncertain, period, to be afterwards ascertained and made certain. It is strictly *debitum in presenti solvendum in futuro*, and is as irrevocable as any other obligation under seal which in law imports consideration."

That this is the rule in Maryland, also, was intimated in *Selby v. Case*, 87 Md. 459, 30 Atl. 1041, which was a bill in equity by a son for the sale of his deceased mother's real estate to pay her debts, his purpose being to raise sufficient funds to discharge two notes under seal, executed and delivered to him by his mother, "of her own free will and accord, simply with the desire of benefiting him." The court was of the opinion that a judgment might have been obtained at law on the notes because they were under seal, but refused to grant the relief sought upon the ground that a court of equity would not enforce an executory contract which was merely voluntary and not founded on a valuable consideration really and actually existent.

And in *Shotwell v. Struble*, 21 N. J. Eq. 31, in which it further appeared that the daughter had also sued on a sealed bill of her father for the same amount as his note, and in which the mother sought, also, for a discovery of the consideration of the bill, the court held that the latter was entitled to such relief, but intimated that, if the bill was obtained legally and without fraud, although without consideration, the daughter would be entitled to recover upon it, but that in such case it was an advancement by the father, and must be brought into hotchpot before the distribution of the personal estate.

As has already been remarked, there are some earlier cases that support the proposition that one may make his own promissory note the subject of a gift *inter vivos*, notably *Woodbridge v. Spooner*, 1 Chitty, 661, and *Bowers v. Hurd*, 10 Mass. 427. All these cases apparently proceeded upon the theory that the maker of a promissory note could

simple contracts, to support which mere relationship or natural love and affection is not a sufficient consideration." In 1 Daniel on Negotiable Instruments, § 179, the rule is thus stated: "A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry. Therefore a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note; as, for instance, when a bill or note is accepted or made by a parent in favor of a child, or *vice versa*, it could not be enforced between the original parties, the engagement being gratuitous upon what is called a good, in contradistinction to a valuable, consider-

ation." In Ewards on Bills, Notes, and Negotiable Instruments, § 456, it is said: "The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and bona fide purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient." See, to same effect, Story, Promissory Notes, § 183; Richardson v. Richardson, 148 Ill. 563, 26 L.R.A. 305, 36 N. E. 608; Phelps v. Phelps, 28 Barb. 121; Holley v. Adams, 16 Vt. 206, 42 Am. Dec. 508; Flint v. Pattee, 33 N. H. 520, 66 Am. Dec. 742; Parish v. Stone, 14 Pick. 198, 25 Am.

not impeach the same by showing that there was a total lack of consideration to support it, but was limited to the defense of failure or illegality of consideration. The cases just reviewed, however, clearly show that such is no longer the law, even in the case of a note from a parent to a child. But in Seton v. Seton, 2 Bro. Ch. 610, which was a bill in equity upon a promissory note executed to a trustee by a mother for the benefit of her unborn child, filed by the child and the trustee to establish the note together with the trust declared therein, and to have the same realized upon the proceeds invested, Lord Thurlow overruled a general demurrer upon the ground that he could not undertake to say that a promissory note given by a woman to a trustee for her child was *nudum pactum*.

There are, too, some *dicta* to the effect that the relationship of parent and child is of itself sufficient to support a promissory note not under seal from the parent to the child. In Ross's Appeal, 127 Pa. 4. 17 Atl. 682, where a man, on the eve of his second marriage, signed, sealed, and delivered a note to his mother in trust for the three children of his first marriage, it was held to be a binding obligation which could be recovered against his estate; an adjudication to be expected in view of the law in that state with respect to seals, as above shown. But in the opinion of the court below, whose judgment was affirmed by the supreme court without opinion, the following language is found: "A seal imports a consideration, but there is here a good consideration in the natural affection of a father for his children and his obligation to provide for them. The note was not placed in escrow, but was delivered to the payee named therein. It passed wholly and unconditionally out of his control and into the custody and control of the payee. . . . [The father] himself recognized this fact, and during his life conferred with his mother in regard to the note, the proper time for its payment, and the division of the money among the beneficiaries. There is no room upon this state of the facts to hold this note to be an unexecuted gift."

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And in Doty v. Dickey (Ky.) 96 S. W. 544, which was an opinion rendered five months after SULLIVAN v. SULLIVAN, and by the same tribunal, the court, in passing upon the question of the validity of an assignment of an insurance policy made to the insured by his wife and children, the beneficiaries therein, used the following language: "In this state love and affection growing out of the relationship of parent and child is a good consideration, and sufficient to uphold not only an executed, but an executory, contract between them;" citing in support of this proposition several Kentucky cases, which, however, upon perusal, are found to be far from establishing the assertion of the court, as far as an executory contract is concerned, since all the contracts sued upon were under seal, or the agreement was shown to have been made upon other considerations than that of love and affection, though in Mark v. Clark, 11 B. Mon. 44, the court said that the affection of a father to his son or daughter had been held to be sufficient consideration to make enforceable a note to pay a sum of money for the purpose of equalizing the estate of the maker. But no authority is cited in support of this proposition, and the question in that case was whether the consideration of love and affection was sufficient to support a bond executed by an uncle to a niece binding himself to pay her a sum of money in three annual instalments, which question the court decided in the negative.

In Foster v. Walker, 32 N. S. 156, the promissory notes of a father to his child were held not to be valid as gifts either *inter vivos* or *causa mortis*, solely upon the ground that there had been no actual delivery thereof to the donees. The question here under consideration, whether such a note could be the subject of a gift, was not considered by any of the judges, all of whom seemed to think that the question of their validity or invalidity turned entirely upon their delivery or nondelivery to the donees.

Dec. 378; *Fink v. Cox*, 18 Johns. 145, 9 Am. Dec. 191.

None of the Kentucky cases relied on are in point. It is true a note may be made payable at death, but it must be upon a valid consideration. A note may be delivered as a gift *causa mortis*, but these notes were not so delivered. In *Reynolds v. Reynolds*, 92 Ky. 556, 18 S. W. 517, the money belonged to the mother, and was in effect borrowed by the father, who executed his note to the daughter for it. The consideration there for the note was the money which belonged to the mother, and which the father retained upon his promise to pay it to the daughter. In *Fain v. Turner*, 96 Ky. 634, 29 S. W. 628, the note of the mother was based upon the consideration that the child forebore to bring a suit and thus lost a right of action which she had. In *Graves v. Graves*, 7 B. Mon. 213, the promise of each of the children was a sufficient consideration to support the promise of the other. The case of *Jennings v. Anderson*, 4 T. B. Mon. 445, rests upon the idea that the instrument was an acknowledgment of a marriage portion. In *Mark v. Clark*, 11 B. Mon. 44, the instrument sued on was not held enforceable. To uphold notes such as these would be to establish a very dangerous doctrine, and those who have access to the old would be given a great advantage over their brothers and sisters who are at a distance. All the salutary checks which the law has thrown around the disposition of property by will would be dispensed with; for no attesting witness is necessary to a note, and it may be obtained when no one is present to testify to the circumstances of its execution. Many old people may be induced to give a note payable out of their estate at their death, when they would not make a gift of the money if they had it, and would be unwilling to make a will so devising their estates. We therefore conclude that the two notes to Samuel I. Sullivan and Katie M. Pierce are, under the evidence, without consideration and unenforceable, and that the court should have instructed the jury peremptorily to so find.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

LOUISIANA SUPREME COURT.

PETER C. SCHMIDT

v.

NEW ORLEANS RAILWAYS COMPANY.
Appt.

(116 La. 311, 40 So. 714.)

Street railway—act of servant—liability.

1. The defendant railway company, by
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its act of incorporation, came under certain legal obligations for the safety and protection of the public, and particularly of its passengers. It had for that purpose to act through its employees, for whose acts it was responsible. The conductor of a street car represents the street railway company. The company cannot free itself from the obligations referred to by failing to give its conductors full and specific instructions, or by restricting the limit and extent of their authority, so as to disable them from properly performing duties which it is inherently necessary and essential they should have to carry out to the extent of legal requirements of the functions of the positions in which they are placed. It cannot, by merely enjoining upon the conductors to perform their duties cautiously, prudently, and well, break the effect of their failure to comply with these instructions; nor can it, by throwing the instructions into the form of prohibitory orders, alter the legal scope of their powers, duties, and authority. These are matters which it cannot lessen and make to fall below the limit of authority affixed by the law to the positions themselves.

Same—wrongful arrest.

2. The conductor of a street car invited a police officer to come upon his car, saying there was a pickpocket upon it. After he entered the conductor pointed out to him one of the passengers on the car as being such. The policeman arrested the passenger, took him off the car short of his destination, marched him under arrest through a crowded street, and sent him in a patrol wagon to a police station, where he was detained several hours and then released without any charge having been preferred

Headnotes by NICHOLLS, J.

Case Note.—Liability of carrier for wrongful arrest of passenger by servant:

—In considering the liability of a master, other than a carrier, for a wrongful arrest by his servant, the question to be determined is: Was the servant, at the time of making the arrest, acting within the scope of his authority, was he acting as the servant of his master, or as an individual merely? If he acted within the scope of his authority, express or implied, the master is liable. In case of arrest by a servant of a common carrier, however, other considerations may enter into the determination of the carrier's liability. If a passenger on a railroad train is wrongfully arrested during the course of his transportation by the servants of the carrier intrusted with the performance of the contract of carriage, the weight of authority seems to hold the master to a much stricter rule of liability than that applied to other cases of wrongful arrest, since such an arrest is regarded as a breach of the carrier's contract safely to transport the passenger. Because of this special duty of protection which the contract of carriage is deemed to impose upon the carrier, it has been declared that the real

against him. He was shown to be a man of good character and position.

Same—liability of company.

3. The conductor did not himself make the arrest, but it was through his instrumentality that the passenger was arrested and ejected from the car and taken to the station. The conduct and course pursued by the policeman was the direct and natural consequence of that of the conductor. Under the Civil Code, he who causes another person to do an unlawful act, or assists or encourages the commission of it, is answerable *in solido* with that person for the damage occasioned by that act.

(January 15, 1906.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action

test of the carrier's liability is, not whether the servant making the arrest acted within the scope of his authority, but whether there has been a breach of the carrier's contract safely to transport the passenger. This seems to be the better rule by which to determine the carrier's liability and it is believed to be sustained by the weight of authority, though there are not wanting cases that apply the ordinary rule under such circumstances. Whether or not this special rule of liability is applicable in all its strictness to street railway companies is not so clear, but the tendency of the cases is to attribute to the conductors of street cars implied authority so broad as to include within its scope practically any wrongful act toward a passenger committed during the actual course of the transportation.

If an arrest takes place before the actual carriage of the passenger has commenced, or after it has ceased, the usual rule of *respondere superior* is generally applied, and the liability of the carrier made to depend upon the extent of the servant's authority and the facts and circumstances of each particular case. The early cases, especially in England, were much more strict in their construction of the servant's authority, and much more favorable to the carrier, than the later ones, which show a tendency to broaden the rule of liability in favor of the passenger. Indeed, some of the late cases go so far as to deny the distinction referred to above, between an arrest made on the train and one made before the carriage has commenced, or after its completion.

In the early case of *Roe v. Birkenhead, L. & C. Junction R. Co.* 7 Exch. 36, which was an action of trespass for assault and false imprisonment, where it appeared that the plaintiff was wrongfully taken into custody, after completing his journey, by some of the servants of the railway company, on the charge of not having paid his fare, and after being detained some time, obtained his liberty by paying the fare demanded, a nonsuit was ordered on the ground that the arrest was not authorized by the company. 7 L.R.A. (N.S.)

brought to recover damages for false arrest. Affirmed.

Statement by Nicholls, J.:

The plaintiff prays for a judgment in his favor against the defendant for this: That the New Orleans Railways Company is a corporation doing business in this city as operator of street cars.

That on February 15, 1904, between the hours of 10 and half past 10 o'clock p. m., he was a passenger on car No. 253 of the Clio street line of cars operated by the defendant corporation then in charge of conductor Jules Mossy; that petitioner had paid his fare on entering the car at the intersection of Royal and Orleans streets and was peaceably riding on said car to his intended destination, namely, 2230 Clio

The court said that the general rule is that a master is not liable for the tortious act of his servant, unless that act is done by an authority, express or implied, given him for that purpose by the master; that, if it had appeared in this case that the act complained of was one that the company had legal authority to perform, the act would not have been tortious, and it might well have been put to the jury as having been done by an authority given by the company; but that there was no evidence that the act was of that character, and it therefore followed that the plaintiff was bound to show, not only that the person by whom he was arrested was a servant of the company, but also that he had its authority to arrest him.

And in *Poulton v. London & S. W. R. Co.* L. R. 2 Q. B. 534, it was held that where a station master arrested a railway passenger in charge of a horse at the end of the journey for not paying for the transportation of the horse, he exceeded his authority, and the company was not responsible, on the ground that the railway company itself could not lawfully arrest a person for non-payment of a horse's transportation, but could only detain the horse, and that, therefore, it could not authorize its servant to do so.

So, a railway ticket agent was held, in *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65, to have no implied authority to cause the arrest of a person whom he suspected of an attempt to rob the till after such attempt had ceased, and the company was held not liable for his act. *Blackburn, J.*, in this case, said that he was inclined to think that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender, or, if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the prop

street, when, at the intersection of Canal and Royal streets, the said conductor, Jules Mossy, while acting as the agent of the defendant corporation and within the scope of his employment, and with the intention of carrying out the instructions given him by said defendant corporation and its officers or agents superior to him, and of performing his duty of protecting the passengers on said car, as he thought, did call police officer Methe and two other police officers of the local police force, who entered from the rear and front of said car, and then and there, in the presence of a car load of passengers, unceremoniously and without reason or cause did eject petitioner from said car and order said police officers to remove petitioner from said car and arrest him as a pickpocket.

erty taken away, it might be that that also might be within the authority of a person in charge of a till; but that there is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done; that there is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who, he supposes, has done something with reference to the property which he has not done; that the act of punishing the offender is not anything done with reference to the property, but is done merely for the purpose of vindicating justice that, if the law were that defendants were responsible in this case for the act of their clerk in giving the plaintiff into custody on an unfounded charge, every shop keeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop; every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman.

So strict were the early English cases in limiting the carrier's liability that liability was denied in one case even though the passenger was forcibly ejected from the car and then arrested, on the ground that the carrier's servants exceeded their authority. *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 20 L. J. Exch. N. S. 196, *infra*.

But in *Goff v. Great Northern R. Co.* 3 El. & El. 672, where a passenger, at the end of his journey, was wrongfully arrested by the direction of the superintendent of the line, on the charge of not paying his fare; and, under the railway act, a penalty was imposed on any person traveling on a railway without having paid his fare, with intent to avoid payment thereof; and all officers and servants of the company were empowered to apprehend such person,—it was held that the company was liable, on the ground that, since it must naturally have

That the said conductor, in the presence of all the passengers, charged petitioner with being one of the pickpockets who escaped from his car a few evenings before, and, by persisting in the statement and not permitting petitioner to explain that he (the conductor) was making a mistake, and by instructing said police officers to arrest petitioner as the pickpocket who had escaped from his car, humiliated petitioner.

That thereupon, at the instance of said conductor, whilst acting as aforesaid, he was removed from the car (although his intended destination was 2230 Clio street, though he remonstrated), and was walked through Royal street from Canal to Customhouse, now called Iberville, street, followed by a large and inquisitive gathering, to the patrol box at the corner of Iberville street and Ex-

been expected that the exigency of deciding whether or not a particular passenger should be arrested would be likely to arise, it was to be reasonably inferred that the company would have at its stations officers with authority to make such decision; and that the conduct of the defendant's agents in referring the matter to the superintendent of the line was sufficient evidence to go to the jury that he was an officer having authority to act for the company in arresting the plaintiff.

This case was cited as controlling authority in *Moore v. Metropolitan R. Co.* L. R. 8 Q. B. 36, a case almost identical in its facts and in which the court follows the same line of reasoning. It was argued in this case that, unless the passenger had really committed the offense denounced by the statute, the officer in charge of the station had no authority from the company to give the passenger into custody; but the court well said that, if this were so, there would never be an action against a railway company for false imprisonment. The court distinguished the case of *Poulton v. London & S. W. R. Co.* *supra*, on the ground that there the station master had given the passenger into custody on a charge which would not have justified the company itself in arresting him, and that therefore the authority of the railway officials to decide what should be done on the exigency of the moment did not arise.

The appointment of one as cashier at a railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, was held, in *Daniel v. Atlantic Coast Line R. Co.* 130 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, not to empower him to arrest persons whom he suspected of having stolen money which had come into his possession, so as to render the railroad company liable in case he caused the arrest of an innocent person. The court in this case said: "A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because

change alley, where he was compelled to stand and be gazed upon and inquired about by a large gathering of citizens until the arrival of the police-patrol wagon, when he was ignominiously placed in said wagon like a common felon, in the presence of the aforesaid gathering, amongst which were many of his acquaintances, and driven to the third precinct police station, when, after being questioned by the captain in charge, and upon the remonstrance and representations of several of his friends who had witnessed the outrages heaped upon him, and who followed him to the station house to protest against such treatment, he was allowed to depart without even a charge being preferred against him.

That all this happened on the night before Mardi Gras just after the Proteus parade,

at a time when both Canal and Royal streets, as well as Iberville street and Exchange alley, were unusually crowded with residents of and visitors to the city; and that a vast throng witnessed his arrest, greatly to his chagrin and humiliation, and that the mental agony and mental and bodily suffering of petitioner whilst being escorted by the police officers through the streets as a pick-pocket were indescribable, and that he was equally tortured and humiliated by the gross, wanton, and uncalled for insult and abuse heaped upon him as aforesaid by said conductor whilst acting within the scope of his duties and instructions, on said car, as the agent of said defendant corporation.

That he has made amicable demand upon said defendant corporation for reparation and for the amount herein sued for as dam-

his authority to do so is clearly implied by the nature of the service; but, when the property has been taken from his custody, or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent."

And a railroad ticket agent who takes a bill believing it to be a counterfeit, in payment for tickets, and immediately procures the arrest of the person from whom he takes it, is held, in *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952, not to be acting within the scope of his business, so as to make the railroad company liable for false imprisonment, although the arrest is wrongful and the bill proves to be a good one. It was also held in this case that an agent whose sole duty is to sell tickets at a railway station is not charged with the protection of passengers waiting for trains, nor intrusted with the execution of the transportation contract, so as to bring the passenger in this case within the protection of the stricter rule of liability, considered later in this note, which is applied where the actual performance of the contract of transportation has commenced. But two of the judges dissented from this view, contending that, the relation of carrier and passenger having been created by the purchase of a ticket, the passenger was just as much entitled to protection against the wrongful acts of the company's servants as if at the time of his arrest he had been in one of its cars.

This case is distinguished in *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, where a ticket agent who followed a woman who had bought a ticket out upon the plat-

form and charged her with giving him counterfeit money, with a demand for other money in its stead, and, on her refusal, angrily insulted her by slandering her character, and put his hand upon her, telling her not to stir until he got a policeman to arrest and search her, but let her go when he failed to get an officer, was held to be acting within the scope of his employment, so as to render the carrier liable for false imprisonment and slander if the detention was unlawful and his charges false. The court said this case was distinguishable from the *Mulligan Case*, because here the agent was attempting to obtain from the passenger other money in place of that which he thought was counterfeit, and that in doing so he was acting for his employers and with no other conceivable motive, while in the *Mulligan Case* the agent, instead of refusing the bill which he suspected of being counterfeit, as he should have done, accepted it and gave the change with the ticket and then sent for a police officer; that his duty as the agent of the company was to have refused the bill if he supposed it was not genuine, and that, when he accepted it, his only purpose could have been to further the efforts of the police officers, who, it appeared, had warned him to look out for counterfeit bills of a certain denomination.

The liability of the railroad company was also sustained in *Lynch v. Metropolitan Elev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141, where a passenger purchased a ticket and entered a car, but, before reaching his destination, lost his ticket; and, when he attempted to pass from the station platform through the gate into the street, was prohibited by the gatekeeper and told that he could not pass until he produced a ticket or paid his fare, and he explained that he had paid his fare and lost his ticket, but the gatekeeper pushed him back and refused to let him pass, and then sent for a police officer and ordered his arrest. In this case it appeared that the railroad company had a regulation that at the end of his passage the passenger must produce and deliver up

ages, without avail; that he has suffered damages in said sum for injury to his feelings, humiliation, mental and bodily agony, and suffering, loss of reputation and time, and chagrin.

That he was born in New York city twenty-five years ago, and has been a resident of this city continuously for the past eight years; that he has always borne an excellent reputation for honesty and as a respectable and peaceable citizen; that the outrageous treatment to which he has been subjected by reason of the fault of said defendant corporation's agent has preyed upon his mind to such an extent that he has never been the same in health or spirits since the occurrence of the outrage.

a ticket or pay his fare; but the court held that the company had no right to detain and imprison him in case of a refusal to pay fare, and that the gatekeeper clearly acted within the line of his duty; that the rule of the company required passengers to show a ticket or pay their fare at the gate in order to be able to pass out, and that the gatekeeper should not let them go out until they either paid their fare or showed a ticket; that in anything the gatekeeper did he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal; that it mattered not that he exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the company, attempted to perform a duty pertaining, or which he believed to pertain, to that service.

This case is distinguished in *Corwin v. Long Island R. Co.* 2 N. Y. City Ct. Rep. 106, in which the liability of the company for the wrongful arrest of a passenger who, because he had lost his ticket, was unable to deliver it to the gateman upon leaving the premises, was denied, where the passenger had succeeded in passing through the gate, and had actually left the railway premises at the time the arrest was made. The court said that in *Lynch v. Metropolitan Elev. R. Co.* it appeared that the company's rules required its gatekeepers not to permit passengers to pass out until they had paid their fares or deposited their tickets, and that the gatekeeper, in detaining the plaintiff in that case, was simply doing his duty; that, if the gatekeeper in the present case had unreasonably detained the passenger, and had by force prevented him from passing the gate, and had then and there caused his arrest, the *Lynch* Case would have been applicable, the act would have been within the scope of the gatekeeper's authority, and the company would have been liable; but that here the passenger was allowed to pass through the gate and to leave the company's grounds, and that when he left the grounds he had ceased to be a 7 L.R.A. (N.S.)

In view of the premises, petitioner prays that said New Orleans Railways Company be cited according to law; and that after due proceedings had there be judgment in favor of petitioner and against said New Orleans Railways Company in the full sum of \$5,000, with legal interest from judicial demand, for costs and general relief.

Defendant answered, pleading the general issue.

The court rendered judgment in favor of the plaintiff, in the sum of \$750, with interest from date of judgment.

Defendant appealed.

Plaintiff answered the appeal, praying for an increase in the judgment to the amount prayed for.

passenger, and the company was no longer liable for his safety; that whatever the servants of the company did after this was not the act of the corporation, but the tortious act of the individual, for which he alone was responsible.

Wrongful arrest of a passenger, at the completion of his journey, on a charge of attempting to pass counterfeit money, procured by a railroad detective employed for the purpose of protecting the property of the company and of ferreting out and prosecuting parties guilty of crimes against the company, was held, in *Eichengreen v. Louisville & N. R. Co.* 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219, to render the company liable, although in this particular matter the detective exceeded his authority and acted contrary to his instructions respecting the caution to be exercised.

So, in *Hamel v. Brooklyn & N. Y. Ferry Co.* 1 Silv. Sup. Ct. 584, 25 N. Y. S. R. 153, 6 N. Y. Supp. 102, Affirmed in 125 N. Y. 707, 26 N. E. 753, it was held that, if the gateman of a ferry company assaulted an intending passenger who was attempting to pass the gate, and, as a part of that transaction, called in a police officer and had the passenger arrested, the ferry company was liable, whether it authorized the arrest or not.

And a railroad company was held liable for the act of its baggage master, who had been placed in charge of its waiting room, in assisting in the wrongful arrest of a passenger waiting at the station for a train, although the arrest was at the instance of city authorities, and not on behalf of the railroad company, on the ground that it was the duty of the railroad company and its servants to whom the care of passengers was committed to refrain from committing wrongful acts toward them. *Texas Midland R. Co. v. Dean*, 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135. The court said: "It appears that the baggage master was one of the employees selected by the defendant to render services to passengers about the station provided for their use, and that he was present and on duty when the arrest was made. In

Mr. Harry H. Hall, for appellant:

Appellant's contentions sufficiently appear in the opinion.

Messrs. George Montgomery and Albert Guilbault, for appellee:

The negligence of the conductor as to any matters involving the safety and security of passengers while being conveyed is the negligence of the railroad company.

Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325.

The carrier must not only protect its passengers, but, *a fortiori*, must protect them against the violence and insults of its servants.

such places the passenger is as much entitled to proper treatment and protection as when he is aboard a conveyance, and employees put there to be brought in contact with passengers and to render to them services due to them from the carriers are as fully within the principle stated as are such employees upon trains and vessels. The case is therefore governed by the broad principle deduced from the obligation of the contract, and is not of the class in which a person employed by another for some purpose commits a wrong while he is not engaged in his master's business. One employed as was Barton is engaged in the master's business in respect of the duty of according proper treatment to a passenger when he is on duty in such capacity around such a place. The fact that he is not at the particular time actively doing anything for the carrier does not make conduct on his part violative of the master's obligation any the less attributable to the master."

An act making depot or station agents of railroad companies the conservators of the peace, with authority to preserve order in the waiting rooms, and to arrest and deliver to the custody of the most convenient officer all persons guilty of disorderly conduct, was held, in King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42, not to make such agents officers of the state and its representatives in the exercise of the powers conferred, so as to relieve their employers from responsibility for a wrongful arrest of a passenger at a station.

And a special policeman appointed for a railroad company by the mayor, who had no legal power to appoint him, was held, in Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935, to be acting within the scope of his authority in wrongfully arresting a passenger in the station before he had obtained his ticket; and the company was held liable therefor. The court, in this case, said that the fact that the arrest was made before the passenger had obtained his ticket was immaterial; that neither the actual purchase of a ticket, nor the entering into a car, is essential to create the relation of 7 L.R.A. (N.S.)

Lafitte v. New Orleans City & Lake R. Co. 43 La. Ann. 37, 12 L.R.A. 337, 8 So. 701.

Nicholls, J., delivered the opinion of the court:

The testimony adduced on the trial of this case established beyond the possibility of a doubt that about 10 o'clock on the night of February 15, 1904, the plaintiff entered on Royal street at the corner of Orleans, as a passenger on car No. 61 of the Clio street line of cars, owned and operated by the defendant company, for the purpose of going to his home on Clio street; that he paid his fare as a passenger; that while thus upon the car he was guilty of no wrong or fault; that when the car reached the corner of Royal and Canal streets a policeman entered the

carrier and passenger; that the plaintiff, having come to the station for the purpose of purchasing a ticket and taking the train, was entitled to the courtesy and protection due to a passenger from the moment he entered upon the premises of the company.

In Shea v. Manhattan R. Co. 27 N. Y. S. R. 33, 7 N. Y. Supp. 497, which was an action for false imprisonment by a person who had been arrested while on a railroad platform, by the agent in charge of the platform, it was held that the question whether or not the arrest was justified was properly left to the jury, and a verdict for the plaintiff was sustained, the court saying: "It is the duty of the defendant to treat its passengers with courtesy and kindness, and where one of its employees, while engaged in the business of the company, whether wilfully and maliciously, or in consequence of what he considers a duty, illtreats a passenger so far as to wrongfully cause his arrest, the company is liable for it."

Where the wrongful arrest is made during the actual carriage of a passenger on a railroad, by the servants intrusted with the performance of the contract of carriage, the tendency of the later cases is to hold the carrier to strict accountability for the acts of its servants. It seems to be now pretty well settled that the arrest of a passenger while being transported under the protection of the servants to whom the carrier has delegated the performance of the contract of carriage constitutes, like an assault or a wrongful ejection, a breach of the carrier's contract safely to transport the passenger and to protect him against interference by strangers and the misconduct of the company's employees; and in such cases the carrier is generally held liable regardless of the servants' motives, and even though they acted contrary to instructions. Hutchinson, Carr, 3d ed. § 1100, p. 1286; Gulf. C. & S. F. R. Co. v. Conder, 23 Tex. Civ. App. 488, 58 S. W. 58; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

car, arrested him, and took him off the car in the presence of a large number of passengers, placed him under arrest, and, followed by a large crowd, carried him to the corner of Exchange alley and Iberville (Custom-house) streets, from which place the officer sent him in a patrol wagon to the police station, opposite Jackson square, where he remained until 1 o'clock at night. At that time he was released, without any charge being brought against him; it having been shown to the satisfaction of the officers of police that the arrest which had been made was the result of mistaken identity. The plaintiff is shown to have been a man of good character, standing, and position, and was necessarily greatly mortified and humiliated by the treatment he received.

Some cases, indeed, show a tendency to apply this strict rule even when the actual transportation of the passenger has not yet commenced. See *Texas Midland R. Co. v. Dean and Norfolk & W. R. Co. v. Galligher*, supra, and dissenting opinion in *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506. 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952.

And the unreasonable refusal of a passenger to state his name when asked by a conductor to whom he tenders a mileage ticket, if the name thereon is his own, is held, in *Palmer v. Maine C. R. Co.* 92 Me. 399, 44 L.R.A. 673, 69 Am. St. Rep. 513, 42 Atl. 800, not to justify the conductor in procuring his arrest without a warrant on the charge of fraudulently evading payment of fare. In this case no question was raised but that the conductor was acting within the scope of his authority as a servant of the defendant corporation.

That in such cases the question at issue is not the authority of the servant to make the arrest, but whether or not there has been a breach of the carrier's contract to transport safely, is also plainly stated in *McLeod v. New York, C. & St. L. R. Co.* 72 App. Div. 116, 76 N. Y. Supp. 347. In this case a railroad detective wrongfully accused a passenger of theft, and searched him, after the passenger had appealed to the conductor for protection and the conductor had refused to interfere; and, although no money was found upon him, the detective took him from the train and had him confined in jail. It was held that it was for the jury to determine whether the act of the detective in removing the passenger from the train, with the conductor's sanction after he was appealed to by the passenger for protection, constituted a violation of the defendant's contract to carry the passenger safely, and that, if the jury so found, then it would follow that for the subsequent arrest and detention the company would be liable. In the lower court the complaint was dismissed on the ground that the detective did not act within the scope of his employment, but on appeal the court 7 L.R.A. (N.S.)

The occurrence took place on the night before Mardi Gras. At that season the city is filled with strangers seeking pleasure, who are accompanied or followed usually by numbers of thieves and pickpockets endeavoring to take advantage of the crowded streets and cars to ply their illegal practices.

It seems that, upon a report made by the conductor of car No. 61 of the Clio street line to the inspector of the company, Winters, that several evenings before several of these pickpockets had entered upon his car, the inspector called up some of the police officers by telephone, communicated to them the information he had so received, and directed them to place themselves in communication with the conductors; which accordingly they did. Upon the information

said that the liability of the carrier was to be determined by another and different principle, viz., whether the damages did or did not result from a breach of the defendant's general duty as a common carrier to convey the passenger safely and without molestation to his destination; that the rule relieving the master from liability for an injury caused by his servant when not acting within the scope of his employment does not apply, even though the injury be maliciously inflicted, as between a common carrier and a passenger; that, regard being had to the obligation imposed upon the defendant of conveying the passenger safely, it was bound, not only to protect him so far as practicable, while being so conveyed, from violence committed by strangers and co-passengers, but it was bound to protect him absolutely against the misconduct of its own servants who were employed to perform its obligation or contract of carriage; that it therefore became immaterial whether the detective or the conductor was acting within the scope of his employment; that, had the detective been an entire stranger, instead of an employee of the road, and had he, with the assent, or by the direction, of the conductor, removed the passenger from the train, the same question would be presented.

In *Duggan v. Baltimore & O. R. Co.* 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, where a passenger was wrongfully arrested and taken from the car by police officers, in pursuance of directions sent by telegram by a detective agent of the carrier; and it appeared that the telegram was addressed to the conductor, though it was not delivered to him, but to the baggage master, who summoned the policemen; and there was some evidence that when the policemen entered the car the conductor pointed out this passenger as the man to be arrested.—the court said that the question of the defendant's liability might turn on either of two grounds: First, whether the detective acted as the agent of the carrier in ordering the arrest, and acted within his authority; and, second, whether the carrier was made liable by the action of the conductor. In regard to

thus received, Detectives Schultz and Reynolds entered several days later in citizens' dress into the car, and upon a nod from the conductor they arose and went to the front of the car, where several pickpockets who were aboard the car took alarm; one ran to the front platform and jumped over the dashboard, followed by Detective Schultz, who, however, failed to arrest the man.

The arrest made on the night of the 15th of February seems to have been a sequence of that just referred to and of the information of the situation of affairs which had been brought to the notice of the police. When car No. 61 stopped that night at the corner of Royal and Canal streets, there were several policemen standing in the immediate neighborhood, among others police-

man Methe, who arrested the plaintiff. The following is his version of what took place: He was stationed at the corner of Royal and Canal streets. "The conductor of car No. 61 of the Clio street line says to me: 'Officer, here's a pickpocket on the car.' I went through the front of the car, and he points the man out. I got the man. I took him out of the car. While I was taking the man out several gentlemen whom I knew by sight said, 'The conductor is mistaken;' and I was in doubts, so I took the man down to Exchange alley and Custom-house street and rang the wagon, and several more gentlemen came there and told me they knew the man; knew him to be a respectable sort of person. So the wagon came, and I did not want to put myself into it. I held

the detective, the court held that, if he had general authority, actual or apparent, to act for the company in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in its behalf, then the mode of execution of such power, with a warrant or without, was immaterial, and the company was liable in either event. In regard to the conductor, the court said that he had general power and control over the train and all persons on it, with authority to enforce regulations and preserve order, and that those powers involved the correlative duty to protect passengers; that the subject of the illegal arrest was within the general line of his duty, and that if, therefore, he took part in it, the company was liable for the consequences of his act. But it was held that the case must go to the jury to determine what part, if any, the conductor took in the arrest.

In *Krulevitz v. Eastern R. Co.* 140 Mass. 573, 5 N. E. 500, which was an action for false imprisonment and malicious prosecution because of the act of a railroad conductor in causing the arrest of a passenger on his train on a charge of fraudulently evading payment of fare, the court held that want of probable cause, and malice on the part of the conductor, if established, might be imputed to the carrier.

This strict rule of liability is apparently repudiated, however, in *Patterson v. Maysville & B. S. R. Co.* 25 Ky. L. Rep. 1750, 78 S. W. 870, where the liability of a railroad company for the act of its conductor in causing the wrongful arrest of a passenger on a charge of rape is denied, on the ground that such an act was not within the scope of the conductor's duties, where the arrest had not been instigated or continued by the direction or procurement of the railroad company. The court said that the only connection between the carrier and the alleged injuries to the passenger, attempted to be set out in the petition, was that one of the carrier's conductors set the prosecution on foot by swearing out a warrant for his arrest, adding: "There has been great di-

versity of opinion as to whether a corporation was liable for damages for the unauthorized malicious acts of its agents, committed in the course of their employment. But in this state the law is well settled that, if the act of the servant was committed in the course of his employment and while acting within the scope of his authority as agent of the corporation, they may be so held; but, so far as we are advised, they have never been held liable for the malicious act of one of their employees which was not committed in the scope of their employment or while acting within the line of their duty to the employer. . . . It cannot for a moment be contended that there was anything in the employment of Morarity as conductor of one of appellee's trains which imposed upon him the duty to swear out warrants for the arrest of persons charged with committing rape." The arrest in this case took place on one of the carrier's trains, and, if the conductor caused the arrest on the charge that the passenger had committed a rape while on the train, it is difficult to understand how it could be said that he was not acting within the scope of his employment; but the facts in this case are not clearly set out, and there is some language in the opinion from which it might be inferred that the rape was not charged to have been committed on the train and that the conductor swore out the warrant before the contract of carriage commenced. In such case there might be ground for holding that his act was in no way connected with the contract of carriage.

The liability of a railroad company for the wrongful arrest of a passenger was also denied in the early English case of *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 20 L. J. Exch. N. S. 196, where the passenger was forcibly ejected from the train and given into custody because of his failure to produce and deliver up his ticket, as required by a by-law of the company providing that each passenger must show his ticket when required by the guard in charge of the train, and deliver it up before leaving the company's premises, on the ground that

the man subject to the captain's orders. Captain Walsh, the commander of the precinct, when he got to the station, released the man. . . . The conductor told me there was a pickpocket in the car, and he pointed the man (Mr. Schmidt) out to me and said he was a pickpocket; that's the words he used. He didn't order me to arrest him, but he told me he was a pickpocket, and naturally it was my duty to arrest such people as these. He said: 'It's the same man who jumped off the car a couple of nights before, when Detective Schultz and Reynolds were in the car.' I was near him when he said it. We were right close together. The car was very crowded. This happened inside the car. The attention of the people in the car was attracted to the

remark. There was a stampede in the car at the time. Everybody was excited, and everybody wanted to look at him, and naturally a policeman coming in the car made some excitement. There was a crowd in the street when I took Mr. Schmidt off. There was a crowd all night there. . . . When I put my hands on Mr. Schmidt and arrested him he was surprised. He said: 'These people are mistaken; you are making a mistake.' "

The plaintiff Schmidt testified that he rode on the car as far as Canal street, when he was taken off the car by a policeman. There was one at the front door and one at the rear, and they took him off the car. He was wondering why, so he went to the front of the car and asked the conductor why he

there was no evidence that the servant had any authority to arrest the passenger, or to enforce the by-law of the company as to the payment of fare.

So, in *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162, the court said that, as matter of law, it cannot be said that it is within the scope of the power and duty of a conductor, as an agent of the corporation, to cause the arrest of a passenger on the charge of offering counterfeit money in payment of his fare, and to cause the passenger to be confined in jail; that these are questions of fact, to be determined by the jury from the evidence; that if, as matter of fact, the conductor wrongfully expelled the plaintiff in this case from the cars, or procured it to be done by others, or wrongfully prevented him from going on to the point of destination, or procured it to be done by others, the company, as matter of law, would be liable for the actual damages resulting therefrom; also that, if the corporation had expressly empowered or instructed the conductor to institute legal proceedings against passengers, and to cause them to be arrested and confined in prison upon such charges, it would undoubtedly be liable for the acts of the conductor coming within the scope of such authority.

In the case of the arrest of a passenger on a street car, there is more conflict among the decisions. Of course, if the servants in charge of the car have been given authority to arrest when necessary, the company is liable for a wrongful exercise of this power. *Ruth v. St. Louis Transit Co.* 98 Mo. App. 1. 71 S. W. 1055; *Grayson v. St. Louis Transit Co.* 100 Mo. App. 60, 71 S. W. 730.

But where the conductor has not been given express authority to arrest, there is some conflict of opinion as to whether the wrongful arrest of a passenger renders the company liable.

The arrest of a street-car passenger at the request of the conductor, on the charge of riding without payment of fare, was held, in *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 141, 40 L.R.A. 473, 45 S. W. 57, not to render the carrier liable, where the

conductor had been authorized only to put delinquent passengers off the cars. It was held that the conductor had no right to cause the arrest without express authority from the company, though in determining what might be regarded as express authority the court might include not only authority given in express words, but such authority as necessarily followed by implication from the express language conferring the authority.

In *Furlong v. South London Tramways Co.* 1 Cab. & El. 316, the act of a conductor of a tram car in causing the arrest of a passenger on a charge of attempting to pass counterfeit money was held to be within the scope of his authority, where, under the tramways act, any officer or servant of a tramway company was empowered to detain any person seeking to avoid payment of his fare.

But in the subsequent case of *Charleston v. London Tramways Co.* 36 Week. Rep. 367, it was held, on the same state of facts, that the tramway act must be construed as meaning any officer or servant appointed for that purpose, and that without some other authority to the conductor the company would not be responsible for his acts.

And the act of a conductor on a street car in causing the arrest of a passenger immediately after ejecting him from the car, on the charge of not having paid his fare, was held, in *Lezinsky v. Metropolitan Street R. Co.* (C. C. App. 2d C.) 31 C. C. A. 573, 59 U. S. App. 588, 88 Fed. 437, not to be within the scope of his authority, so as to charge the company with liability therefor in an action for malicious prosecution and false imprisonment. But here the arrest was made after the passenger had been ejected, and this fact apparently affected the decision, since the court said that for the improper removal from the car the defendant, being a common carrier, would be liable in damages, because the carrier's obligation to transport safely includes the duty of protecting passengers from any injury caused by the act of any subordinate or third person engaged in any part of the

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put him off. He looked at him awhile and then said: "Ain't you the man who jumped off the dashboard of this car the other night?" It was not long after that the car went off, the policeman took him down to Exchange alley and Customhouse street, and from there took him in the patrol wagon to the station. "The conductor said to the policeman: 'That's the man back there.' The policeman took the man back of me first, and the conductor said: 'Not him; the first one,'"—pointing to Schmidt himself. The policeman then took him off the car, and he walked with the policeman to the front of the car. The conductor was there with the motorman, and he asked him (Schmidt) whether he was not the man who had jumped over the dashboard the other night.

service required by the act of transportation, but that the subsequent act of the conductor in causing the arrest of the passenger was apparently outside of the scope of the conductor's service as such; that it could not be inferred, in the absence of testimony, that it was in the course of the employment of the conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or leave the car, and thus take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor. The facts in this case might be sufficient, perhaps, to take the case out of the rule which is believed to govern in case of the arrest of a passenger while actually being transported, and bring it within the ordinary rule of *respondere superior*, which is generally held to apply in case of an arrest before the commencement, or after the termination, of the transportation.

So, in *Lafitte v. New Orleans City & Lake R. Co.* 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701, the liability of a street railway company for damages for malicious prosecution and false arrest was denied, where it appeared that the driver of a car accused a passenger of giving him a counterfeit coin, and threatened to have him arrested when he reached the station, and did cause the arrest to be made when the station was reached, just as the passenger was stepping from the car, on the ground that, in instigating the arrest, the driver was not exercising the functions for which he was employed; the court saying that he had no instructions to make arrests for the passing of counterfeit money, and that no inference of such authority could be drawn from the fact of changing money for passengers. The court also said that the company had no interest in the arrest of a person attempting to pass counterfeit money, as it appeared that, if counterfeit money was accepted by the driver, he would be charged with it and the company would lose nothing. But it was held that the company was liable for the abuse and defamation of the passenger while on board the company's car. 7 L.R.A. (N.S.)

There was a large crowd there. The attention of the passengers was attracted to the excitement. They saw the arrest. The whole crowd saw the conductor point him out to the policeman. The conductor said to the policeman: "Detective Schultz will know him."

The evidence shows that the officer Methe took plaintiff out of the rear end of the car and took him on the outside to the front of the car.

Mr. Abraham Beer testified that he was, at the time of the occurrence, at the corner of Royal street. He saw a car come up there and stop; the conductor saying that Mr. Schmidt was a pickpocket. "I heard him tell that to somebody, I saw the conductor tell the policeman, 'That's the man,'

And in *Cummingham v. Seattle Electric R. & Power Co.* 3 Wash. 471, 28 Pac. 745, where, as a passenger on a street car was being ejected by the conductor, a policeman inquired what he had been doing, and, upon the conductor replying that he was disorderly, the policeman arrested him; but the conductor refused to make a charge against him when subsequently requested by the policeman,—the court said that it was not alleged or contended that it was within the scope of the conductor's authority, confided to him by his principal, to cause the arrest, and that it was not shown that the company adopted the action of the conductor, or knew of the arrest, until after the passenger's discharge; that, under such a state of facts, it could not be held liable for the arrest, even though it had been procured by the conductor, which was doubtful.

And in *Central R. Co. v. Brewer*, 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615, where the superintendent of a street railway company caused the arrest of a passenger after he had left the car, on the ground of placing a counterfeit coin in the fare box, he was held to have no implied authority to make the arrest, so as to render the company liable therefor. The court here said that, in consequence of the fact that a corporation must of necessity act through its agents, courts have almost invariably held that, to hold a corporation liable for a tortious act committed by its agents, the act must be done by its express precedent authority or ratified and adopted by the corporation; that a corporation is not responsible for unauthorized and unlawful acts, even of its officers, though done *colore officii*; that to fix the liability it must appear, either that the officers were expressly authorized to do the act, or that it was done bona fide in pursuance of a general authority in relation to the subject of it, or that the act was ratified by the corporation.

The distinction between an arrest while the subject thereof still retains his character of passenger and one made after the relation of passenger has ceased is clearly stated in *Grayson v. St. Louis Transit Co.*

pointing to Mr. Schmidt. Mr. Schmidt and the conductor were on the back platform."

The witness Gillis testified that the policeman, after taking Schmidt from the rear end of the car, brought him to the front to the conductor, who was at that end. Mr. Schmidt wanted to know what was the matter with him, and the conductor said: "Ain't you the man who jumped off the dashboard the other night?" Mr. Schmidt said he was not, and someone (witness did not know who) said: "They will know all right." When Mr. Schmidt was arrested he said he was not guilty of any crime, and would make them pay for putting him to that trouble and disgrace.

The defendant placed its inspector, Mr. Winters, on the stand, also Mossy, the conductor of car No. 61, and its second vice president, Joseph H. De Grange.

The former testified that conductor Mossy had made complaint to him of larcenies committed on his car by pickpockets entering the same. He told the conductor he would take the information and give it to the police department. He accordingly rang them up by telephone, and they sent Detectives Schultz and Reynolds over to see him. He told them exactly what the conductor had told him. He told them to go and see the conductor. He did not give any instructions to the conductor or to anyone else to arrest

100 Mo. App. 60, 71 S. W. 730, which also contains an excellent statement as to the general duties and powers of street-car conductors. In this case the company was held liable for the wrongful act of its conductor in causing the arrest of a passenger while he was in the act of descending from a car, as the act was held to be within the scope of his authority, both under the rules of the company which permitted him to make arrests in proper cases, and on general principles of law. The court said: "The conductor had charge of the car and full control of it for the time, and represented the defendant in the fullest sense as to any and every matter connected with its management and control; and, it being his duty to protect passengers from insult and injury, it cannot be said, as matter of law, that, in the discharge of this duty, he had no authority to call an officer and cause the arrest of a passenger when necessary to preserve the peace on board the car and to protect his passengers from insults and injury. On the contrary, it seems to us that, if a passenger should be guilty of a flagrant breach of the peace to the annoyance and disturbance of his copassengers, the conductor would have the right, and it would be his duty to cause his arrest by an officer if one was by to make it. It is true, he is not a conservator of the peace, yet it is his bounden duty to preserve the peace on his car, and to prevent insult and injury to the passengers; and if, to discharge this duty, it should become necessary to call a policeman, we are satisfied that he should do so, and that to do so is within the scope of his employment. . . . We think that, both from necessity and under the company's rules, it was within the scope of his authority to cause the arrest of any passenger when necessary to preserve the peace and to protect other passengers. After the relation of passenger ceased, of course, the authority of the conductor to cause his arrest ceased, and an arrest caused by him after the passenger had left the car would not be the act of the company, but the act of the conductor, for which he, and not the company, would be liable. . . . The plaintiff had not quit the car when the con-

ductor ordered his arrest, but was in the act of alighting from the car, and his testimony is that the order for his arrest was simultaneous with his being pushed from the car by the conductor. The order for his arrest was before he quit the car, and while he was yet under the protection of the conductor, and at a time when it was the duty of that employee to treat him with respect and to protect him from injury and insult. The order for the arrest was therefore given by the conductor while he was about the business of the company, and was within the scope of his authority, though in abuse of it."

And where a conductor on a street car called an officer to arrest a passenger for his refusal to pay a second fare, and the officer refused to make the arrest without a formal charge, and the three thereupon went to the police station, where the conductor made a formal charge against the passenger of disturbing the peace, and the plaintiff was arrested and required to give bond for his appearance, it was held, in *Dwyer v. St. Louis Transit Co.* 108 Mo. App. 152, 83 S. W. 303, that, although the arrest was not actually made on the car, it was there agreed to and arranged for in the presence of the passenger, and that the transaction was continuous, without intermission, so that the act of the conductor in causing the arrest after leaving the car was done by him while serving his master as conductor, and the company was liable therefor in an action by the passenger for malicious prosecution. The court also said, in reply to the contention that the conductor had no authority to cause an arrest, that, although he had no express authority and no statutory authority was given, yet, independent of any statute on the subject, if authority to call an officer by a conductor was not conceded in an emergency, it would practically put street railway travel in populous cities at the mercy of thieves and thugs; that the official discharge of the conductor's duty to protect his passengers requires that he shall have authority to call an officer when practicable to make an arrest; that to deny him this authority would be to deny him the use of the agencies provided by law

the men on the cars. The railway company did not give such instructions. The witness simply reported the matter to the police and left it to them to act. Witness did not tell the conductor to receive instructions from the police. He told him we would give the information to the police. Witness has no right to give instructions to the police department. They thanked him for the information. Witness asked them to go and see the conductor and get from him the information which he himself had received from him. He did this because there had been lots of complaints made in reference to thieves in the cars, and he thought it was no more than right that the company should

protect the patrons of the street cars. He considered it was the duty of the company to protect the passengers against pickpockets by giving the information received to the police.

The inspectors were not instructed in particular in all such details, but he considered that the company owed the people of the city, if anything was wrong on the cars, that information should be given to the police. He considered it was part of his duty to give such information to the police.

Mr. De Grange, a vice president of the company, testified that the defendant company had never given any instructions to its conductors or motormen in regard to the

to preserve the peace; and therefore that the conductor, when he made the formal charge against the plaintiff to cause his arrest, was acting for the defendant and within the scope of his authority, and the fact that there was no disturbance of the passengers, in fact no disturbance of any kind whatever, did not militate against the authority of the conductor to cause the arrest; that it showed an abuse of that authority, not a lack of it, for, if he was authorized to do the act at all, the master was liable.

So, in *Boden v. St. Louis Transit Co.* 108 Mo. App. 696, 84 S. W. 181, the liability of a street railway company for a wrongful arrest of a passenger by a conductor was sustained, although the conductor had been given no authority to make arrests.

And it is said in *West Chicago Street R. Co. v. Luleich*, 85 Ill. App. 643, where the liability of a street car company for an arrest by its conductor of a passenger on a charge of having used counterfeit money in payment of fare was sustained, in answer to the contention that the arrest was outside the scope of the conductor's duty, that the defendant, as a common carrier of passengers, had power to expel from its trains persons who were disorderly and persons who refused to pay their fares; that it could exercise this power only by an agent, who was usually, if not uniformly, its conductor; that it therefore authorized the conductor to exercise the power, and that in doing so the conductor must necessarily act in accordance with his own judgment; that, in legal contemplation, the corporation was present and acting in the person of its conductor.

Again, in *Corbett v. Twenty-Third Street R. Co.* 42 Hun, 577, a street railway company was held liable for a wrongful arrest of a passenger made at the instance of the driver of the car, under whose management the car was, the court saying that, as the driver removed the plaintiff from the car and placed him in the custody of the officer under the authority conferred upon him for the management of the car by the company, the latter became legally liable to the plaintiff for the damages to which he was

subjected, since the law is well settled that a railroad company is liable to the same extent as an individual, for any injury done to a passenger by a person in the course of his employment, who is in the service of the company.

In *Rown v. Christopher & T. Street R. Co.* 34 Hun, 471, it was also held that the act of a street-car conductor in causing the arrest of a passenger, upon a controversy arising as to whether or not he paid his fare, was within the apparent scope of his authority, and that the company was liable therefor where the arrest was wrongful. As to the authority of the conductor to cause the arrest of the plaintiff, the court held there could be no serious doubt, since the conductor said that the plaintiff not only resisted the attempt to remove him from the car, but used profane and abusive language and conducted himself in a disorderly manner, and that that charge, under N. Y. Laws 1880, chap. 186, would justify not only his removal from the car, but, in addition, his arrest and confinement by the officer. The court held, therefore, that the conductor's conduct was consequently within the limits of his authority, and that the company could not exonerate itself from liability because it had not, as matter of fact, delegated this particular authority to the driver; that he had it by virtue of his position, and could exercise it within the scope of his employment whenever a state of facts arose indicating to him that it was the proper course to be followed.

In *Barry v. Third Ave. R. Co.* 51 App. Div. 385, 64 N. Y. Supp. 615, where the plaintiff, while a passenger on a street car, was wrongfully arrested at the instance of the conductor and taken before a justice, but, no complaint being made, was discharged; and he subsequently brought an action against the company for malicious prosecution,—the court held that, no judicial proceeding having been begun, the essential element of an action of malicious prosecution was wanting, and that therefore the complaint must be dismissed. But the court added that the plaintiff's remedy was an action for false imprisonment.

arrest of the suspected people on their cars. On the contrary, they were forbidden to do any police duty.

If the conductor and motorman on this or any other car caused the arrest of a suspected person, they would have been unauthorized to do so by the company. They would have done it in direct disobedience of orders, because they have no police powers and are not authorized to make any arrests. When there are suspected persons operating on the cars, the company, for the purpose of protecting its patrons, notifies the police, calls their attention that such information had reached them, and asks them to do whatever they see fit to do. He did not consider it was one of the duties of his company to protect its passengers against loss through manipulations of pickpockets on the cars. The company protected them as well as it possibly could. It was the duty of the conductor to see that passengers reached their destination safely, as far as they possibly could; but there were a great many contingencies that they were unable to control.

Detectives Schultz and Reynolds were placed upon the stand. They testified to the fact that they had received information from Mr. Winters, the inspector of the defendant company, that conductor Mossy had made a report to him that there were pickpockets working on his car, and he referred them to the conductor. They called upon the latter on his car and were told by him about it. They testified in reference to the occurrence on that car when one of the pickpockets jumped over the dashboard of the car and escaped. They asked the conductor, on that occasion, if he saw any of the pickpockets that he knew, to give them a little tip on the quiet. There was an agreement with him that he should notify them when these parties whom he took to be pickpockets would get on his cars. On that particular occasion, when the car got near Poydras street, the conductor nodded to them. Immediately several men ran out of the car and escaped, as before stated. They instructed the conductor to point out thereafter to the police any of those people.

Mossy testified to the same prior facts which the detectives have testified to. Touching the arrest of Mr. Schmidt, he said that he did not know him, but thought when he came on the car that he had seen him on the car with the three pickpockets who had escaped several nights before, and that he was one of them. He testified that on the night of plaintiff's arrest his car was "jammed" with people, and he asked the police corporal whether there were any detectives around, and he answered: "No; why?" And he (witness) said to him: "I think I

have one of the thieves on the car. I would like you to put a detective on the car." The first thing, he opens the gate, walks in, and he says: "Is this one of the men?" Witness said, "I think so," and "he lugged the man off." Witness asked for a detective to watch the man. His purpose was to have the detective watch him and see if he did anything. He did not tell the policeman to arrest him. He had never received any instructions from inspector Winters or any other of the officers of the company to make any arrest or cause the arrest of anybody on the car. He never gave any instruction to arrest anyone. Witness simply asked the police if there was a detective there in citizen's clothes, so he might get on the car and see if the man he suspected did anything wrong.

Mr. Schmidt resembled one of the men from the size and everything else. He denied positively having pointed out Mr. Schmidt to the policeman, saying, "Officer, here is a pickpocket in the car;" denied having made the statement that "Mr. Schultz would know;" denied having asked Mr. Schmidt whether "he was not one of the men who had jumped off the car," or having spoken to him at all; denied having been at the front end of the car at all; denied having seen the officer arrest Mr. Schmidt. It was the police corporal who arrested him, not officer Methé.

In the brief filed on behalf of the defendant it is urged that "the master is never liable for the wilful and malicious acts of the servant, committed outside of the scope of his employment. On such a state of facts, therefore, a master cannot be held responsible where the servant makes or causes a false arrest or false imprisonment," citing 20 Am. & Eng. Enc. Law, 2d ed. p. 174; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Walker v. South Eastern R. Co. L. R. 5 C. P. 640*; *Poulton v. London & S. W. R. Co. L. R. 2 Q. B. 534*; *Roe v. Birkenhead, L. & C. Junction R. Co.* 7 Exch. 36; *Edwards v. London & N. W. R. Co. L. R. 5 C. P. 445*; *McSorley v. St. John*, 6 Can. S. C. 532; *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57; *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188; *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311; *Barabasz v. Kabat*, 86 Md. 23, 37 Atl. 720; *Central R. Co. v. Brewer*, 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615; *National Bank v. Baker*, 77 Md. 402, 26 Atl. 867; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; also *Ware v. Barataria & L. Canal Co.* 15 La. 169, 35 Am. Dec. 189; *Gerber v. Viosca*, 8 Rob. (La.) 150; Civil Code, art.

2320; Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; Dyer v. Rieley, 28 La. Ann. 6; Lafitte v. New Orleans City & Lake R. Co. 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; McDermott v. American Brewing Co. 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498.

We do not think that the conductor was, in this case, malicious. On the contrary, though acting erroneously, carelessly, and to the great injury of the plaintiff, his acts were in the line of the discharge of his duty to his employers and in their supposed interest, and not his own. The railway company, by reason of its act of incorporation, came under certain obligations for the safety and protection of the public, and particularly of its passengers; and it had for that purpose to act through employees, for whose acts in that regard it assumed responsibility.

The conductor of the street car represented in this instance the street railway company. The company could not free itself from the obligations referred to by failing to give its conductors full and proper instructions, or by restricting the limit and extent of their authority so as to disable them from properly performing duties which it was inherently necessary and essential they should have in order to carry out to the extent of legal requirements the functions of the position in which they were placed. It could not, by merely enjoining upon the conductors to perform their duties cautiously, prudently, and well, break the effect of their failure to comply with these injunctions, nor could it, by throwing its instructions in the form of prohibitory orders, alter the legal scope of their power, duties, and authority.

These are matters which it cannot lessen and make to fall below the limits affixed to the positions themselves by operations of the law itself.

The conductor in the case before us did not himself arrest the plaintiff, but it was through his instrumentality that the latter was arrested in, and ejected from, the car in which he was a passenger, by a policeman, and taken to the police station through the streets in a patrol wagon as a prisoner. The conduct of the policeman was the direct and natural consequence of the course pursued by the conductor. Article 2324 of the Civil Code declares that he who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable *in solido* with that person for the damage occasioned by that act. It was held in Dickson v. Waldron, 135 Ind. 524, 24 L. R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, that, where a person selected and paid by the proprietor of a theater is, at the 7 L.R.A. (N.S.)

request of the latter, appointed a special policeman for that theater, and, under the direction of the proprietor's ticket agent, makes a wrongful arrest, the proprietor will be liable.

We do not underrate the difficulties in which railroad companies are placed by the heavy responsibilities thrown upon them by the law, but these responsibilities they voluntarily assume as being compensated by the privileges conferred by the state. Being assumed, they must be met.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

Petition for rehearing denied February 12, 1906.

MARYLAND COURT OF APPEALS.

CHARLES R. SCHIRM. Appt.,

v.

LEOPOLD H. WIEMAN.

(103 Md. 541, 63 Atl. 1056.)

Stolen property—payment for recovery—validity.

One who, to secure the money with which to procure the return of stolen property, is obliged to indorse the check of the owner, may, if he is compelled to make good the amount upon the owner's stopping payment of the check, recover the sum so paid from the owner, since the payment of money to secure the return of stolen property violates no rule of law and such a transaction is therefore legal and binding.

(June 14, 1906.)

Case Note.—Legality of contract to pay thief for return of stolen property:—

A search of the authorities has failed to disclose any other case upon the question as to the legality of a contract by which the owner pays, or agrees to pay, the thief, or one acting in his interest, for the return of stolen property, when unconnected with any attempt to compound a felony or to prevent the apprehension and conviction of the thief, although, as shown in the opinion, there are a number of cases upholding the legality of contracts for the payment to the owner of the value of the stolen property.

In Worthen v. Thompson, 54 Ark. 151, 15 S. W. 192, it was held that a promise by one in possession of stolen property to surrender it to its owner, being an undertaking to do only what the law exacts, was not a consideration that would support the owner's promise to pay money therefor.

In Morgan v. Hodges, 89 Mich. 404, 15 L.R.A. 438, 50 N. W. 876, it was held that an agreement by the owner of stolen property to permit the bona fide purchaser to

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in defendant's favor in an action brought to enforce his liability upon a check payment of which he had stopped after plaintiff had, by indorsement, become liable for money advanced on it. Reversed.

The facts are stated in the opinion.

Mr. J. Cookman Boyd, for appellant:

It was not illegal for Mr. Wieman to endeavor to secure the return of his watch, even by paying to have it returned, provided he did not thereby compound a felony.

1 Page, Contr. § 418; Johnston v. Allen, 22 Fla. 225, 1 Am. St. Rep. 180; 2 Chitty, Contr. p. 991; Powell v. Flanary, 109 Ky. 348, 59 S. W. 5; Barrett v. Weber, 125 N. Y. 25, 25 N. E. 1068; 9 Cyc. Law & Proc. p. 506 (b).

The cashing of the check by Schirm for Wieman was at most a collateral undertaking for which Wieman would be liable.

State v. Baltimore & O. R. Co. 34 Md. 364; De Groot v. Van Duzer, 17 Wend. 176; Beeton v. Beeton, L. R. 1 Exch. Div. 15; McBlair v. Gibbes, 17 How. 236, 15 L. ed. 134; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; United German Bank v. Katz, 57 Md. 142; Bridger v. Savage, L. R. 15 Q. B. Div. 363; Dewey, Contr. p. 329; 1 Page, Contr. 659; Bibb v. Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; Watts v. Brooks, 3 Ves. Jr. 612; Connolly v. Union Sewer Pipe Co. 184 U. S. 546, 46 L. ed. 684, 22 Sup. Ct. Rep. 431.

Schirm having parted with his money at Wieman's request, and Wieman having thereby obtained his watch, he ought not to be permitted, when the transaction was over and completed, at this eleventh hour, to disavow his contract with Schirm, who acted in good faith.

Read v. Anderson, L. R. 13 Q. B. Div. 779; Hieronimus v. Sweeney, 83 Md. 159, 33 L.R.A. 99, 55 Am. St. Rep. 333, 34 Atl. 823.

Messrs. Alonzo L. Miles, John T. Morris, and German H. H. Emory, for appellee:

The alleged contract is illegal and void:

1. Because *malum in se*.

retain part of it upon his surrendering the remainder was without consideration, and did not defeat the owner's right to recover the other part.

It will be observed that the decisions in these two cases rest upon the ground that there was no consideration to sustain the owner's agreement, and not that the contracts were illegal. It is obvious, therefore, that they furnish no authority against the position taken in SCHIRM v. WIEMAN, that a contract or negotiation for the return of stolen property by the thief is not, if unconnected with any attempt to shield the thief, illegal in such a sense that one ad-

Lester v. Howard Bank, 33 Md. 562, 3 Am. Rep. 211; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70; Hassan v. Doe, 38 Me. 45; 6 Am. & Eng. Enc. Law, p. 406.

2. Because against public policy.

Bishop, Contr. 467; 15 Am. & Eng. Enc. Law, p. 933.

3. Because there was no consideration to support Wieman's promise and the giving of the check.

Fink v. Smith, 170 Pa. 128, 50 Am. St. Rep. 750, 32 Atl. 566; 15 Am. & Eng. Enc. Law, p. 1100; Baltimore v. Lefferman, 4 Gill, 425, 45 Am. Dec. 145.

4. Because the appellant, as the professed agent of Lyons, who received the stolen goods, has no greater rights than his principal.

Koch v. Branch, 44 Mo. 543, 100 Am. Dec. 324.

Page, J., delivered the opinion of the court:

This suit was instituted to recover upon a check given to the appellant by the appellee, under the circumstances which will afterwards be stated. The case was tried without the intervention of a jury, and but one exception was taken, and that was to the action of the court upon the prayers asked for by the respective parties. The court, by its granted instructions, decided there was no sufficient evidence to entitle the appellant to recover. The judgment being against him, the appellant has appealed.

The following facts appear from the record: In July, 1904, the appellant and the appellee, together with two other persons, all members of the Order of Elks, occupied the same room in a hotel in the city of Cincinnati, on the occasion of a convention of the members of that order. During the night, the watch of the appellee was lost under circumstances which led to the belief that it had been stolen. Notice was given by the appellee of his loss, and extensive searches therefor were instituted by officers and detectives throughout the hotel, and elsewhere,

vancing or securing money to enable the owner to carry out such contract or arrangement will be denied a recovery. Assuming the legality of the main contract or transaction, there is, of course, a valid consideration for the owner's promise to repay or reimburse the person advancing the money. Such a person is under no antecedent duty to advance the money, whereas, of course, the thief, or even one innocently in possession of the stolen property, is under an antecedent duty to return the property, and therefore his return of it constitutes no consideration for an agreement by the owner.

without, however, obtaining any clue as to the manner of its mysterious disappearance. The appellee obtained no information about his watch until the 7th of December, 1904. About that time the appellant had an interview with a Mr. Lyons, since deceased, a detective in the city of Baltimore. After pledging him not to reveal what he was about to tell him, Lyons told the appellant that the appellee could recover his watch, but would have to pay for it; that parties outside the state had communicated with him, and told him they would accept \$350 for it. Neither at that time, nor subsequently, was the appellant informed who these persons were, and he never knew more of the matter than was communicated to him by the detective Lyons. It was shown that on that occasion Lyons employed the appellant "to communicate this information to Mr. Wieman, and, if Mr. Wieman was satisfied to accept the proposition, to turn over the money to Lyons and get the watch, and return it to Wieman." The appellant also stated in evidence, and there is nothing to contradict, or in any respect impeach it, that he knew of the loss of the watch, and believed it had been stolen; but he had no knowledge as to that fact or the manner of its loss, other than that which Wieman himself communicated to him. The appellant communicated this conversation to the appellee. At first, the latter refused to pay anything; but after several weeks he agreed to give \$300 if the watch could be returned to him in good condition. The appellant so informed Lyons, and the sum was then agreed to. The appellant testifies without being contradicted that the state of his knowledge at that time was that "Mr. Wieman agreed to pay the money; that the watch was at the time outside the state, and that it was sent for at his [Wieman's] request, through him," and "that Lyons would not have sent to New York for the watch, except Mr. Wieman had authorized me to tell him to have it sent for and that he (Wieman) would pay the \$300 for it."

It was under these circumstances that the appellee and appellant met on the 4th of April to carry out the understanding between them as to the return of the watch. Wieman's account of the conversation is substantially as follows: Schirm asked Wieman, Have you got the money? "Wieman replied he had a check," that he paid everything by check; and besides, he said, "suppose he gave a check and that fellow should pocket the money and keeps the watch too, he would have no redress;" and "how do I know the watch is not all battered up." He, Wieman, then suggested to call in Hennegen & Bates and let them examine the watch. Schirm

objected to this. Wieman then proceeds, "There is no shenanigan about this." I was to say this, and when I did make that remark I felt a little guilty because there was some scheme arranged beforehand to have a deputy sheriff there, and to seize it, "but I told there was no shenanigan about it." "I wanted the watch at any price." He (Schirm) said: "Well, I will tell you what I will do; I will go to your bank and cash that check. I will first go to the other party and show them that I have got the check." In reference to the last statement, the testimony of the appellant is that he (Schirm) said: "I will go to the Fidelity & Deposit Company and get it cashed, because I will have to deliver the cash for it." Upon this conversation the appellee delivered the check on the Drovers' & Mechanics' National Bank to the appellant, who indorsed it, and had it cashed at the Fidelity & Deposit Company after it was indorsed by Schirm. With the proceeds Schirm obtained the watch and delivered it to the appellee. The payment of it was, the same day, stopped by Wieman, and the appellant afterwards was compelled to make it good, and has not since been reimbursed. It is contended that, under these circumstances there can be no recovery because the consideration of the check was the advancement of money to be used for an illegal purpose; that is, for securing the return by a thief of property alleged to have been stolen. It undoubtedly is a correct principle that one who furnishes funds to another who he knows or has every reason to believe intends to devote them to the perpetration of crime, and that they were procured for that purpose, will not be allowed to maintain an action on his contract. He cannot do so for the reason that, as was said by [Hanauer v. Doane, 12 Wall. 347, 20 L. ed. 441] Judge Story in his Conflict of Laws, § 253: "No one can hesitate to say that such a man voluntarily aids in the perpetration of the fraud, and, morally speaking, is almost, if not quite, as guilty as the principal offender." But is that the case with which we are now dealing? Was it intended by any of the parties to perpetrate a crime with the proceeds of the check? The purpose, as shown, was to employ it in an arrangement having for its object the return of the watch by the supposed thief to its real owner. Unless this object was, for some sufficient reason, fraudulent, or legally wrong, or contrary to public policy, the act of the appellant in advancing or otherwise procuring the money on the appellee's check cannot be so obtained as to preclude the recovery by the appellant of the amount paid him on that account. And this legal conclusion would be equally sound, even though in

the transaction in which he advanced his own money or credit for the use of the appellee, the appellant was acting as the agent of the detective, or even of the thief, inasmuch as it was on the credit of the appellee that he acted, unless by so doing he participated in some wrong act. It seems to be clear that, unless it can be maintained that it was illegal, or morally wrong, or contrary to public policy, for the appellee to pay money to the detective or to anyone else for the purpose of recovering his own property, the legal right of the appellant to recover from Wieman in this case cannot be questioned. Now, was it illegal or morally wrong, or contrary to public policy, for Wieman to pay money to secure the recovery of his own property which presumably had been stolen? The solution of this question depends upon the nature of the act and its effect upon the public interest.

Every case of larceny may be considered from two points of view: First, with respect to the interest of the general public in the matter; and then as to the interests of the real owner of the lost property. As to the first, it seems to be clear that the public has no property interest, and, indeed, no other interest, except such as grows out of its duty to protect property and enforce its laws in the interest of the public. For these reasons it is of public interest and in accordance with public policy that the laws for the protection of property shall be effective, in order that the offenders may be promptly apprehended and convicted. Therefore, all proposed agreements made with the thief, or with anyone, by which the apprehension of the criminal, his trial or conviction, may be prevented or obstructed, are contrary to public policy, and absolutely void. With respect to the personal property interests of the real owner, the public has no particular concern. There can be no reason assigned why the owner of stolen property cannot pursue his own interest as he deems proper, so long as there is no interference with the proper enforcement of the laws in the pursuit, apprehension, and conviction of the criminal. The owner may properly take no step, nor make contracts or arrangements, that in any respect will interfere with the performance of these things. He may sue the thief or others in the possession of the stolen property in replevin or by any other appropriate proceeding, and it seems to be without reason to deny him the right to negotiate for the return of any of the property he could sue for, provided he agrees to nothing that has the object or effect of obstructing, impeding, or preventing the apprehension or conviction of the criminal. Upon a contract containing such fea-

tures having such a purpose or effect there can be no recovery; it is contrary to public policy, and void; and it may be added that anyone who advances money for such a purpose participates in the illegal purpose, and his contract for that purpose is tainted contrary to the public interest, and is void.

There seems to be a wide concurrence in the general principle that contracts for the return of stolen property to the true owner are not void, as being contrary to public policy, so long as they do not interfere, or tend to interfere, with the public interest and duty respecting the apprehension or conviction of the criminal. It was stated by the Supreme Court of the United States in *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632, that "ordinarily the law leaves to parties the right to make such contracts as they please, demanding, however, that they shall not require either party to do an illegal thing, and that they shall not be against public policy or in restraint of trade." In *Barrett v. Weber*, 125 N. Y. 22, 25 N. E. 1068, a suit to foreclose a mortgage, given to secure to the plaintiff payment for goods stolen, the defense set up was that it was given to compound a felony; the court held that it was necessary "to show that there was some agreement or promise on the part of the mortgagee to forbear prosecution for the crime, or to suppress evidence that would tend to prove it." So, in *Ford v. Cratty*, 52 Ill. 313, an attorney who retained and refused to pay over money of his client was shown a warrant for embezzlement, and told that, unless he paid or secured the claim, the prosecution would be pushed to a conclusion. It was held not to be regarded as having been given to compound a felony. The same view is maintained in *Brittin v. Chegary*, 20 N. J. L. 630; *Deere v. Wolff*, 65 Iowa, 37, 21 N. W. 168. In *Ward v. Lloyd*, 6 Mann. & G. 785, it was moved to set aside a warrant on the ground that it was founded upon an illegal consideration, namely, an agreement to abstain from prosecuting the defendant for embezzlement. The court held, per *Tindal*, Ch. J., that "this is not the case of a security given to induce an uninterested party to withhold a charge of a criminal nature; there is a just debt due from the defendant to the plaintiff." And *Maule, J.*, said: "The plaintiff demanded what he had a perfect right to demand, viz., money due to him; and the defendant did what he was bound to do, namely, give a security for money which he was bound to pay." *Portner v. Kirchner*, 169 Pa. 472, 47 Am. St. Rep. 925, 32 Atl. 442; *Cass County Bank v. Bricker*, 34 Neb. 516, 33 Am. St. Rep. 649, 52 N. W. 575. Many other cases of

similar import could be cited. A large number of these will be found referred to in 6 Am. & Eng. Enc. Law, p. 410, note 6, to the effect that it is perfectly lawful for the parties to compromise the civil liability arising from the commission of an offense, and, if this be the sole purpose it is valid. In this case there is no evidence that the appellee agreed to compound the felony, or intended to do so. In fact the proof is not clear that it was the thief who had the possession of the watch. Many circumstances might have then existed which would show that the person for whom the detective was acting came into its possession without having been guilty of a crime. But, without laying much stress upon this, the evidence makes it clear that the purpose of the appellee was solely to regain his property, and, in his efforts to do so, carefully refrained from making any terms, other than upon the payment of the money he was to receive his property. In *Brittin v. Chegary*, supra, the court said of a transaction similar in some respects to this, that it was "merely getting his own money." We hold that Wieman, in paying the money and receiving the property, did not violate any rule of law, and therefore the act of Schirm in having the check cashed upon his indorsement does not now preclude him from recovering from Wieman the amount which, in consequence thereof, he has had to pay.

It follows that the plaintiff's first prayer should have been granted, and the first of the defendant rejected; the other prayers were properly refused.

Judgment reversed, with costs to the appellant, and new trial awarded.

MICHIGAN SUPREME COURT.

FRANCES L. FOURNIER et al., Appts.,
v.
JONATHAN L. CLUTTON et al.

(— Mich. —, 109 N. W. 425.)

Decree for alimony—assignability.

1. A decree for permanent alimony is not assignable.

Case Note.—Assignability of decree for alimony: —The case reported, together with *Re Robinson*, L. R. 27 Ch. Div. 160, and *Kempster v. Evans*, 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327, the holdings in which with the reasons assigned therefor are sufficiently stated in the opinion in *FOURNIER v. CLUTTON*, appear to be the only decisions which discuss the assignability of a decree for alimony.

As bearing upon the question, however, reference may be made to *Lynde v. Lynde*, 7 L.R.A. (N.S.)

Assignment—rescission—tender.

2. A formal tender of consideration received for an assignment of a judgment is not necessary before instituting an action for its rescission, where defendant expressly refuses to accept a tender.

(November 7, 1906.)

A PPEAL by complainants from a decree in Chancery of the Circuit Court for Wayne County refusing to set aside an assignment of a decree. Reversed.

The facts are stated in the opinion.

Mr. Edward S. Grece, for appellants:

A decree for alimony cannot be assignable.

Perkins v. Perkins, 10 Mich. 425; *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; *Re Robinson*, L. R. 27 Ch. Div. 160; *Kempster v. Evans*, 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327; *Daniels v. Lindley*, 44 Iowa, 567; *Romaine v. Chauncey*, 129 N. Y. 533, 14 L.R.A. 712, 26 Am. St. Rep. 544, 20 N. E. 828.

The right to production of money in court is presumed to be waived if it was not called for.

Wetherbee v. Kusterer, 41 Mich. 359, 2 N. W. 45.

Messrs. Jeffries & Williams for appellees.

Carpenter, Ch. J., delivered the opinion of the court:

Complainant Frances L. Fournier is the divorced wife of Charles A. Fitzsimmons. The other complainants are the children of Frances L. Fournier and Charles A. Fitzsimmons. Charles and Frances were divorced May 10, 1895. By this decree it was "ordered and decreed that the defendant (Charles A. Fitzsimmons) pay to the complainant (Frances L. Fournier) the sum of \$1,000 together with the costs to be taxed in said cause, the same being in full of all rights, claims, and demands of the said complainant upon the said defendant for permanent alimony. . . . It is further ordered that the complainant have the care, custody, and education of the children, the issue of said marriage, until the further order of this court." On the 27th day of May, 1897, complainant sold, assigned, and trans-

64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694, which holds that a contract between a wife and her solicitor, providing that, for his services in procuring an allowance of alimony and enforcing its payment, he shall receive a share of the alimony recovered, is void, not only because the claim for alimony is incapable of assignment, but also because the contract is in contravention of public policy. The court says: "An examination into the history of the allowance of alimony, and the

ferred said decree to the first-named defendant for the sum of \$200. The object of this suit is to set aside said assignment on the ground that a decree for alimony is not assignable. The trial court dismissed said bill. Complainants appeal.

The briefs of counsel and my own research have enabled me to find but two cases touching the question of the assignability of decrees for alimony, viz., *Re Robinson*, L. R. 27 Ch. Div. 160, and *Kempster v. Evans*, 81 Wis. 247, 15 L. R. A. 391, 51 N. W. 327. Each of these cases holds that such a decree money assigned was an annuity not yet due. While the circumstances distinguish these decisions from the case at bar, it cannot be said that the reasoning upon which they rest is altogether inapplicable to this case. The ground of the decision in *Re Robinson* is found in these words quoted from the opinion: "The very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such as the half pay of the officers in the Army and Navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for her maintenance from time to time; and the court may alter it or take it away whenever it pleases." In *Kempster v. Evans* it is decided that a decree for alimony is not assignable because it may be modified or annulled by the court which gave it. It is ap-

proposed by the court which gave it. I think our own decisions (see *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710, and cases there cited) will prevent our holding, as did the court in *Kempster v. Evans*, that a decree for alimony is not assignable, merely because it may be modified by the court which pronounced it. Can we follow the reasoning of the court in *Re Robinson*? The ground upon which the court in that case held that an award of alimony was not assignable is, as I understand it, this; viz., that the purpose for which the law gives alimony is to secure the maintenance of the wife. I think this ground is sound, and that it is applicable to the case at bar. The reason why a wife is denied the right to assign an award of alimony intended by the law for her maintenance is not stated, but it is obvious. It is that she may not, by the exercise of that right, frustrate the purpose of the law. That the principal object for which the law awards alimony is the maintenance of the wife, or of the wife and children, is clear. That the recognition of the wife's right to assign that alimony would tend to defeat this object may be easily shown. If the wife has the right to assign her alimony, she may assign it on such terms and conditions as she may make. She may, as in this case, assign a decree for \$1,000 upon the receipt of \$200, and thus use it as a means of dissipating her husband's estate without any corresponding benefit to herself or to her children. It is not difficult to imagine instances in which the bulk of the husband's estate might thus be transferred to third persons—possibly to unworthy speculators—and the burden of maintaining his wife and children imposed upon the public. It is ap-

proposed by the court which gave it. It is also considered in *Re Le Claire*, 124 Fed. 654, in which it was held that property awarded a wife as alimony in a suit for divorce brought prior to the filing by her of a petition in bankruptcy did not become part of her bankrupt estate.

The nature of a claim for alimony was also considered in *Re Le Claire*, 124 Fed. 654, in which it was held that property awarded a wife as alimony in a suit for divorce brought prior to the filing by her of a petition in bankruptcy did not become part of her bankrupt estate.

The rights of an assignee of a claim for alimony have, however, been impliedly recognized in *Meissner v. Bergman*, 11 Ohio C. C. 539, in which it was held that where alimony in a fixed sum, payable in instalments, was adjudged in lieu of dower rights, the court would not relieve the husband from the obligation to pay instalments falling due after the death of the wife, where the wife had assigned the judgment to her daughter in consideration of care and nursing; and in *Cohen v. Cohen* (Cal.) 88 Pac. 267, which holds that the rights of a purchaser of alimony which had accrued under a decree are subject to the right of the husband to procure a vacation of the judgment as to alimony.

In *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826, the same conclusion was reached.

parent that the wife is not the only person interested in the proper application of money decreed as alimony. Her former husband, her children, and the public are also interested (see *Ferguson v. Ferguson* [Mich.] 13 Det. L. N. 453, 108 N. W. 682), and their interests would be in constant jeopardy if she could at pleasure assign such decrees. I conclude, therefore, that the law gave complainant Frances L. Fournier no authority to assign her decree for alimony.

I am not sure that act No. 230, p. 360, of the Public Acts of 1899, which makes awards for permanent alimony enforceable by contempt proceedings, has not some bearing upon the question under discussion. I think that act was passed upon the assumption that such awards were not assignable. If it were not passed upon that assumption, we must impute to the legislature the intention of giving to the assignees of such awards the right to enforce them by contempt proceedings. I find it difficult to believe that the legislature had any such intention. I do not doubt that the suggestion will occur to many who read this opinion that its effect will be injurious to the interests of the wife where she has a decree against the husband who has no present means of support, but who has such expectations that some speculator will buy her decree and advance money which will relieve her present necessities. To those who think this a legitimate criticism, we suggest that they compare the injury resulting in such instances with the benefits that will result in other instances, both to the wife and to the public generally, by the denial of her right to assign a decree for alimony. But the proper answer to the suggestion is that it is not a legitimate criticism of the opinion. It assumes that the opinion is based on the ground that it is beneficial to wives generally to be denied the right to assign their alimony. While we believe it is so beneficial, this opinion is not based on that ground. It is based on the ground, as heretofore stated, that the existence of the right to assign frustrates the purpose of the law that alimony shall be used for the maintenance of the wife, or of the wife and children.

It is urged that complainant's bill was properly dismissed on the ground that she was guilty of laches. We think this contention is answered by the case of *Ripley v. Seligman*, 88 Mich. 196, 50 N. W. 143.

It is also claimed that complainant did not tender defendant the \$200 she obtained from him, and that for that reason the decree of the lower court should be affirmed. We are convinced by the testimony that, before this bill was filed, complainant undertook to make a tender, and that she did not

do so because defendant said he would not accept it. This, in our judgment, excused a more formal tender. See *Lacy v. Wilson*, 24 Mich. 479.

The decree of the Circuit Court should be reversed, and a decree entered in this court in accordance with the prayer of complainant's bill. Complainant is entitled to costs of both courts.

OREGON SUPREME COURT.

STATE OF OREGON

v.

JOHN C. BARNES, Appt.

(47 Or. 592, 85 Pac. 998.)

Homicide—corpus delicti—proof.

1. The evidence necessary to establish the *corpus delicti* in cases of homicide must show that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed, and that the death was unlawfully caused by the party accused thereof, and by no other person.

Same—circumstantial evidence.

2. The identity of a corpse found partly consumed in a fire may, for the purpose of proving the *corpus delicti* in a prosecution for murder, be established by circumstantial evidence, such as the size of the remains, and the finding, at and near the spot where the body was found, articles known to have belonged to a person who is alleged to have been killed; the weight and sufficiency of the evidence for that purpose being for the jury to determine.

Same—lapse of time—effect.

3. That several days elapse between the finding of a corpse and, near the spot, an article known to have belonged to a certain person who is charged to have been mur-

Case Note.—Sufficiency of circumstantial evidence to identify remains found as those of person charged to have been killed:—

That the identity of the remains found as those of the person charged to have been murdered may be established by circumstantial evidence is abundantly established by the cases cited in the foregoing opinion and those subsequently cited in this note, in which evidence of this character has been held sufficient for the purpose. In *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, it was held that the identity of the victim may be established by indirect or circumstantial evidence, notwithstanding the provision of § 181 of the Penal Code, which prohibits a conviction "of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing as alleged, are each established as independent facts, the former

dered, does not render the fact of the finding inadmissible in proof of the *corpus delicti*, but it weakens its force for that purpose.

Same—evidence of murder.

4. That one whose skeleton was found in a burning pile of logs was wrongfully killed may be found from the facts that he was a healthy man, and that, from conditions in the vicinity of the fire, the body had been dragged to it, leaving bloody stains along the way.

Same—sufficiency of evidence.

5. Possession shortly after his homicidal death of articles known to have belonged to decedent, under circumstances which would justify accused's conviction of larceny, will warrant a conviction of murder,—especially when coupled with contradictory statements by accused as to the whereabouts of the missing person.

Same—evidence—remoteness.

6. Upon a trial for murder, evidence is admissible of the finding of a ring which belonged to deceased, several weeks after

by direct proof and the latter beyond a reasonable doubt." The court took the position that this provision does not require direct proof of the identity of the victim, but only of the death.

The doctrine of the last case was, upon the authority of that case, adopted in *State v. Pepo*, 23 Mont. 473, 59 Pac. 721, construing an identical provision of the Penal Code.

It is, of course, impossible to set out fully all the facts and circumstances relied upon in a particular case to establish the identity of the remains; but the following summary of the cases shows in a general way the nature and character of circumstances that have been held sufficient or insufficient to establish such identity:

In some cases, where the body was badly burned, mutilated, or decomposed, identification has been established by articles of clothing and other personal belongings found on or near the body, with little, if any, aid from the appearance of the body itself. See *People v. Palmer*, *supra* (it was so held notwithstanding the testimony of witnesses that they had seen the person alleged to have been murdered after the date of the alleged murder); *State v. Pepo*, *supra*.

In *State v. Winner*, 17 Kan. 298, it was held that the identity of the body found as that of the person charged to have been murdered was sufficiently established notwithstanding that the body was burned past recognition. The evidence and circumstances relied upon to establish the identity do not appear from the report of the case.

In other cases clothing and other personal articles as means of identification have been materially aided by the appearance of the body.

Thus, in *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53, fragments of a body found in the cabin of the person alleged to have been 7 L.R.A. (N.S.)

the commission of the crime, in a piece of tin foil which was found in a sack of potatoes belonging to accused shortly after the crime was committed, but which was not examined until the time of the finding of the ring.

Criminal law—attempt to break jail—evidence of guilt.

7. The attempt of one awaiting trial to escape from jail is a circumstance which may be considered on the question of his guilt.

(June 26, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Douglas County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. Cardwell & Watson, J. E. Sawyers, and J. A. Buchanan for appellant.

Messrs. A. M. Crawford, Attorney General, George M. Brown, and J. M. Williams for the State.

murdered were identified by evidence that the fragments, when put together, outlined, so far as they went, a man of the size and appearance of the person in question, in connection with the finding of bloody clothing that belonged to him, and of a bloody ax, the hair upon it being the color of his. This decision was rendered before the provision of the Penal Code, already referred to, had been construed not to require direct proof of the identity of the victim; and the circumstances above stated were held to constitute "direct proof" of the death of the person alleged to have been killed, within the meaning of that provision.

For the purpose of identifying a body found as that of the person alleged to have been murdered, evidence of similarity in the color of hair and whiskers, of correspondence in the measure of the body and stature, and the testimony of a dentist who had extracted teeth for him of the absence of the same teeth from the jaw of the body, and of the correspondence of marks on other teeth, were held admissible in *Lindsay v. People*, 63 N. Y. 143.

In *State v. Downing*, 24 Wash. 340, 64 Pac. 550, the body, which was so far mutilated that little was left of the physical features, was identified by its correspondence with the body of the person claimed to have been murdered in size and stature, character of teeth, color of hair and clothing, in connection with the fact that the body was found near where the person in question was last seen alive.

In *Taylor v. State*, 35 Tex. 97, the identity of the body was held to be sufficiently established by the recognition of the witnesses' description of the body by the father of the person alleged to have been killed, and the recognition of articles of clothing and certain papers found on or near the body. In the last case the court said that the law does not require any more direct or positive

Moore, J., delivered the opinion of the court:

The defendant, John C. Barnes, was indicted, tried, and convicted of the crime of murder in the first degree, alleged to have been committed in Douglas county, April 28, 1905, by killing one William Graham, in some way and manner, and by some means, instruments, and weapons, to the grand jury unknown. He appeals from the judgment of death which followed, and his counsel contend that the court erred in refusing to instruct the jury, as requested, to return a verdict of not guilty, on the ground that the evidence, which is wholly circumstantial, is insufficient to warrant a conviction.

The entire testimony given at the trial is sent up with the bill of exceptions, from which it appears that on Monday, May 1, 1905, at about 10 o'clock in the forenoon, a human skeleton was discovered in a burning log heap, a few feet east of the right-of-way fence near the railroad, about a mile and a

quarter north of Glendale. Nearly all the flesh had been consumed, and there remained of the framework intact only the skull, the vertebrae, and parts of the shoulder and of the hip bones. The structure of the skeleton indicated the death of a small person, but it was impossible to distinguish the sex. A soft black hat, having two matches stuck in the band, was found at the same time hidden beneath the loose bark of a stump near the fire. There were also discovered in the ashes, about where the hips of the skeleton lay, a three-bladed pocket knife, and near it some nails that had probably been driven in the soles and heels of the shoes worn by the deceased. In the immediate vicinity were seen some dark spots on the grass, earth, and stones, supposed to be blood stains, and the grass appeared to be lodged, as if some object had been dragged over it. After quite a number of persons had visited the place where the skeleton was found, a leather belt and a purse were discovered in the brush

proof to identify the body of a murdered man than it does to prove the murder or identify the murderer; but all should be so completely proved as to leave no reasonable doubt in the minds of the jury.

In *Johnson v. State*, 45 Tex. Crim. Rep. 453, 77 S. W. 15, where the defendant was on trial for the murder of her child, it was held that the identity of the child was sufficiently established to justify a conviction, by testimony of a witness that he found the remains of a child that looked like a negro about a year and one half or two years old, in the creek, that the skin on the body was a yellow color as if bleached by lying in the water, although he could not tell the sex, in connection with other evidence tending to show the defendant's guilty connection with the disappearance of her child.

In *Carter v. State*, 40 Tex. Crim. Rep. 225, 47 S. W. 979, 49 S. W. 74, 619, the remains were identified by certain peculiarities of moustache and forehead, and by the clothing and a piece of a broken harp found on the body.

In *Keith v. State*, 157 Ind. 376, 61 N. E. 716, it was held that it was not error to permit the father of the person alleged to have been killed, and other witnesses, to testify that a body found in a creek was that of his daughter. The court, after alluding to the fact that the hair and nails were gone; the skull fractured in many places; the eyes very deeply sunken; the nose somewhat mutilated; flesh somewhat decomposed; and the skin somewhat discolored,—said: "But there was the whole body,—contour, size, age, shape of head and face; tapering fingers; double ankles; birthmark; a certain front tooth decayed; beyond all, that indefinable impression produced by the *ensemble*."

In *Gray v. Com.* 101 Pa. 380, 47 Am. Rep. 733, the identity of a human skull and jaw-

bone found near the residence of the person alleged to have been killed was established by a lock of hair attached to the skull and the peculiarities of the jawbone, in connection with circumstances tending to show that she had disappeared about a year before the remains were found, and at a time when the prisoner, who had more than once been heard to threaten her life, was known to have been in the vicinity.

In *Wilson v. State*, 43 Tex. 472, the identity of a skeleton as that of the defendant's wife, whom he was charged with killing, was established by evidence that the skeleton was found at a time and place consistent with and suggestive of the hypothesis that it was that of the defendant's wife; that it corresponded generally with the appearance to be expected at that time in her remains; that it was the skeleton of a woman about her height; that it was the skeleton of a person who, like her, had a missing front tooth, and, according to expert testimony, of a person who, like her, was of mixed blood.

In *State v. Dickson*, 78 Mo. 439, the identity of the body, which was considerably burned, was established by the opinions of witnesses based upon resemblances of clothing, color of the hair and beard, and the absence of an upper front tooth; and by means of articles found on the body, aided by the false statement by accused to account for the disappearance of the person in question, and evidence of motive and evil intent on the part of accused. The court said that, on questions of identity, it is not necessary that the witness should swear pointedly; it is only necessary, and is a common occurrence, for witnesses to swear that they believe the person to be the same, and the degree of credit to be attached to their evidence is a question for the jury. Again, the court said it is not necessary that the remains be identified by direct and positive

about 40 feet from where the fire had been. It further appeared that Graham, the man charged to have been killed, was about 5 feet 4 inches in height, weighed about 140 pounds, usually had matches in his hat band, and always carried a large Colt's revolver in a holster made from a boot top and suspended by a leather belt. Notwithstanding the fiber part of the handle of the knife had been burned, George Wood, as a witness for the state, claimed to recognize it as Graham's property, saying he had given it to him. The hat was claimed to be identified as Graham's by S. H. Duley, who testified that he had seen him wear it. Jesse Clements testified that the belt found in the brush was the one worn by Graham by which his revolver was carried, and which the witness recognized by the clasp of the girdle being loose.

The testimony tending to connect the defendant with the commission of the crime shows that he and Graham were gold miners who were acquainted with, and had lived near, each other on Dadd's creek, Douglas county, for several months until Thursday, April 27, 1906, when Graham moved across Cow creek to Tuller's creek, several miles westerly, and was last seen as he crossed the railroad going to his new residence. The defendant on the next day borrowed a Win-

chester rifle from a neighbor, telling him that he desired to shoot a wounded deer which he had seen. That evening, as he returned with the gun, he found two men at his cabin who had been hunting for stray cattle, to whom he stated that Graham claimed to be a "bad man," and referring to the latter, he remarked: "If he makes a crooked move at me, I will kill him." He further stated to his visitors that they need not arise when he did the next morning for he was obliged to get up early so as to meet a man at a tunnel on the railroad. Barnes left his cabin Saturday morning about 4 o'clock, taking the rifle with him, and five hours thereafter he was in the town of Glendale, 10 miles southerly, where he paid a bill which he owed a merchant and received a sum of money in exchange for a piece of cast gold that had been molded by and belonged to Graham, the identity of which was unquestionably established. The defendant left that town soon thereafter, and was seen at several points as he walked northerly along the railroad to a section house near his home, where he secured his supper. He returned to Glendale that night and became intoxicated, leaving two packages in the saloon where he had been imbibing. The next day, Sunday, April 30th, he was seen on the railroad carrying a Win-

proof; it suffices if the circumstantial evidence establishes the identity in a manner so satisfactory as to leave no room for reasonable doubt on that point.

In all of the foregoing cases, doubtless, the means of identification by the appearance of the body, or by clothing or other personal belongings found on or near the remains, were aided by other circumstances tending to create a more or less strong probability that the remains found were those of the person claimed to have been murdered. In some cases identity seems to have been established mainly by such circumstances, even when the body was so mutilated, burned, or decomposed as to furnish but little, if any, aid to identification, and notwithstanding that there were no personal belongings found on or near the body to aid identification.

Thus, in *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, it was held that the identity of a badly charred body as that of the Chinaman alleged to have been killed was sufficiently established to warrant a conviction by testimony that the house where the body was found was used by him as a Chinese washhouse; that the washhouse was being used as usual on the day of the homicide; that some human being therein was killed, and that the house was consumed by fire after the homicide; it further appearing that there were usually but three persons in the house, and that the person in question had never been seen since the destruction of the house, whereas both of the 7 L.R.A. (N.S.)

other occupants had been seen and were alive.

In *State v. Calder*, 23 Mont. 504, 59 Pac. 903, where a few teeth and charred bones were identified as those of an adult human being, the testimony of an accomplice as to the identity of the person killed was held to be sufficiently corroborated by the circumstances tending to show the disappearance of the person charged to have been murdered, and to create a strong probability that he was murdered, although there seems to have been nothing found in connection with the remains which would in any way indicate their identity.

In Texas identification without aid furnished by the appearance of the remains, or some part thereof, seems to be impossible, since it is provided by the Penal Code (art. 549) of that state that "no person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed." It has been held in *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929, under this provision, that the identity was not sufficiently established to sustain a conviction of the murder of a newly born infant, by the testimony of the mother of the child that, after she had seen the defendant, as she supposed, place the child on the fire, some bones were found in the fireplace, it not being shown whether or not they were the bones of a human being.

chester rifle, and, meeting a man who appeared as a witness at the trial herein, he told him he had been hunting, describing the route he claimed to have traveled. Barnes returned the rifle that day and paid the man from whom he borrowed it 10 cents for the cartridges he had used. About noon that day the defendant engaged one G. L. Hittsman to help him carry some provisions that had come by rail up a hill towards his cabin, and as they halted for a moment's rest Barnes, unwrapping a package, exhibited a revolver, whereupon his companion, referring to Graham, said, "You have got Bill's gun," and the defendant replied, "Oh! yes; I bought it from Bill." Sunday evening Barnes went south on the train towards Glendale. The next morning, May 1, 1905, which will be remembered as the day when the skeleton was found, he called at a saloon in that town about 5 o'clock and, waking the barkeeper, he secured a drink of whisky. At 1 o'clock that day he was about a mile and a quarter north of Glendale, where he met one W. H. Pruett, to whom he stated that Graham had gone to Mule creek, a tributary of the Umpqua river, prospecting, and that he had purchased from him some sluice boxes and was going to his cabin after them. Pruett told him the boxes referred to never belonged to Graham, but had been owned by

another person from whom the narrator purchased them. Barnes, upon receiving this information, remarked: "I am so damned tired and sore that I won't go any further. When you see Bill (meaning Graham), tell him that I got this far with you and turned around and went back." Whereupon he departed. The defendant on Tuesday night told a hotel keeper at Glendale that Graham, possessing a few dollars, had gone to California, and, referring to the nails discovered in the ashes, he further said if Graham was found he would have on old rubber boots. The sheriff of Douglas county, on Friday, May 5, 1905, visited Graham's cabin, which was locked; but, opening it, he found the bed in order, some wearing apparel, provisions, dough mixed for bread, water left in pails, and two pairs of rubber boots. The following Sunday Barnes was apprehended at his cabin, underneath which there was then found wrapped in a gunny sack a pistol that was identified as Graham's and referring thereto the defendant, though claiming to have owned the gun several years, said to the sheriff and to the men accompanying him: "I put the revolver there, and I did not expect you fellows to find it." At the time the arrest was made, the defendant's cabin was searched, and in emptying a sack of potatoes a chunk of tin foil rolled out and

And it was held in *Lightfoot v. State*, 20 Tex. App. 77, that the circumstances relied upon to identify a body found in the water were insufficient in view of the fact that the person charged to have been killed was a negro, whereas the body when found was perfectly white, there being a diversity of opinion between the medical experts of the prosecution and defense whether the effect of the water for the length of time the body was supposed to have remained therein would be to whiten the skin.

So, in *Gay v. State*, 42 Tex. Crim. Rep. 450, 60 S. W. 771, identity was held not to be sufficiently established where about a tin cupful of bones, with buttons, brads, and a tuft of hair, were found, the bones being identified as those belonging to a human being, by experts who, however, were unable to tell whether the bones were those of a white man, Mexican, negro, or Indian, although one of the experts, a dentist, stated that the size of the teeth indicated that they were those of a man; it further appearing that the tuft of hair, which contained from 50 to 70 strands, showed no gray hair, whereas the hair of the person alleged to have been murdered was intermingled with gray.

In *Walker v. State*, 14 Tex. App. 609, the identity of a skeleton as that of the murdered man was sought to be established by articles of clothing and other articles found upon the same; but the evidence to identify such articles as belonging to such person was unsatisfactory, and the proof of the 7 L.R.A. (N.S.)

identity was therefore held insufficient to meet the requirements of the article of the Penal Code already above referred to.

In *Smith v. Com.* 21 Gratt. 809, it was held that the identity of the body of an infant as that of the infant charged to have been murdered was not sufficiently established by the circumstances relied on. The court called special attention to the testimony that the infant alleged to have been killed was a bright mulatto, whereas the description of the body found was merely that it was a mulatto, and that the clothing on the body of the dead child was not identified as that which was worn by the child alleged to have been murdered.

In all of the foregoing cases the circumstances of a positive nature relied upon to establish identification were aided to a greater or less degree, depending upon the time elapsed, by the negative circumstance of the disappearance of the person charged to have been murdered, although, as above shown, in one case in which a conviction was sustained this negative circumstance was not left without contradiction.

The question as to the sufficiency of circumstantial evidence to establish the death of the person charged to have been murdered, when there is no claim that his remains have been found, presents another question, which has not been touched upon in this note.

fell to the floor; but, without any examination, it was picked up and placed with the potatoes in the sack which had contained them. The sheriff, about May 31, 1905, took the defendant's goods and provisions from his cabin to the house of a neighbor, who, taking potatoes from a sack which had been so brought to him, saw a piece of tin foil which he swept with the dust into a fireplace where it remained until the 17th of the next month when, concluding to make solder of the foil, he picked it up and unrolled it, discovering inwrapped therein a diamond ring that had belonged to, and been worn by, Graham. The defendant gave no testimony at his trial and called only two hardware dealers, who as witnesses severally testified that the knife, the parts of which were found in the ashes, and the revolver that was discovered beneath Barnes's cabin were generally kept and sold by merchants engaged in their trade. It also appeared that, while the defendant was incarcerated in jail awaiting trial on the charge of which he was convicted, he attempted to escape.

It is argued by defendant's counsel that the evidence hereinbefore detailed, which we deem a fair statement of that given at the trial, is insufficient to establish either the death of William Graham, the person charged to have been killed, or the criminal agency of the defendant. In *State v. Williams* (Or.) 80 Pac. 655, it was held that circumstantial evidence alone was sufficient to prove the death of the person alleged to have been killed, and also the criminal agency of the party accused of the commission of the offense. In that case the person charged to have been killed was last seen in the presence of the defendant in that action, and there were found in what was supposed to have been a temporary grave gunny sacks that had been saturated with a liquid which, by chemical analysis, was claimed to have been human blood, and also a lock of a woman's hair which was recognized as that of his alleged victim. The evidence necessary to establish the *corpus delicti* in cases of homicide must show (1) that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed; and (2) that the death was unlawfully caused by the party accused thereof, and by no other person. In *Campbell v. People*, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123, it was held that the *corpus delicti* might be proved in a prosecution for murder by circumstantial evidence where that was the best proof obtainable; but that great caution should be observed in acting upon it.

Reviewing the evidence introduced in the 7 L.R.A. (N.S.)

case at bar, to prove the first element stated, Dr. W. H. Dale, a licensed practising physician, and a graduate of a reputable medical college, who was a witness at the coroner's inquest, testified that he was positive the skeleton found in the burning log heap was the remains of a human being. As to the identity of the remains, it is not necessary that the evidence should be direct and positive, where such proof is impracticable. *Wills*, Circumstantial Ev. 6th Am. ed. 213; *Taylor v. State*, 35 Tex. 97. Thus, in *Rex v. Clewes*, 4 Car. & P. 221, a carpenter's rule and the remains of a pair of shoes found near a skeleton were in part the means used to identify the relics of a man who had been buried twenty-three years. In *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, the metallic teeth of a person found in a furnace were held sufficient to prove the identity of a person charged to have been killed. In *State v. Williams*, 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248, the charred remains of a missing woman were identified by the finding of certain hair pins with the bones and proof that the deceased was in the habit of wearing such pins two or three years prior thereto. In *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247, the identity of a child was proved by finding a number of small bones, locks of short curly black hair, and a small calico bonnet. So, too, in *State v. Martin*, 47 S. C. 67, 25 S. E. 113, the identity of the charred remains of a person was established by finding in the ashes with the skeleton a piece of burned cloth like the woven fabric of which his trousers were made, and which he wore at the time of his disappearance, and by discovering in the same place a slate pencil with certain indentations thereon. In the case at bar the witness George Wood, referring to the knife found in the ashes, in answer to the direction: "Tell the jury why you know the knife," said: "I know the knife by the shape, the make, and by the defects in it. The knife was always loose in the springs here, and hard to open. That is the reason that I gave it to Graham."

It is argued by defendant's counsel that, the fire having consumed a part of the handle of the knife, the heat was sufficiently intense to injure the springs, and, this being so, the witness could not recognize the instrument which was commonly sold by hardware dealers, and hence the skeleton was not identified as the remains of Graham. The testimony so given by Woods was competent, and its adequacy was a question which the jury were called upon to determine. *Udderzook v. Com.* 76 Pa. 340. The hat which was found beneath the loose bark of an old stump near the fire, at the time

the skeleton was taken from the ashes, was identified as the head covering worn by Graham, whose habit it was to carry matches stuck in his hat band. The finding of two matches so placed in the hat referred to affords corroborative evidence of the identity of the person who carried them in this peculiar manner. So, too, the finding of the belt in the brush, though not discovered until several days after the fire, was identified as Graham's girdle. The finding, near the remains of a human being of property that is recognized as having belonged to a missing person is a circumstance tending to identify the body of the deceased. It is possible, however, that such property may have been purposely placed by its owner where it was found to induce the belief that a living person is in fact dead, or that such personal chattels were intentionally put in the place indicated to create an inference of the identity of the deceased where doubt on that subject exists. The degree of proof resulting from such discovery necessarily depends upon the opportunity which time and interest afford a designing person to manufacture evidence. The finding of the belt several days after the inquest was held, when there had been time and chance to create an inference of the identity of the deceased, weakens the evidence which the circumstance of the discovery would ordinarily produce, if seasonably made. Such evidence was admissible, and it will be presumed, in the absence of any showing to the contrary, that the court correctly instructed the jury as to the degree of proof which the circumstances adverted to furnished. It will be remembered that the parts of the skeleton found in the burning log heap indicated the remains of a small person. This fact, alone, is not controlling on the question of identity, for the human framework discovered might have been that of any person corresponding in stature with Graham (*Com. v. Webster*, supra); but, when this circumstance is considered in connection with the other attending conditions, we think the jury were authorized in concluding, as the verdict implies, that the remains were those of the person charged to have been killed. The consumption of a human body by fire does not necessarily repel an inference of suicide or of an unintentional death, for the dissolution may have been caused by purposely leaping or accidentally falling into a fire, or by being unable to escape from a burning building. So, too, a human body may be destroyed by that means after death has resulted from natural causes. The finding of the remains of a healthy person, like Graham, in a burning log heap, where escape was possible in case contact with the fire was accidental, and

probably where immediate intense pain resulting from the flame would cause an abandonment of an attempt at self-destruction, must necessarily repel every inference of death by means of such a fire. This conclusion is fortified by the testimony of a locomotive fireman who said that on Monday, May 1, 1905, at about 2:20 A. M., he saw, on the east of the railroad, about a mile and a quarter north of Glendale a fire and a man standing by it. From this declaration under oath it would seem to appear that the fire which consumed Graham's body was not ignited by him. The evidence of what was supposed to have been blood stains in the vicinity of the ashes, and the appearance of the grass and weeds indicating that some object had been dragged towards the fire, thereby lodging the vegetation and staining the right-of-way fence with blood, warranted the jury in concluding that Graham's death did not result from natural causes, or from suicide.

This brings us to a consideration of that branch of the question which involves the criminal agency. It will be remembered that on Saturday, April 29, 1905, at about 9 o'clock in the morning the defendant paid a bill which he owed a merchant in Glendale by giving a piece of gold that had belonged to Graham. The next day Barnes exhibited a revolver to the witness Hittsman, saying he had purchased it from Graham, which gun was found when the defendant was arrested hidden beneath his cabin. At the time the revolver was found there was also seen in a sack of potatoes in Barnes's cabin a piece of tin foil. These potatoes were taken to a neighbor's house and emptied, there dropped from the sack a piece of tin foil, which being thereafter unrolled, a diamond ring was discovered that had belonged to Graham. In *Williams v. Com.* 29 Pa. 102, it was held that an instruction, directing the jury to infer the commission of the crime of murder from the possession of stolen articles, where the evidence was adequate to warrant a conviction of the latter crime, correctly stated the law applicable to the facts involved. In deciding that case, Mr. Justice Porter, comparing the instruction referred to with another that had been given, says: "In that portion of the charge which treats of the possession of the coin, and the right of the jury to infer a higher crime from the possession of stolen articles, sufficient to convict the defendant of larceny, we see as little to condemn. If criminal offenses are to be punished, circumstances like these must be laid hold of to prove them." In *Poe v. State*, 10 Lea, 673, a similar instruction was given at the trial of the plaintiffs in error, who were charged with the commission of

the crime of murder in the first degree, and it was held that no error was committed, the court saying: "In fact, the recent possession of stolen articles under these circumstances would not merely be a strong circumstance, but raise a presumption of guilt, upon which the jury should convict." So, too, in *State v. Anderson*, 10 Or. 448, a pocketbook containing money that had belonged to a person alleged to have been killed having been found in the possession of the defendant was considered as tending to establish his criminal agency.

An exception was taken by defendant's counsel to the admission of testimony as to the finding of Graham's diamond ring, on the ground that the circumstance was too remote, indefinite, and uncertain. In *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757, testimony of the finding in a well, of a watch, the property of a person charged to have been killed, several months after the alleged murder, was held admissible in connection with other evidence proving that on the day the defendant was arrested he had access to the well and could have thrown the watch into it. It will be remembered that on the day Barnes was arrested there was found in his sack of potatoes a small roll of tin foil, the identity of which was reasonably accounted for, which, being unwrapped, revealed Graham's diamond ring. Evidence of this circumstance in connection with the others was, in our opinion, admissible. In the case of *State v. Anderson*, supra, the defendant's contradictory statements as to the whereabouts of the missing person were also regarded as tending to create an inference of his guilt. In the case at bar Barnes stated that Graham had gone to Mule creek prospecting, and afterward that he had gone to California, saying that Graham had a few dollars, thereby implying that he was able to travel by rail. As Mule creek is situated west of Glendale and California south of that town, it was possible for a person going to the former place to continue his journey to the sister state; but, as the travel by rail is so much easier and speedier than journeying over the mountains, the defendant's declarations should be considered as tending to incriminate him. *State v. Reed*, 60 Me. 550. The defendant having attempted to escape from the jail in which he was confined, awaiting trial on the charge of which he was convicted, is also a circumstance slightly tending to prove his guilt. Circumstantial evidence is legal and competent in the gravest kind of criminal cases; and, if it is of such a character as to exclude every reasonable hypothesis, other than that the party accused of the commission of the offense is guilty thereof, it is sufficient to authorize a conviction.

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Believing that the attending circumstances adverted to are of the character indicated, and that other alleged errors that have been assigned are unimportant, the judgment is affirmed.

SOUTH CAROLINA SUPREME COURT.

MRS. R. M. TURNER, Resp't.,
v.
SOUTHERN RAILWAY COMPANY, Appt.

(— S. C. —, 54 S. E. 825.)

Damages—loss of baggage—trouble and expense.

Damages for loss of baggage by a carrier cannot include the trouble and expense of trying to locate it, or in purchasing other wearing apparel to replace that lost, in the absence of notice to the carrier at the time of delivering the baggage to him of facts which would render special damages probable.

(August 10, 1906.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Cherokee County in plaintiff's favor in an action brought to recover damages for the loss of baggage delivered to defendant for transportation. Reversed.

The facts are stated in the opinion.

Messrs. Sanders & DePass, for appellant:

The amount expended by plaintiff in the purchase of other clothing, because of the loss of her trunk, is not an element of damage. So, expenses incurred by the plaintiff

Case Note.—Right to recover expenses or damages incidental to loss of, or delay in delivering, baggage:—The generally accepted rule is that the measure of damages for loss of baggage by a carrier is the value of the articles lost. *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212; *New Orleans, J. & G. N. R. Co. v. Moore*, 40 Miss. 39; *Spooner v. Hannibal & St. J. R. Co.* 23 Mo. App. 403; *Texas & P. R. Co. v. Taylor*, 3 Tex. App. Civ. Cas. (Willson) § 192; *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 765; *Provencher v. Canadian P. R. Co.* Montreal L. Rep. 5 S. C. 9.

Hotel expenses incurred while waiting for the baggage to arrive are not recoverable. *Provencher v. Canadian P. R. Co.* supra.

Nor expenses incurred in searching for the lost baggage. *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671; *Spooner v. Hannibal & St. J. R. Co.* supra.

But in *Texas & P. R. Co. v. Ferguson*, 1 Tex. App. Civ. Cas. (White & W.) § 1254, a request to charge that plaintiff was not entitled to recover damages for expenses incurred in searching for his baggage, further than such expenses necessarily incurred in ascertaining whether said baggage had

in endeavoring to rescue or find the property are too remote.

2 Fetter, Carr. Pass. ¶ 653, p. 1553; 3 Thomp. Neg. ¶ 3470; Ray, Negligence of Imposed Duties, Pass. Carr. ¶ 204, p. 745; Texas & P. R. Co. v. Ferguson, 1 Tex. App. Civ. Cas. (White & W.) § 1253; Fraloff v. New York C. & H. R. R. Co. 10 Blatchf. 16, Fed. Cas. No. 5,025; Illinois C. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Anderson v. North-Eastern R. Co. 4 L. T. N. S. 216; New Orleans, J. & G. N. R. Co. v. Moore, 40 Miss. 39; Mississippi C. R. Co. v. Kennedy, 41 Miss. 671; Spooner v. Hannibal & St. J. R. Co. 23 Mo. App. 403; 3 Sutherland, Damages, 2d ed. § 955.

Messrs. Butler & Osborne, for respondent:

This is an action for tort, and not one on contract. The rule as to proper elements of damages is different from that for mere breach of contract.

Pickens v. South Carolina & G. R. Co. 54 S. C. 498, 32 S. E. 567; Devereux v. Champion Cotton Compress Co. 17 S. C. 73.

Even remote damages are allowed where they are the direct and proximate result of the tort complained of.

Pickens v. South Carolina & G. R. Co. supra; Sitton v. Macdonald, 25 S. C. 71, 60 Am. Rep. 484; Devereux v. Champion Cotton Compress Co. supra.

reached its destination, was held to be erroneously refused. And compare Morrison v. European & N. A. R. Co. infra.

In an action for damages for loss of baggage, evidence of the expenditure by the plaintiff for wearing apparel to take the place of that lost is improper. Merrill v. Pacific Transfer Co. 131 Cal. 582, 63 Pac. 915; New Orleans, J. & G. N. R. Co. v. Moore, supra.

In the absence of special circumstances, consequential damages are not recoverable. Thus, where the plaintiff did not inform the carrier that he was a dentist, and that his baggage contained the implements of his profession, and that, in case they should be lost, he would be unable to pursue his vocation, he cannot recover profits which he might have made in the practice of his profession if his baggage had not been lost. Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

And, where it is not alleged that the carrier was informed of the facts which would render such damages probable in event of the loss of the baggage, no recovery can be had for the loss of an engagement as teacher of a school, and for loss of pay as a preacher. Texas & P. R. Co. v. Taylor, supra.

The measure of damages recoverable for delay in the transportation of baggage is the value of its use during such delay. St. Louis, I. M. & S. R. Co. v. Hindsman, 1 Tex. App. Civ. Cas. (White & W.) § 204; Texas & P. R. Co. v. Taylor, 3 Tex. App. Civ. Cas. (Willson) § 192; Gulf, C. & S. F. R. Co. v. 7 L.R.A. (N.S.)

In actions for negligence for loss of baggage the defendant is liable for all damages that naturally and proximately follow as a result of the tort and for any expenses or other damage the owner may suffer by reason of the tort.

Nettles v. South Carolina R. Co. 7 Rich. L. 190, 62 Am. Dec. 409; Foard v. Atlanta & N. C. R. Co. 53 N. C. (8 Jones, L.) 235, 78 Am. Dec. 277; Teague v. Southern R. Co. 45 S. C. 32, 22 S. E. 779; Sitton v. Macdonald, supra; Wall v. Atlantic Coast Line R. Co. 71 S. C. 337, 51 S. E. 95; 3 Am. & Eng. Enc. Law, pp. 584, 585; Morrison v. European & N. A. R. Co. 15 N. B. 295; Texas & P. R. Co. v. Ferguson, 1 Tex. App. Civ. Cas. (White & W.) § 1253; Texas & P. R. Co. v. Taylor, 3 Tex. App. Civ. Cas. (Willson) § 192; Hart v. Charlotte, C. & A. R. Co. 33 S. C. 434, 10 L.R.A. 794, 12 S. E. 9; 8 Am. & Eng. Enc. Law, pp. 614, 615.

Mere inconvenience, where it is alleged and shown to be a result of negligence, may be considered as an element of damage by the jury.

Milhous v. Southern R. Co. 72 S. C. 450, 110 Am. St. Rep. 620, 52 S. E. 41; Central R. & Bkg. Co. v. Strickland, 90 Ga. 562, 16 S. E. 352; Rountree v. Atlantic Coast Line R. Co. 73 S. C. 272, 53 S. E. 424; Young v. Western U. Tele. Co. 65 S. C. 93, 43 S. E.

Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303; Texas & P. R. Co. v. Douglas (Tex. Civ. App.) 30 S. W. 487.

Hotel expenses incurred while waiting for the baggage to arrive, and the expense of a journey which was rendered abortive by the want of business papers which were among the baggage, are not recoverable. Morrison v. European & N. A. R. Co. 15 N. B. 295.

Nor are expenses incurred by the plaintiff in searching for the baggage. St. Louis, I. M. & S. R. Co. v. Hindsman, supra. Contra, Morrison v. European & N. A. R. Co. supra, in which it was held that a reasonable expense of searching, telegraphing, and cab hire in going to the carrier's office is recoverable.

Expenses incurred by the plaintiff in the purchase of clothing and for laundry while waiting for the delivery of baggage are too remote to enter into the measure of damages. Texas & P. R. Co. v. Douglas, supra.

In the absence of special circumstances, consequential damages arising from delay in delivering baggage are not recoverable. Thus, it was held in Texas Mexican R. Co. v. Willis, 3 Tex. App. Civ. Cas. (Willson) § 71, and Katz v. Cleveland, C. C. & St. L. R. Co. 46 Misc. 259, 91 N. Y. Supp. 720, that, where it does not appear that the particular loss was within the contemplation of the parties as a contingency which might follow delay in delivering baggage, no recovery can be had for loss of time and profits by a salesman whose trunk containing samples is delayed in transportation.

448; *Marsh v. Western U. Teleg. Co.* 65 S. C. 430, 43 S. E. 953.

Woods, J., delivered the opinion of the court:

The plaintiff alleged in her complaint the loss by the defendant of her trunk and its contents, which the defendant had undertaken to carry for her as a passenger on its road from Salisbury, North Carolina, to Memphis, Tennessee. In addition to the value of the trunk and the wearing apparel which constituted its contents, the plaintiff sought to recover for "the trouble, annoyance, worry, and expense" in trying to locate the trunk and in communicating with defendant about it, in being deprived of the use of the trunk and its contents, and in having to purchase other wearing apparel. The motion made to strike out all allegations of the complaint referring to the claim for trouble, annoyance, worry, and expense, was granted by consent as to annoyance and worry, but refused as to trouble and expense incurred as above set forth. The charge to the jury as to defendant's liability for such trouble and expense was in accordance with this ruling. The jury found a verdict for \$360, the entire amount claimed, which necessarily included \$150 claimed on account of trouble and expense, in addition to the value of the baggage. The question made by appeal is whether, in case of complete loss of baggage, no previous notice being given to the carrier of special circumstances, the recovery would be limited to the actual value, without taking into the account any expense or trouble incurred in the effort to recover it, or in being deprived of its use, or in purchasing other apparel. The general rule is that the carrier is liable for the value only, not necessarily, however, the market value, but the value of such property for the use of the owner. *Wood v. Maine C. R. Co.* 99 Am. St. Rep. 385, note (98 Me. 98, 56 Atl. 457); *Fairfax v. New York C. & H. R. R. Co.* 73 N. Y. 167, 29 Am. Rep. 119; *Houston, E. & W. T. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437; *Cooney v. Pullman Palace Car Co.* 121 Ala. 368, 53 L.R.A. 690, 25 So. 712; 3 Am. & Eng. Enc. Law, p. 584; 6 Cyc. Law & Proc. p. 676.

This is the application to loss of baggage of the general rule recognized in this state, that the measure of damages for loss of goods by a carrier is their value at the place of destination. *Wallingford v. Columbia & G. R. Co.* 26 S. C. 268, 2 S. E. 19. The case of *Nettles v. South Carolina R. Co.* 7 Rich. L. 190, 62 Am. Dec. 409, has been referred to as controlling authority for the proposition that in case of loss of goods the owner may recover, not only the value of

goods, but any other loss or expense occasioned by the failure to deliver. The court does say in that case: "The defendants were, by the contract, which, as common carriers, they made with the plaintiff, bound to deliver the goods in Camden within a reasonable time. *Raphael v. Pickford*, 5 Mann. & G. 551. After the expiration of the reasonable time, without disproof of negligence on their part, they became answerable for the wrong of nondelivery; and, if nothing more had appeared, the measure of damages would have been the value of the goods at the place where they should have been delivered, together with any reasonable loss and expenses which had been directly occasioned by the wrong." That case, however, did not involve the measure of damages for loss of goods, but for delay in transportation, the instruction to the jury being approved, the plaintiff ought to have received the goods when tendered and claimed the damages which he had sustained from nondelivery in time, and that the verdict must be less than the value of the goods, as it could only cover damages for delay in delivery. The verdict of \$100 was sustained as a measure of the loss and expense due to delay in transportation, not embracing nor reaching the value of the goods, but, on the contrary, as being less than the value. The case of *Wall v. Atlantic Coast Line R. Co.* 71 S. C. 337, 51 S. E. 95, the decision of which was rested on *Nettles v. South Carolina R. Co.* was very peculiar. The verdict in the magistrate's court was for \$75. The circuit judge reduced the judgment to \$55, which was near the value of the baggage, but he also ordered a valise produced by the defendant at the trial as the lost baggage to be delivered to the plaintiff. There was evidence that the valise which was checked in June contained wearing apparel for summer, which was out of season and of little value when it was tendered in October, and, while both sides appealed, there was no exception to the order requiring the delivery of the valise to the plaintiff. The judgment of the circuit court was regarded as a judgment for the return of baggage delayed in transportation and damages fixed as a finding of fact by the circuit court for the failure to deliver from June to October; the evidence being that there had been great deterioration, in addition to the deprivation of the use. The case was one of great doubt, even under these peculiar facts, and is not to be regarded as authority for holding that anything more than the value of lost baggage may be recovered of a carrier in the absence of information to the carrier of facts which would render probable special damages.

The judgment of this court is that the judgment of the Circuit Court be reversed

unless the plaintiff shall, within thirty days, remit from the verdict \$150, the amount embraced therein over and above the value of the baggage.

TEXAS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY et al., Pliffs. in
Err.,

v.

C. B. THOMPSON.

(— Tex. —, 97 S. W. 459.)

Conflict of laws—contract governing master's liability.

The statute of a state where the action is brought to recover damages for injuries to an employee, making void unreasonable contracts for notice of the injury to the employer as a condition to maintaining

an action in such cases, is not applicable to affect a contract valid in the sister state where made, and in that where the injury occurred, in the absence of anything to disclose a legislative intent to make it applicable to such contracts.

(November 14, 1906.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Tarrant County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. N. H. Lassiter, Robert Harrison, and J. H. Barwise, Jr., for plaintiffs in error.

Messrs. Stewart & Templeton for defendant in error.

Case Note.—Law governing stipulation in contract making notice of damages a condition of right of action:—As intimated in the foregoing opinion, there are two possible theories upon which the court might have refused to enforce the stipulation in question notwithstanding that it was valid by the proper law of the contract: (1) That the stipulation pertained to the remedy, and was therefore governed by the law of the forum; (2) that the law of Texas on the subject embodied such a distinctive public policy as to forbid the courts of that state to enforce a stipulation not in conformity therewith, although valid by its proper law.

In *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L.R.A. 685, 32 S. W. 168, 36 S. W. 18, a stipulation, in a contract made in Kentucky for the transportation of a car load of cattle from a point in that state to a point in Ohio, providing that written notice of an injury to the cattle or claim for damages must be given before the cattle were unloaded or mixed with other cattle, was held void because in violation of a provision of the Kentucky Constitution; the court stating that the stipulation, being void where it was made, was void everywhere. This case, by reason of the language just referred to, affords some support for the position taken in the above case, that such a stipulation relates to the substance of the contract, and not to the remedy merely. The case, however, is not authoritative on that point, for the reason that Kentucky was both the forum and the place where the contract was made.

The Kentucky case is obviously no authority upon the question whether a provision in a local statute or Constitution, invalidating stipulations of this kind, is such a part of the distinctive policy of the forum as to prevent its court from enforcing such a stipulation in a contract valid by its proper law.

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It is true that if, as appears to have been the case, the action in *CHICAGO, R. I. & P. R. Co. v. THOMPSON* was *ex delicto*, the rights of the parties would in general be determined by the law of Oklahoma, where the tort occurred. The court, however, was right in assuming that any defense depending upon the contract would be determined by the proper law of the contract. See 2 *Parmele's Wharton*, *Confl. L.* § 478b. The contention that the law of Kansas governed would have had a better foundation if the contract had required that, under all circumstances, the notice should be given in that state. As shown in §§ 427l and 471c of the work already referred to, the courts generally make the intention of the parties, expressed or presumed, the ultimate criterion of the governing law with respect to the validity or invalidity of a particular provision or stipulation measuring the rights and duties of the parties; and, as shown in § 427p, the presumption, in the absence of anything to the contrary, is that the parties contract with reference to the law of the place of performance with respect to matters connected with the performance of the contract.

And it is to be observed, in this connection, that different parts of a contract may have different places of performance. In the case of *Vanco De Sonora v. Bankers' Mut. Casualty Co.* 124 Iowa, 576, 104 Am. St. Rep. 367, 100 N. W. 532, for example, the court, without undertaking to determine the place of performance for other purposes, or the governing law in general, of a contract insuring a Mexican bank against loss in shipments of money between points in the United States, or between the United States and Canada, held that the law of Mexico determined whether one was an adult for the purposes of a provision in the contract requiring that the packing and sealing of the packages containing the money be witnessed by two adults, upon the ground that the particular part of the contract re-

Williams, J., delivered the opinion of the court:

The defendant in error applied for and received from plaintiffs in error at Chickasha, Indian territory, employment in the capacity of brakeman. His application, which constitutes part of the contract of employment, contained this stipulation: "In further consideration of my employment, I agree that if, while in the service of the said company, I sustain any personal injury, for which I shall or may make claim against said company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to the general claim agent of said company, at Chicago, for injuries occurring in Illinois or Iowa, and to the general attorney of said company, at Topeka, for injuries occurring elsewhere on the system, which notice shall state the time, place, manner, and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly, and promptly investigated; and my failure to give notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries." He was afterwards, in Oklahoma territory, hurt while performing his duties to plaintiffs in error under the contract, and brought this action and recovered the judg-

ment before us for damages upon the ground that his injury resulted from the negligence of defendant in failing to exercise proper care in keeping its track in safe condition. At the trial the defendant offered in evidence the contract above stated, together with evidence to show that it was valid under the laws of the Indian territory and of Oklahoma, and that the notice had not been given as agreed upon; all of which facts had been pleaded in the answer. This evidence was excluded upon the objections urged by the plaintiff. The court of civil appeals held that this ruling was justified by article 337 of the Revised Statutes of 1895 of this state, which provides: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void; and, when any such notice is required, the same may be given to the nearest or any other convenient local agent of the company requiring the same. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is specially pleaded under oath."

The stipulation was regarded by the court

lating to packing and sealing was to be performed in Mexico. The fact, however, that for injuries occurring in Illinois or Iowa the notice was to be given to the agent at Chicago, militates against the contention that the law of Kansas should govern, since it would be unreasonable to impute to the parties an intention that the governing law in respect of this provision of the contract should depend upon the law of Illinois or of Kansas, depending on the place where the injury was sustained. A somewhat analogous question has arisen with respect to carriers' contracts for the transportation of goods from a point in one state to a point in another state. In a few cases of this kind the courts have conceived of the contract as divisible into parts corresponding to the various places of performance, and as thus (upon the principle that the law of the place of performance governs) subjected successively to the law of the place where the transportation commences, to that of each place through which it extends, and to the place of destination. See *Carpenter v. Grand Trunk R. Co.* 72 Me. 388, 39 Am. Rep. 340; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42, and note in 63 L.R.A. 516. The vast majority of the cases, however, take the view that a carrier's contract of this kind is entire and indivisible, and that any provision therein of

a general nature, *e. g.*, a stipulation limiting the carrier's common-law liability, which may be called into operation by an act or event occurring at the point of departure, at any point along the line of carriage, or at the point of destination, is governed by a uniform law, and that the governing law does not depend on the place of the occurrence, act, or event by which the provision is called into operation. See note to 63 L.R.A. 517. It has been held, however, that this principle does not apply with respect to the provisions of the local law, or stipulations in the contract that have exclusive reference to matters affecting the rights and duties of the parties at destination, *e. g.*, the question as to the continuance of the carrier's liability as such. See *Springs v. South Bound R. Co.* 46 S. C. 104, 24 S. E. 166, and note in 63 L.R.A. 519. If the provision in the *Thompson Case* had required the claim under all circumstances to be presented in Kansas, the case would perhaps have been analogous to the carrier cases last referred to. In view, however, of the fact that the claim was to be presented in Illinois or Kansas according to the place of the injury, the analogy is rather with the class of cases that fall within the general principle which refers carriers' contracts to a uniform law.

Assuming, in accordance with the general principle already stated, that the parties are presumed to have intended that this

of civil appeals as affecting only the remedy, in analogy to the statute of limitations, and as being controlled by the law of the forum. The evident purpose of the stipulation was to secure notice to the employer of the claim of the servant that it was liable for an injury suffered by him in order that an opportunity might be given for prompt investigation and ascertainment of the facts affecting the claim. *Phillips v. Western U. Teleg. Co.* 95 Tex. 643, 69 S. W. 63. It fixes no time within which suit must be brought after notice has been given, leaving the plaintiff free to sue within the time allowed by law. But it attaches to the failure to give the notice the effect of "a bar to the institution of any suit on account of such injuries." The bar is not to arise from lapse of time merely, but from the failure to do that which the parties agreed on as essential to the right to have a determination by suit of the question of liability for the injury. Its effect, if enforced according to its terms, was either to prevent the accrual of liability, or to put an end to all further question of liability after the expiration of the prescribed time without notice. Whether it had the effect first mentioned, as contended by plaintiffs in error, or the latter, as contended by defendant in error, is wholly immaterial to the present inquiry. In either view it acts upon the substantive rights of the parties, and not upon the mere mode and time of

their enforcement in the courts. Had it been only an agreement, valid both in Oklahoma and in the Indian territory, to fix a period within which suit must be brought, we should have the question, which we need not consider, whether the time so fixed or that prescribed by our statute of limitations would govern. *Parmele's Wharton, Confl. L.* vol. 2, p. 1434. The cases of *Armstrong v. Galveston, H. & S. A. R. Co.* 92 Tex. 117, 46 S. W. 33, and *Burgess v. Western U. Teleg. Co.* 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 794, cited by the court of civil appeals, do not decide the question before us. In the *Armstrong Case* the contract was made in Texas, and was subject to our laws, unless the fact that it was for an interstate shipment put it beyond their operation; and that was the question discussed. The contract in the *Burgess Case* was made in Louisiana; the law of which, presumed to be the same as that of this state, made it illegal. This is the gist of the decision, the court holding, as in the *Armstrong Case*, that it was in the power of the state legislatures to make regulations applicable to contracts concerning interstate commerce. Neither case holds that the statute of this state applies to contracts made in other jurisdictions. Indeed, the *Burgess Case* holds that the contract there in question was governed by the law of Louisiana.

It is too well settled to require citation of

stipulation of their contract should be governed by the law of the place of performance, there is an apparent difficulty in determining the governing law, arising from the fact that there are different, or at least alternative, places of performance (Illinois and Kansas). Here, again, an analogy drawn from carriers' contracts for the transportation of property from a point in one state to a point in another may be of service. The majority of the courts that have dealt with that class of contracts, being confronted with conflicting presumptions by reason of the different places of performance, have adopted as a *prima facie* rule that the contract is governed by the law of the state or country in which the contract is made and the transportation commences. (See note 63 L.R.A. 518 et seq.) It must be conceded, however, that the analogy is not perfect, for the reason that in the carrier cases the very provision in question was performable in part in the state where the contract was made, whereas in the *THOMPSON CASE*, although some parts of the contract were undoubtedly performable in Indian territory where the contract was made, in no event was the particular provision under discussion to be performed there. In the case of *Morgan v. New Orleans, M. & T. R. Co.* 2 Woods, 244, Fed. Cas. No. 9,804, however, the court gave as a reason for the rule with respect to carriers' contracts that, in the embarrassment resulting from the

equal and opposite presumptions with respect to the laws of the different places of performance, the court could do no better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. This reasoning is applicable by analogy to the *THOMPSON CASE*, although it is not in that case, as it is in the carrier cases, aided by the fact that the place where the contract was made was also one of the places of performance of the very provision in question. In the absence of other circumstances, however, it would obviously be impossible to measure the comparative force of the conflicting presumptions in favor of the law of Illinois on one side and the law of Kansas on the other; and, unless the court in such a case is to regard the provision as divisible, it probably can do no better—to use the phraseology employed in the case already cited—than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. This is practically the result reached in the *THOMPSON CASE*, though it will be observed that the validity of the provision in question is referred to the law of Indian territory, not as the law of the place where the contract was made, but as the law of the place where the contract was in most respects to be performed.

authority that the statutes of a state have no extraterritorial operation, and cannot invalidate contracts made and to be performed in other jurisdictions. The courts of this state might be forbidden by the laws of the state, in the absence of constitutional obstacles, to enforce particular contracts, although made in other jurisdictions, by the laws of which they would be valid. The rule by which courts of one country test the validity of contracts made and to be performed in other countries, in accordance with the laws of such countries, is one of comity only, and cannot be applied in opposition to the positive law of the forum; and, if the statute in question disclosed a purpose to change this rule of comity, and to prevent the courts of this state from applying it to contracts made and to be performed out of the state, questions of a different nature might arise. But we can discover nothing of the sort in it. No reference is made to foreign contracts, nor is any command or inhibition concerning them laid upon the courts. Instead, the statute assumes to act directly upon the contracts and stipulations to which it relates, declaring them to be illegal and invalid. This is a sufficient indication that the provisions relate to things, the legality and validity of which were under the control of the legislature, and not to those which were beyond its power, and which it could not nullify. For, while the legislature might set aside the rule of comity by which contracts elsewhere made are enforced by our courts in conformity with the law governing their making and performance, it could not render those contracts void, and the purpose to do so should not be imputed when it does not appear. Hence we conclude that the transactions to which this statute applies are such as occur in this state, and that the statute has no application to this case. And if we could hold that the statute did apply, we do not see how that would enable the courts of this state to render a judgment for plaintiff, as upon a cause of action which had accrued to him under the laws of Oklahoma, if, according to those laws, he has none which he can assert. It is only by virtue of the principles of comity that the plaintiff, a citizen of the Indian territory, can ask our courts to enforce a transitory cause of action, which he claims accrued to him in Oklahoma; and this does not entitle him to have a portion of the law of that territory affecting his claim disregarded because it differs from ours. His right of recovery must be given by the law of the place where his injury occurred, whether that law be ascertained by proof, or by presumption in the absence of proof. 2. Wharton, *Confl. L.* pp. 1108 et seq., and cases cited L.R.A. (N.S.)

ed. All of the questions raised as to the validity of the stipulation referred to, and its effect upon the case, are therefore to be determined by the laws of Oklahoma, and the defendant ought to have been allowed to introduce the stipulation in evidence, together with testimony as to the law there in force determining its validity and legal effect.

The force of the contention of defendant in error that, although such stipulations may be held valid by the law of Oklahoma in their application to cases generally, yet they may become, in their operation in particular cases, arbitrary and unreasonable limitations upon the liability of masters for the consequences of their own negligence; and that such is shown to be the case here must also be tested by the law of Oklahoma. That question has not been tried; the exclusion of the evidence offered having deprived the plaintiffs in error of any hearing upon it. No view that we might now take of the contention would sustain the action of the court below, and we cannot know what the developments of another trial may be. There is a further contention of the defendant in error that, because the notice was to be given in Topeka, Kansas, the contract was to be performed there, and that hence its validity should be tested by the laws of that state, as to which there were no allegation and proof. But this contention, at last, only goes to the legal effect of the stipulation upon plaintiff's right, and that is to be determined by the law from which the right must be derived,—that of Oklahoma. Besides, this stipulation was only an incidental part of the contract of service which was to be performed in the Indian territory and Oklahoma. The mere fact that the notice was to be received at a place in Kansas does not make the contract performable there in any such sense as to justify the inference that the parties intended to subject their rights to the laws of that state rather than to those of the place where the contract was made, where they were to remain, and where they were to do most of the things to be done in carrying out their engagements.

For the error in excluding the evidence, the judgment is reversed, and the cause remanded.

TEXAS COURT OF CRIMINAL APPEALS.

CHARLES POTTS, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. App. —, 97 S. W. 477.)

Appeal—instruction—error—preservation.

1. Exception during the trial or on mo-

tion for new trial is necessary to preserve error in the instructions to the jury for the consideration of the appellate court.

Intoxicating liquor—illegal sale—lager beer

2. One cannot be convicted of selling intoxicating liquors on the testimony of a witness that he bought from accused a beverage called "lager beer."

Same—intoxicating qualities.

3. To sustain a conviction for violation of the local-option law the liquid sold must be shown to have been of sufficient alcoholic body to produce intoxication if drunk in reasonable quantities.

(October 31, 1906.)

APPEAL by defendant from a judgment of the Camp County Court convicting him of violating the local-option law. Reversed.

The facts are stated in the opinion.

Messrs. W. W. Ballew and John W. Hooper for appellant.

Mr. J. E. Yantis for the State.

Case Note.—Is proof of sale of "lager beer" sufficient to sustain a conviction for unlawful sale of "intoxicating liquors," in the absence of proof that it is intoxicating:

—The case of *POTTS v. STATE*, in holding that proof of the sale of lager beer will not of itself establish the sale of intoxicating liquor, is interesting as a direct adjudication in support of a doctrine the authority as to which, as appears in the following cases, has heretofore consisted principally of *dicta*, pro and con.

In *Rau v. People*, 63 N. Y. 277, it was said: "The question is, whether lager beer is included in the words 'intoxicating liquors.' As to such well-known beverages as whisky, brandy, gin, ale, and strong beer, the courts without proof, acting upon their own knowledge derived from observation, will take notice that they are intoxicating, and will, therefore, require no proof of the fact. *Nevin v. Ladue*, 3 Denio, 437; *Board of Excise v. Taylor*, 21 N. Y. 173; *People v. Wheelock*, 3 Park. Crim. Rep. 9; *Taylor v. People*, 6 Park. Crim. Rep. 347. But there are, doubtless, intoxicating beverages which are not so well known, and of whose character the courts could not take notice, and more intoxicating beverages may yet be discovered. As to all such, when one is charged with selling them in violation of law, there must be proof that they are intoxicating before a conviction can be had. Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence." The question presented for decision was, however, the propriety of a charge, where evidence had been given tending to prove such fact, that, if the jury found lager beer to be intoxicating, they should convict the defendant.

In *Blatz v. Rohrbach*, 116 N. Y. 450, 67 L.R.A. (N.S.)

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of violating the local-option law.

It is contended: First, that the court erred in charging the jury that lager beer was an intoxicant; and second, that the evidence is not sufficient to support the conviction. Under the decisions of this court, error assigned in regard to the charge cannot be considered, as no exception was taken during the trial or on motion for new trial. Witness Cadenhead testified that he went to Pittsburg with Puckett. On reaching town, on the invitation of Puckett, he went to defendant's cold storage and he and Puckett drank "two bottles of beer." These were set out by appellant. Puckett presented defendant with a ticket which defendant punched. About an hour afterwards, on invitation of Puckett, appellant drank more beer. He inquired of Puckett how he managed to get the beer, and, being informed

L.R.A. 669, 22 N. E. 1049, it was held that proof of the sale of beer will not justify a charge that the purchaser drank intoxicating liquors in defendant's saloon, in an action to recover damages under the civil damage act; and it was said that lager beer is not to be deemed intoxicating without proof of the fact.

In *People v. Schewe*, 29 Hun, 122, and *People v. Zeiger*, 6 Park. Crim. Rep. 355, the intoxicating properties of lager beer were held to be a question for the jury upon conflicting evidence submitted.

In *Dillman v. People*, 4 N. Y. Week. Dig. 251, it was held that lager beer, if proved intoxicating, is within the provisions of a statute against selling intoxicating liquors on Sunday.

In *People v. Zeiger*, *supra*, an instruction that the jury were to use their own knowledge and science if they possessed any; and the question was whether lager beer was an intoxicating liquor,—was held to be erroneous, for the reason that it might improperly influence the conclusions of the jury.

In *People v. Hart*, 24 How. Pr. 289, it was held that a warrant charging the sale of lager beer failed to charge an offense under a statute forbidding the sale in certain places of any wine, beer, strong or spirituous liquors, the court being unable to take judicial notice that lager beer belongs to the prohibited character or class.

In *State v. Lager Beer*, 70 N. H. 454, 49 Atl. 575, it is held that lager beer, if proved intoxicating, is subject to seizure and forfeiture under a statute providing for the seizure of all spirituous or intoxicating liquor kept for sale in violation of law.

As to the sufficiency of proof of the intoxicating property of lager beer which will warrant the submission of the question to the jury, see *Killip v. McKay*, 28 N. Y. Week. Dig. 119, 13 N. Y. S. R. 5, in which it

that he would have to order it, he went to appellant and gave him an order "for a dozen bottles of beer," for which he paid \$1.50. He paid the money, and called for three bottles, which he, Puckett, and King drank. Later this was repeated. When witness left he still had six unpunched numbers on his ticket, each of which called for a bottle of beer. This witness testified at this point as follows: "The beer was lager beer. I do not know the meaning of the word 'lager,' but they called it 'lager' beer." This is the testimony, and all of the testimony, upon which the conviction is predicated, as this was the only witness. If there is any testimony indicating that this was lager beer, or that the beer witness obtained was intoxicating, it is found in the statement above. We are of opinion that this is not

sufficient to show intoxicating properties. The witness did not know that it was lager beer. His testimony states that when he bought it they called it "lager beer." We do not believe that the evidence is sufficient to show beyond a reasonable doubt that the mere statement that they called the beer he bought "lager beer" would, in fact, make it lager beer. Nor, under our decisions, are we prepared to hold that lager beer is judicially known to be an intoxicant, even if the testimony was clear and unequivocal that the bottles contained lager beer. The authorities are divided as to whether or not the court will take judicial cognizance that lager beer is an intoxicant, even when the evidence is clear and conclusive that the beer was lager beer. Speaking of lager beer, Mr. Black says, as to whether or not evi-

was held that testimony by a witness who was in the habit of drinking ale, beer, and lager beer, that the liquor which he drank was one or the other of these kinds of beer, but which he could not say, tended to prove that the beer which he did drink possessed the properties of strong beer, which was intoxicating, and would warrant submission of the question to the jury; *People v. Henschel*, 35 N. Y. S. R. 275, 12 N. Y. Supp. 46, in which evidence that lager beer was intoxicating if one drank enough of it was held sufficient to make a case for the jury to pass upon.

On the other hand, in *State v. Church*, 6 S. D. 89, 60 N. W. 143, it was held that the refusal of an instruction that evidence of a sale of lager beer would not justify a conviction for unlawfully selling intoxicating liquor was not erroneous; the court saying: "We have no more hesitation in holding that the drink known as 'lager beer' is intoxicating than we should have in holding that 'spruce beer,' is not, and we should put both rulings upon the same ground. to wit, that such is the common understanding resulting from common observation."

A case indirectly bearing upon the question under consideration is *State v. Giersch*, 98 N. C. 720, 4 S. E. 193, in which, in passing upon the question whether the sale of lager beer and wine was within the statute prohibiting the sale of "spirituous liquors," the court said: "We know from common observation and knowledge, and it is a generally admitted physical fact not denied in this case, that lager beer and wine contain alcohol, and generally in such quantity and degree as to produce intoxication."

In *Smith v. State*, 113 Ga. 758, 39 S. E. 294, it was held that, while the words "lager beer," in their ordinary use and acceptance, may sufficiently indicate an intoxicating liquor to warrant a conviction of selling liquor of that character, when the proof shows a sale of lager beer and nothing more, yet, where there was affirmative testimony to the effect that a liquid which contained not exceeding 2 per cent of alcohol would

not intoxicate, and that the identical bottle of liquid which the accused sold, and upon the sale of which the question of his guilt or innocence turned, did not contain more than 2 per cent of alcohol, it was, although there was other testimony to the effect that this identical liquid was lager beer, erroneous to charge generally that all lager beer is intoxicating.

In *Bandalow v. People*, 90 Ill. 218, a conviction for unlawfully selling intoxicating liquors upon proof of the sale of lager beer was sustained, no question appearing to have been raised as to its being intoxicating.

Care must be taken to note the difference between the question presented in the case in hand and in the foregoing decisions, and that which arises where the statute has the effect to raise a presumption that all fermented liquors are intoxicating until the contrary is proved, as is the case in Kansas (see *State v. Volmer*, 6 Kan. 371); or where the statute expressly includes all malt liquors (see *Watson v. State*, 55 Ala. 158; *State v. Goyette*, 11 R. I. 592; *State v. Rush*, 13 R. I. 198; *State v. Gravelin*, 16 R. I. 408, 18 Atl. 914; *State v. Morehead*, 22 R. I. 272, 47 Atl. 545, which hold that the courts will take judicial notice of the fact that lager beer is a malt liquor; *Waller v. State*, 38 Ark. 656, which holds that the fact that lager beer is a malt and fermented liquor was properly treated as a matter of common knowledge); or where the statute enumerates lager beer among the intoxicating liquors the traffic in which is regulated or prohibited, as is the case in Massachusetts (see *Com. v. Leo*, 110 Mass. 414; *Com. v. Bloss*, 116 Mass. 56); under which statutes a prima facie case may, of course, be made by proof of a sale of lager beer.

For a discussion of the constitutional right of a state to declare certain liquor intoxicating irrespective of its intoxicating character as a matter of fact, see case note appended to *State v. Frederickson*, 6 L.R.A. (N.S.) 186.

dence of its intoxicating properties is required: "The weight of authority appears to be with the cases holding that courts will take judicial notice that beer of this variety is intoxicating, and that it need not be shown to be so by evidence. But there are also decisions to the effect that lager beer must be shown to be capable of producing entire or partial intoxication, and that this is a fact to be ascertained by the jury upon the evidence in the case. In some of the earlier statutes and decisions similar questions arose in relation to the character and status of what was then denominated 'strong beer.' This term, though now practically obsolete, was once in familiar use as the name of a species of beer made of malt and hops, and so called in order to distinguish it from 'small beer,' which was compounded of molasses and yeast with the addition of either ginger or spruce, and which contained a very small percentage of alcohol. The 'strong beer' seems to have been rich in the intoxicating principle, chemical analysis (in one of the reported cases) showing the presence of alcohol in the proportion of 8 per cent; and the courts had no difficulty in determining that this particular beverage was an intoxicating liquor within the meaning of the statutes on that subject. But, as it differed from the lager beer of modern commerce both in the process of its manufacture and in the proportion of alcohol contained (the latter being a very much lighter fluid), the courts appear to be unwilling to be bound in their judicial dealings with beer of to-day by the precedents relating to the beer of a past generation. At least there are some decisions, particularly in New York, not explainable on any other hypothesis." In Massachusetts it was held that the fact that a given quantity of beer contains a certain percentage of alcohol, or that a gallon of beer contains as much alcohol as does a pint of whisky is not conclusive upon the question whether or not the beer is intoxicating. These quotations are from Black on Intoxicating Liquors, § 17, pp. 21, 22; and see foot notes for authorities cited.

The question has been before this court in quite a number of cases, under our local-option law, when the general term "beer" was used, and it has been invariably held that the court did not judicially know that the general term "beer" meant an intoxicating liquor. Nor do the decisions rest at that point. They go further and hold that, where a conviction is sought under the local-option law, the commodity sold must be shown to be intoxicating. Ex parte Gray (Tex. Crim. App.) 83 S. W. 828; Scales v. 7 L.R.A. (N.S.)

State (Tex. Crim. App.) 83 S. W. 380; Harris v. State (Tex. Crim. App.) 86 S. W. 763; Cassens v. State (Tex. Crim. App.) 88 S. W. 229; Sullivan v. State (Tex. Crim. App.) 87 S. W. 150; Rutherford v. State (Tex. Crim. App.) 88 S. W. 810; Potts v. State (Tex. Crim. App.) 89 S. W. 836; Uloth v. State (Tex. Crim. App.) 87 S. W. 822. And to the same effect see Rau v. People, 63 N. Y. 277; Blatz v. Rohrback, 116 N. Y. 450, 6 L.R.A. 669, 22 N. E. 1049; Sarlls v. United States, 162 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; Nevin v. Ladue, 3 Denio, 437; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; Weis v. State, 3 Ind. 204; Kurz v. State, 79 Ind. 488; Klare v. State, 43 Ind. 483; State v. Sioux Falls Brewing Co. 5 S. D. 39, 26 L.R.A. 138, 58 N. W. 1; Hansberg v. People, 120 Ill. 21, 60 Am. Rep. 549, 8 N. E. 857; Netso v. State, 24 Fla. 363, 1 L.R.A. 825, 5 So. 8. The rule has been laid down differently where the general term "beer" is used. Some of these were under statutes peculiar to the states, or in the jurisdiction where the decisions were rendered, and it would be of practically little value to take these under consideration and show the difference where they exist. If the intoxicant charged to have been sold was whisky, or rum, or any beverage or fluid known and recognized generally as being intoxicating, and known to be by reason of the alcoholic body, the court would take judicial cognizance of the fact that it was intoxicating. An investigation of the different kinds and character of beer, and the alcoholic strength of these various liquids might be entertaining and interesting, but where the formula runs from about 1.6 per cent alcoholic strength to 4 and $4\frac{1}{2}$ per cent, and the intoxicating properties depend upon the percentage, it would hardly require reasoning to show that the liquids sold, in order to come under the violation of the local-option law, must be of sufficient alcoholic body to produce intoxication if drunk in reasonable quantities. It has been the rule, where these lighter drinks have been relied upon to sustain a conviction in a local-option case, that it must be made to appear that the liquid was intoxicating within the rule just announced. If not, then the law has not been violated. The mere fact that the party drank a bottle of beer, and he called it "lager beer," is not, in our judgment, sufficient to authorize the court to instruct the jury that the liquid was intoxicating. There must be evidence of the fact that it was an intoxicant. The presumption of innocence should be overcome by proof of sufficient cogency to exclude the

reasonable doubt of that innocence. In the particular case in hand, the only evidence, sifted to its final analysis, is the witness's statement that they called it "lager beer," but that he did not know what the word "lager" meant. He was not even asked, nor did he testify, as to any effect it had upon him. He states that he drank two bottles of beer with Puckett, and that he and King and Puckett drank six bottles that he purchased from appellant. Yet he was not asked, nor does he testify, that it had any effect upon him in the direction of intoxication. The decisions of this state have rather rigidly held to the proposition that we would sustain convictions for the sale of intoxicants in violation of the local-option law whenever the ingredients were shown to be an intoxicant, without reference to its name or supposed quality. If the fact was made to appear that the liquid was an intoxicant, and that such was, or would be, its effect if drunk in reasonable quantities, we have sustained convictions, so far as the weight of the testimony is concerned. We believe this to be a wise and salutary rule in the enforcement of this law. It is not the name they call the liquid, but its quality and its strength when viewed as an intoxicant. For the court to hold that Frosty, Uno, Ino, Hiawatha, and the various other brands of fermented liquors shipped into local-option territory are not, *per se*, intoxicating, would lay down a rather dangerous precedent for the enforcement of this law. It would be a very easy matter for those who desire to evade its provisions to put one of these labels upon the bottles. The law would be rapidly brought into disrepute and with facility evaded. On the other hand, it might be dangerous to the liberty of the citizenship of the country to hold that, because they called it "lager beer," or that it was labeled "lager beer," or that in fact it was "lager beer," it was therefore an intoxicant. It might not be, and the citizen would be unjustly punished. It is a matter of proof whether it is or not intoxicating. Therefore we are of opinion that the evidence in the record is not sufficient to justify an affirmation of this case. If the contents of these bottles were intoxicating, it was a matter easily susceptible of proof. Certainly a man who testifies before the court to drinking as many as six bottles of what they called "lager beer" would be able to know whether or not it had an intoxicating effect upon him, yet this record is wanting in any testimony intimating such a result.

The judgment is reversed, and the cause remanded.

7 L.R.A. (N.S.)

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL.
MARION E. HARLAND

v.

CENTRALIA-CHEHALIS ELECTRIC
RAILWAY & POWER COMPANY.

(42 Wash. 632, 85 Pac. 344.)

Eminent domain—premature exercise.

1. That a street railway company had not in fact secured its right of way and necessary franchises will not prevent an exercise by it of the power of eminent domain to secure power to operate the road, if it is proceeding diligently with the enterprise, and has proceeded far enough to demonstrate that its immediate purpose is to apply the power sought to a public use.

Same—public and private use.

2. Authority to condemn property for the public uses recited in the charter of a corporation will not be denied because a portion of the enterprises in which it is authorized to engage are merely private, where the two are not so combined as to be inseparable.

Same—adjoining property.

3. An electric railway company is not, in securing property necessary for power purposes, limited to that adjacent to its right of way, under a statute empowering it to appropriate land for right of way and "other corporate purposes" without limitation as to locality.

(May 19, 1906.)

APPPLICATION for a writ of certiorari to review proceedings condemning land for the use of the defendant corporation. Judgment affirmed.

The facts are stated in the opinion.

Messrs. H. S. Elliott and E. M. Green for relator.

Mr. W. W. Langhorne, for respondent:

That the right of way and franchises had not been secured did not defeat the right to exercise the power of eminent domain.

Case Note.—Right to exercise eminent domain as affected by the extent to which the general scheme has progressed:—

In order to exercise the power of eminent domain all the requirements of the statute granting the power must, of course, be strictly complied with; but, assuming that the petitioner has complied with all the statutory requirements, there sometimes, as in the foregoing case, arises a question whether or not the general scheme of his undertaking has progressed to such an extent as to give him the right to exercise that power to take particular lands.

This question most frequently arises where the consent of the state, or of a municipal corporation, is necessary for the accomplishment of the undertaking, and the

Nicomen Boom Co. v. North Shore Boom & Driving Co. 40 Wash. 315, 82 Pac. 412.

This court will not presume that this company will use the lands sought for any purpose other than the purposes disclosed by this record.

Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 688; Denver R. L. & C. Co. v. Union P. R. Co. 34 Fed. 387; 1 Lewis, Em. Dom. 2d ed. § 160; Hollister v. State, 9 Idaho, 8, 71 Pac. 543; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 430; Chicago & E. I. R. Co. v. Wiltse, 116 Ill. 449, 8 N. E. 49; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 661; Plecker v. Rhodes, 30 Gratt. 801; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379.

It is not a question whether there is other land to be had that is equally as available,

but the question is whether the land sought is needed for the construction of the public work.

Samish River Boom Co. v. Union Boom Co. 32 Wash. 600, 73 Pac. 670; Postal Tele. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; 10 Am. & Eng. Enc. Law, 2d ed. pp. 1057, 1058; 7 Lawson, Rights, Rem. & Pr. § 3886; Re Wellington, 16 Pick. 87, 26 Am. Dec. 636; Cooley, Const. Law, 336; Cotton v. Mississippi & R. River Boom Co. 22 Minn. 372; Smith v. Chicago & W. R. Co. 105 Ill. 511; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; Ford v. Chicago & N. W. R. Co. 14 Wis. 609, 80 Am. Dec. 791; Coster v. Tide Water Co. 18 N. J. Eq. 54; Douglass v. Brynes, 59 Fed. 29; Eldridge v. Smith, 34 Vt. 484.

Water may be condemned, as well as lands, for public uses.

State ex rel. Kent Lumber Co. v. Superior Court, 35 Wash. 303, 77 Pac. 383; Rocking-

right of way through private lands is sought by condemnation proceedings before such consent is obtained. Most of the cases hold that such consent is not a condition precedent, and agree with STATE EX REL. HARLAND v. CENTRALIA-CHEHALIS ELECTRIC R. & P. Co. that the courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights. Thus, in Union P. R. Co. v. Colorado Postal Tele. Cable Co. 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564, it was held that the fact that leave to erect a telegraph line through certain incorporated towns along the proposed right of way had not been secured from the municipal authorities was not sufficient to prevent the telegraph company from condemning the right of way of a railroad for its poles. So, also, in Ligare v. Chicago, M. & N. R. Co. 166 Ill. 249, 46 N. E. 803, it was held that the consent of a city was not a necessary prerequisite for the exercise of a statutory right to condemn private property within the city for the right of way of a railroad company organized under the laws of the state. And to the same effect was the decision in Chicago & W. I. R. Co. v. Dunbar, 100 Ill. 110, where the court said that the law had provided one mode of acquiring the right of way across private property and another way of acquiring the right of way across streets, but had in no way provided the order in which the railroad company should proceed in acquiring its right of way. And in Clarke v. South Kingstown, 18 R. I. 283, 27 Atl. 336, it was held that it was not necessary to obtain the consent of the general assembly of the state to allow a highway over the lands of the state, before proceedings might be maintained to condemn the lands of private persons. And in Metropolitan City R. Co. v. Chicago West Div. R. Co. 87 Ill. 317, obtaining the consent of the common council of the city to allow tracks of the petition-

er's railway in a given street was held not a condition precedent to condemning such property, right, interest, or privilege as another railway company might have previously acquired by contract or otherwise in such street. In California Southern R. Co. v. Kimball, 61 Cal. 91, it was held that, although a railroad could not lay its tracks in the public streets of a city unless the right to use the same was granted by the city, it did not follow that an action to condemn whatever rights the owners of the land lying adjacent to said street might have therein could not be maintained before the city had granted a right of way over the streets.

But to the contrary was the decision in Wisconsin Water Co. v. Winans, 85 Wis. 26, 20 L.R.A. 662, 39 Am. St. Rep. 813, 54 N. W. 1003, where it was held that condemnation of land for a pipe line, by a water-supply company formed under the general laws to convey water to a city, could not be had where it was not shown that the company had a legal right to enter upon or condemn lands in such city, or had already acquired the right to construct or maintain any waterworks therein, or to sell or dispose of water to its inhabitants; since the public use which would justify condemnation depended upon the disposal of the water after it reached the city. In Rahn Twp. v. Tamaqua & L. Street R. Co. 4 Pa. Dist. R. 29, it was held that, where the railroad company had a charter to construct a road from one borough to another through a township, the company would not be allowed to construct the road through the township until it had secured the consent of the local authorities of the boroughs to run its railroad within their limits.

Where, in the general plan of the sewer system of a city, the sewers were to be flushed by water taken from a canal to be constructed in connection with the general

ham County Light & P. Co. v. Hobbs, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 49; State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 11 L.R.A. 729, 26 N. E. 1068; 1 Lewis, Em. Dom. 2d ed. § 171.

Every facility needed for the operation, maintenance, and use of a railroad is for public purposes.

New York & H. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Low v. Galena & C. U. R. Co. 18 Ill. 324; Alabama & V. R. Co. v. Odeneal, 73 Miss. 34, 19 So. 202; Olmsted v. Morris Aqueduct, 47 N. J. L. 311; Harvey v. Lloyd, 3 Pa. St. 331; Aurora & G. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331.

Fullerton, J., delivered the opinion of the court:

The respondent, the Centralia-Chehalis Electric Railway & Power Company, is a corporation organized under the laws of the state of Washington. The objects for which the corporation was formed, as recited in its articles, are many and somewhat varied, and those of a public and quasi public nature are commingled with those that are purely private. Its primary purpose, however, according to the testimony of its promoter, is to build, equip, and operate electric street railways in the cities of Chehalis and Centralia, and an electric railway between those two cities, to be connected to and operated with the street railways, for the purposes of carrying passengers and freight for hire. For the purpose of generating the necessary electric current to operate its railways the

respondent sought to create a water power on the Chehalis river. It purposes to erect at the site selected a dam across the river some 60 or 65 feet high, which will at once create the necessary fall for power purposes and provide a storage basin, which can be drawn upon during the dry season, when the natural flow of the river may be insufficient to produce the required power. The dam, when constructed, will cause the water to back up and overflow a considerable area of land not now covered by water, a part of which belongs to the relator. The respondent was unable to agree with the relator as to the compensation to be paid for the land taken and damaged belonging to him, and brought an action to condemn under the statutes of eminent domain. After a hearing the court made the preliminary order adjudging the use to which the respondent intended to apply the property to be a public use, that a necessity existed for its taking, and ordered the question of the amount of compensation to be paid the relator to be submitted to the determination of a jury. This proceeding was brought to review that order.

The relator first contends that the use to which the respondent contemplates putting the property is not a public use. The relator does not deny, of course, that the operation of a system of electric railway between and within the cities of Centralia and Chehalis for the purposes of carrying passengers and freight for hire would be a public use within the meaning of the statutes and the

improvement, it was held, in State, Vanderbeck, Prosecutor, v. Jersey City, 29 N. J. L. 441, that a right of way for a sewer could be condemned by the water commissioners of the city before the canal was constructed.

It was held error in Prescott Irrig. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635, to require an irrigation company to show that it had condemned or purchased the right to take water from all the riparian owners of a whole river, before proceeding to acquire a right of way for its canal. And in Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272, it was held that it was not necessary for a water company to secure the right to take water from a stream, before securing the right of way for its pipes by condemnation.

In New York, where the statute provides that a water company which holds a contract to furnish water to an incorporated village may condemn lands for a right of way, it has been held that the possession of such a contract is a condition precedent to the exercise of the right. Citizens' Waterworks Co. v. Parry, 59 Hun, 202, 13 N. Y. Supp. 490, Affirmed in 128 N. Y. 669, 29 N. E. 148; Witcher v. Holland Waterworks Co. 66 Hun. 619, 20 N. Y. Supp. 560, Affirmed in 142 N. Y. 626, 37 N. E. 565.

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That a city was without funds to pay for the land was held, in Re Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142, to be no defense to condemnation proceedings to secure land for purposes of a public park. But in Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634, it was held that the petition must show that there were sufficient funds in the treasury applicable for that purpose, where the statute providing for the condemnation of lands for a highway required them to be paid for from the road fund.

That the time given by ordinance of a borough for the construction of a railroad had expired was held, in Brinkerhoff v. Newark & H. Traction Co. 66 N. J. L. 478, 49 Atl. 812, to be no defense to an action to condemn property, as the borough might acquiesce in and consent to the delay, and it alone could object.

The fact that a foreign railway corporation had not built its road up to the boundary line of the state was held, in St. Louis, K. C. & C. R. Co. v. Lewright, 113 Mo. 660, 21 S. W. 210, not sufficient to prevent the corporation from condemning lands within the state.

Constitution; nor does he contend that it is beyond the powers of the court to condemn his land for the purposes of creating the necessary power to operate that system. But he says that the respondent has not proceeded far enough with its scheme to demonstrate that it will be permitted to construct and operate its proposed railways, since it was made to appear by the evidence that it had not procured franchises from the cities of Centralia and Chehalis permitting it to construct its proposed railways within their boundaries, nor a complete right-of-way between the two cities. The relator argues that, inasmuch as the respondent cannot construct its proposed road until it procures these franchises and this right of way, it is not in a position to say that this power will be needed by it at all, and hence it ought not to be permitted to condemn his land until it is certain that the land will be needed. On the question of the progress the respondent had made in this direction, the record disclosed that it had procured a right of way for its road over all the distance between the two cities, except over a tract about 80 rods in width, and that for this it was negotiating with the owner who was a resident of another county. It appeared, also, that it was then negotiating with each of the cities for franchises; that in each of them the terms of the franchise to be granted had been practically agreed upon, and that ordinances had been drawn and introduced granting to the respondent a franchise in accordance with those terms which had passed to the second reading, and that in one of the cities it had deposited a considerable sum, to be forfeited in case it did not carry out the conditions imposed by the franchise which might be granted it. In fact, it was admitted by the relator on the hearing that the respondent was proceeding diligently in its effort to put itself in a position to commence at once the mechanical construction of its road. It seems to us that the respondent had proceeded far enough to show that its immediate purpose was to apply the power it sought to create by the appropriation of the relator's property to a public use. This was its declared purpose, and its acts, in so far as it had actually proceeded, pointed to that end. Moreover, it is manifest that an enterprise of this character cannot be completed all at once. Being made up of several parts, it must be completed in parts. Why, then, should one part be deemed of more importance than another? Why may not the city as well say that it will not grant the franchise until the respondent has produced the power, as the court may say that it will not grant the right to procure the power until the franchise is granted?

7 L.R.A. (N.S.),

If the city did so say, and the court should hold with the relator, it is plain that the enterprise has reached a point beyond which it cannot proceed. But we think there is no reason for such a holding. We think that when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion. There is no danger that the property condemned will be applied to uses foreign to the purposes for which it is condemned. The property does not become the private property of the condemning corporation, in the sense that it can appropriate it to uses of a private nature. It must use it for the purposes for which it condemns it, or else submit to its reversion at the suit of the state. *People ex rel. Robinson v. Pittsburgh R. Co.* 53 Cal. 694; 2 Lewis, Em. Dom. §§ 594 et seq.

The relator next contends that the respondent should not be permitted to exercise the right of eminent domain because its articles of incorporation show that some of the objects for which it was incorporated are purely of a private nature, and that to permit it to condemn property at all is to permit private property to be taken for a private use. There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses a part of which only are of a public nature is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. *Gaylord v. Sanitary District*, 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564. And there are cases which deny the right to condemn when the avowed purpose as set out in the petition is to condemn for uses some of which are private. *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546. But in this case the respondent asks in its petition to condemn for the public uses only recited in its articles of incorporation, making no mention of those which are purely private. If a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise; but it has been said, and it seems to us that it is the better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public. *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein*, 63 Kan. 484, 65 Pac.

684; *Brown v. Gerald*, 100 Me. 351, 70 L.R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785. In the first of these cases the court said: "We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use, because by its charter it is also authorized to engage in a private enterprise, than to deny to a private person the same power because he is inherently endowed with the same authority." Furthermore, it was held in the case of *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429, that, in determining the question of public use, "the courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association; but evidence *aliunde*, showing the actual business proposed to be conducted, may be considered." And, this being true, we think it must be true, also, that when a corporation, whose articles disclose purposes some of which are public and some of which are not, seeks to exercise the right of eminent domain, we may look to its application and the evidence introduced at the hearing to determine what its real purposes are. Measured by this test, there can be no question as to the purposes of the respondent corporation; for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But, while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrong doing. The preventive rests in the power of the state to compel the lawful exercises of its granted privileges.

It is next said that there is no proof that the necessities of the respondent require the use of all of the property it proposes to take. It is true that the evidence does not give the estimated horse power required to operate the respondent's proposed public facilities, nor does it give an estimate of the horse power it is proposed to develop; but the president of the company, while testifying, stated generally that all that could be developed by the dam proposed would be required, 7 L.R.A. (N.S.)

and that, if the company could get along with less, it would be satisfied to take less. Inasmuch as there was no evidence offered to controvert this statement, we think it is sufficient to justify the finding that no more is proposed to be taken than the necessities require.

Finally, it is said that nothing but land adjacent to the right of way may be taken for the use of a railway company, and that the lands in question here are not adjacent to the railway the respondent proposes to construct. Under the earlier statutes relating to eminent domain, there would be much in this contention; but the several subsequent statutes conferring the power of eminent domain on electric railway companies provide that they shall have the right to appropriate lands for a right of way and "other corporate purposes," without limitation as to the locality. See Laws 1903, chap. 175, § 2, p. 366. It seems to us that this is broad enough to permit the condemnation of land for power purposes, however distant it may be from the proposed railway. Contrary to the statement of the relator that the public have no interest in the cost of the power the respondent uses to operate its railway, we think the public have a vital interest in that cost. The public is interested in cheap transportation, and, since the use of the facilities nature has afforded will help acquire cheap transportation, the law should be construed rather to enable their use than to permit them to waste in idleness. The principle is distinguishable from the principle of the cases holding that a station for a power house or coal beds cannot be condemned. In this case there is no other source from which power can be derived without an expense which is prohibitive of the enterprise, while in the other cases the situation was wanted because of its convenience, not because of necessity.

The order of the court will stand affirmed.

Mount, Ch. J., and Crow, Root, Hadley, Rudkin, and Dunbar, JJ., concur.

OREGON SUPREME COURT.

FRANK WILMOT et al., Appts.,
v.

OREGON RAILROAD & NAVIGATION
COMPANY, Resp't.

(— Or. —, 87 Pac. 528.)

Depot grounds—question for jury.

1. The question whether or not the point where animals killed on a railroad track entered thereon was a part of depot grounds

is for the jury, where the evidence is conflicting, or different inferences might be drawn from it.

Same—definition.

2. The depot grounds of a railway company are the place where passengers get on and off the trains, and where freight is loaded and unloaded, and include all grounds reasonably necessary and convenient for that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station.

Same—presumption.

3. The appropriation, survey, and setting apart of land by a railroad company for

depot purposes afford strong, if not conclusive, evidence that its boundaries and extent are such as, and no more than, are necessary and proper; and the limits should not be curtailed or extended by the court or jury unless in a very clear case.

Same—killing animals—question for jury.

4. Whether or not the turning of horses out to graze upon uninclosed land near a depot is such contributory negligence as will preclude a recovery in case they wander onto the tracks and are killed is a question for the jury.

(November 21, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Multnomah County in defendant's favor in an action brought

Subject Note.—What are depot grounds within the meaning of fence laws.

- I. The principle involved, 203.
- II. In general; illustrative cases
 - a. In general, 204.
 - b. Extension beyond town limits, 207.
 - c. Way stations; flag stations; sidings, 207.
 - d. Switch limits.
 1. In general, 209.
 2. Points between switch ends and depot building, 211.
 3. Points beyond switch ends, 211.
 - e. Private shipping points, 213.
- III. Extent of depot grounds a question for the jury.
 - a. In general, 213.
 - b. Effect of allotment as depot grounds, 214.
- IV. Where burden of proof lies, 215.
 - I. The principle involved.

A very clearly defined principle regulates this question,—the principle of the paramount importance of the public good or convenience over private rights. Fence laws have been passed very generally in all parts of the country, compelling railroad companies to fence their tracks in order to protect individuals from injuries to their stock straying thereon. But at stations where the general public has a right of access, and the necessary transactions of the road require it, an exception, either by express language in the statute, or by construction of the courts, has come to be made in almost every instance to the general obligation to fence, on the ground that the public right of access overrules the private right of protection. The question, then, of how far this exception to the obligation to fence extends, or, in other words, how far or what are station or depot grounds, is decided by determining how far the public convenience requires an open track.

There is another reason why, in the vicinity of stations, railroad companies are sometimes exempt from fencing, at first

glance identified with the one under consideration, but in reality quite distinct, and that is that the safety of employees in making up trains requires, under some conditions, a clear and open track, free especially from cattle guards, which are included under the general term of fencing as used in the statute. In some instances the courts have, in determining the question under consideration, intermingled those two principles in coming to their decision, and those cases have necessarily been included herein; but, where the question of the safety of employees alone has been involved, the line of exclusion has been drawn.

The following cases present the principle involved in the question under discussion:

The failure to fence is excusable only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at the locality in question. While the railroad company would be excused from fencing a sufficient portion of its right of way to allow the public access to the loading and unloading facilities there provided, it would not be excused from a failure to fence another or greater space. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.) 101 N. W. 981.

Public convenience is the limit of the exception exempting railroads from the obligation of fencing station grounds. *Greeley v. St. Paul, M. & M. R. Co.* 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179.

So much of the grounds and side tracks connected with the depot as is reasonably necessary for the business of the public with the railroad company at the station should be free of access, and unobstructed by fences or cattle guards. *Prickett v. Atchison, T. & S. F. R. Co.* 33 Kan. 748, 7 Pac. 611.

Save so far as is necessary to afford convenient and suitable access to station or depot grounds, the road must be protected by guards and fences. *Kobe v. Northern P. R. Co.* 36 Minn. 518, 32 N. W. 783.

A railroad company may leave a sufficient space open about depots for the safe and commodious transaction of the business of the station. *McGuire v. St. Louis, M. & S. E. R. Co.* 113 Mo. App. 79, 87 S. W. 564.

to recover the value of horses alleged to have been killed by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. George W. Joseph and Thomas M. Dill for appellants.

Messrs. W. W. Cotton and Arthur C. Spencer, for respondent:

The place where the horses entered upon the tracks of the defendant was within its depot grounds.

Harvey v. Southern P. Co. 46 Or. 505, 80 Pac. 1061; Grondin v. Duluth, S. S. & A. R. Co. 100 Mich. 599, 59 N. W. 229; Rinear v. Grand Rapids & I. R. Co. 70 Mich. 620, 38 N. W. 599; Ohio & M. R. Co. v. Rowland, 50 Ind. 349; Evansville & T. H. R. Co. v. Willis, 93 Ind. 507; Moses v. Southern P. R. Co. 18 Or. 385, 8 L.R.A. 135, 23 Pac. 498.

A railroad company is not required to fence such grounds as are necessary to remain open for the use of the public. Crenshaw v. St. Louis, K. & N. W. R. Co. 54 Mo. App. 233.

The necessities of the public, of the employees, and of the company, require that depot grounds remain open and unobstructed. Cleveland, C. C. & I. R. Co. v. Newbrander, 40 Ohio St. 15.

II. In general; illustrative cases.

a. In general.

The provisions of the fencing act do not relate to depots and stations, or to grounds immediately surrounding them. The point where the animal was killed in this instance was upon the main track only a few feet from the depot building. Mobile & O. R. Co. v. House, 96 Tenn. 552, 35 S. E. 561.

A railroad company is not liable, except for negligence, for killing stock by reason of a failure to fence between a public road and the station, when that would prevent the public from getting to and from the station. Robertson v. Atlantic & P. R. Co. 64 Mo. 412.

Where the evidence showed that a cow got on the track over a switch used for loading and unloading freight and near a depot, the company is not liable in the absence of negligence. Robinson v. St. Louis, I. M. & S. R. Co. 21 Mo. App. 141.

So, where the side of a spur track in the vicinity of a station could not have been fenced without inconvenience to the business interests of the road, there is no obligation to fence. Lake Erie & W. R. Co. v. Kneadle, 94 Ind. 454.

A railroad company is not legally bound to fence its road in the vicinity of a depot where switches and side tracks are maintained, and large shipments made. Louisville, N. A. & C. R. Co. v. Skelton, 94 Ind. 222.

Proof that land where a cow was killed was opposite to and adjoining depot grounds, 7 L.R.A. (N.S.)

When depot grounds are appropriated and set apart by a railroad company, their limits cannot be curtailed or extended by a jury in a proceeding where they come collaterally in question.

Scott v. Astoria & C. River R. Co. 43 Or. 31, 62 L.R.A. 543, 99 Am. St. Rep. 710, 72 Pac. 594; McGrath v. Detroit, M. & M. R. Co. 57 Mich. 557, 24 N. W. 854; Rabidon v. Chicago & W. M. R. Co. 115 Mich. 390, 39 L.R.A. 405, 73 N. W. 386; Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265, 11 N. W. 152.

Where the facts as to the point of entry are not disputed, the question as to whether said place is within the depot grounds of the railroad company is a question of law for the court to determine.

Grondin v. Duluth, S. S. & A. R. Co.;

and was necessarily to be, and had for years been, used as a public passage; and that the public would otherwise be seriously inconvenienced in doing business with the railroad company,—was declared to tend to prove that the point was one which the company was under no obligation to fence under the statute. Indianapolis, P. & C. R. Co. v. Crandall, 58 Ind. 365.

Where the place at which stock entered upon a track was one used by the public in receiving and loading freight, it must be held part of the depot grounds necessary for the use of the road by the public, and excepted from the operation of the fence laws. Chicago & E. I. R. Co. v. Blair, 75 Ill. App. 659.

Where a railroad company has a number of tracks, side tracks, and switches running out from a station, upon which cars are stored, iced, inspected, and switched, the premises are railroad yards within the meaning of the fence laws. Bird v. Michigan C. R. Co. (Mich.) 13 Det. L. N. 639, 108 N. W. 1100.

Evidence that at a point near a switch the diverging lines of track are so near together as to make loading operations inconvenient will not be sufficient to show that proper depot grounds may not include such point. Cole v. Duluth, S. S. & A. R. Co. 104 Wis. 460, 80 N. W. 736.

A point 160 to 200 yards distant from a station house was not strictly within the station grounds, but constituted an approach to them, and could not have been fenced without incommoding the company and the public in the transaction of the freight business of the road. Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265, 11 N. W. 152.

In ascertaining what portion of its ground at stations should be left open in order to enable it properly to perform its duty to the public, the safety to employees must also be taken into account; therefore, in arranging the switch yards the company may properly keep in view the safety of the employees. Cleveland, C. C. & St. L. R. Co. v. Umphenour, 63 Ill. App. 642.

McGrath v. Detroit, M. & M. R. Co.; and Rabinov v. Chicago & W. M. R. Co.—supra; Illinois C. R. Co. v. Whalen, 42 Ill. 396.

The space between switch stands is within the depot grounds.

Eaton v. McNeill, 31 Or. 128, 49 Pac. 875; Cleveland, C. C. & St. L. R. Co. v. Roper, 47 Ill. App. 320.

A passing track is a part of, and must be held to be within, the depot grounds.

McGrath v. Detroit M. & M. R. Co. 57 Mich. 559, 24 N. W. 854; Rinear v. Grand Rapids & I. R. Co. 70 Mich. 621, 38 N. W. 599.

At least as much of the main line and grounds outside of the switches as is in actual use for reaching side tracks within the switches is a part of the station grounds, to which the statutory requirement to fence does not apply.

"Three conditions must concur to constitute the particular grounds depot grounds, within the contemplation of the law. They must be necessary, convenient, and actually used for the purposes of depot grounds. They must be necessary. This, no doubt, is to be interpreted as meaning reasonably necessary. It is not enough that they are convenient and actually used; they must be reasonably necessary as well." Grosse v. Chicago & N. W. R. Co. 91 Wis. 482, 65 N. W. 185.

The question arose in the lower court, in *Latty v. Burlington, C. R. & M. R. Co.* 38 Iowa, 250, as to whether a point in question was a station, and whether the grounds around it were to be regarded as depot grounds. The court, on appeal, says merely in passing that point: "Evidence was introduced as to their use and the business there transacted, which need not be stated."

There was no obligation to fence at a point near the station house and wood and coal houses, which were located on opposite sides of the main track and between side tracks, in *Durand v. Chicago & N. W. R. Co.* 26 Iowa, 559.

A railroad company cannot be required to fence so as to cut itself off from its wood yards. *Jeffersonville, M. & I. R. Co. v. Beaty*, 36 Ind. 19.

So, a railroad company is not required to fence its road in the immediate vicinity of its engine house, and machine shop, car house, wood house, and wood yard. *Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231.

Where an animal entered upon the track from a point customarily and necessarily used by the company for the storage of wood hauled there by farmers for shipment, and the station buildings and side tracks were in the vicinity, the point in question, by reason of the public convenience, must be regarded as public depot grounds. *Hopper v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 52, 33 N. W. 314.

A water tank 530 feet easterly from a depot, near which is a switch, and beyond 360 feet is another switch, warehouses being 107 L.R.A. (N.S.)

Grondin v. Duluth, S. S. & A. R. Co. 100 Mich. 598, 59 N. W. 229.

The criterion is whether, in view of the present or prospective needs of such grounds for station or depot purposes, the company has used a reasonable discretion in throwing them open for that purpose.

Rinear v. Grand Rapids & I. R. Co. 70 Mich. 620, 38 N. W. 599; *Davis v. Burlington & M. River R. Co.* 26 Iowa, 551.

Bean, Ch. J., delivered the opinion of the court:

This is an action to recover the value of four horses killed by the moving trains of the defendant on an unfenced portion of its track, but which the plaintiffs claim and allege should have been fenced.

The complaint states a cause of action

cated on the side track, is clearly within the depot-ground limits. *Harvey v. Southern P. Co.* 46 Or. 505, 80 Pac. 1061.

A railroad company is not required to fence along a highway abutting upon an open space south of the main track and the depot and between that and the switch and cattle pens which extend to within a short distance of the highway. *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925.

A railroad company is not bound to fence along its track on either side between its depot and cattle yards, when a side track extends from its depot 250 yards, and, in connection with the side track, stock pens are maintained. *Wabash, St. L. & P. R. Co. v. Nice*, 99 Ind. 152.

A depot is a place where passengers get on and off the cars, and where goods are loaded and unloaded; and all grounds necessary or convenient and actually used for these purposes are included in depot grounds. Perhaps, also, as the engine is frequently supplied with wood and water at such places, so much ground as is necessary and used for those purposes, where wood and water are taken at a depot, should be included in depot grounds. *Fowler v. Farmers' Loan & T. Co.* 21 Wis. 77; *Plunkett v. Minneapolis, S. Ste. M. & A. R. Co.* 79 Wis. 222, 48 N. W. 519; *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 485, 65 N. W. 185.

It was held unreasonable in *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349, to require a railroad company to fence its track at a point paralleled by a side track, and in the immediate vicinity of which were a hay press and sawmill, depot and yards. The following instruction was declared correct: "Neither does the law require a railway company to build and maintain a fence at a point where, by so doing, it will interfere with the free use of a switch or side track constituting a part of the road; nor is such company bound to build or maintain a fence at a point on its road where it will interfere with the free use of a piece or parcel of ground kept and used by the company as

for common-law negligence, and also under the statute making a railway company liable for stock killed on an unfenced track. The court below, in accordance with the doctrine approved in *Harvey v. Southern P. Co.* 46 Or. 505, 80 Pac. 1061, required plaintiffs to elect upon which cause of action they would proceed, and they elected to rely upon the statutory liability. The defense is that the animals entered upon the track at the depot grounds of the defendant, and that plaintiffs were guilty of such contributory negligence in suffering and permitting them to run at large at the place where they were killed as will bar a recovery. The defendant owns and operates a railroad from Portland to the eastern boundary of the state. Bridal Veil is a station between Portland and The

Dalles, used principally for the shipment of lumber. It consists of station grounds, a depot building, side track, switches and turnouts necessary and proper for the handling of the business at that point. A switch or side track used by it in the transaction of its business leaves the main track at a point 200 or 300 feet east of the depot building, and, passing south of such building, intersects the main track again about 1,800 feet west thereof. Along this side track are situated the planing mill, lumber yards, sheds, and other buildings of the lumber company. In 1902, the defendant constructed on the north side of the main track a passing track 3,000 feet long which commences about 700 or 800 feet west of the depot building and opposite the lumber plat-

a coal and wood yard; nor when it will interfere with the free use of a yard or lot kept for the purpose of loading or unloading staves, lumber, timber, wood, or other kinds of freight shipped, or to be shipped, on the cars of the company. . . . But whenever a company can build and maintain a fence without interfering with the rights of the public, or with the free use of property belonging to private individuals, or of its own property, then it is bound to maintain a fence, whether it be in a town or village, or in the country."

Distance from depots is not the controlling consideration in determining depot grounds. Neither does the question of frequent or infrequent use for switching purposes control. The question is, Are they reasonably necessary for that purpose, or liable to become so? *Rabidon v. Chicago & W. M. R. Co.* 115 Mich. 390, 39 L.R.A. 405, 73 N. W. 386.

A point over a mile from the freight and passenger station in a thickly populated community is not so far as to be outside the yard limits, if it is within the limits reasonably set by the company, and the fence and guards at that point would render switching and management of trains dangerous to employees. *Ibid.*

The public convenience requires that at stations or sidings where freight or passengers are received or discharged the approach to the road should be free and unobstructed by a fence. In this instance the unfenced siding was 1,320 feet in length, but the court said that it could not say that it was longer than the convenience and necessities of the business required. *Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143.

It would be unreasonable to require a railroad company to fence its road between the crossing of a county road and its depot, the county road being over 2,000 feet north of the depot, when it could not do so without unjustly interfering with the proper and legitimate use of its property. *Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593.

But where a crossing was a quarter of a mile east of a depot, and the point where

an animal was killed east of that, and between a switch maintained for the use only of a tile factory, a judgment for damages will not be disturbed. *Toledo, St. L. & K. C. R. Co. v. Fly*, 8 Ind. App. 602, 36 N. E. 215.

And that part of a track extending through the addition to a city, to a bridge across a river and east from a railroad crossing at right angles, is not exempt from fencing when all of the shifting and switching of cars was done west of the railroad crossing. *Toledo, St. L. & K. C. R. Co. v. Cupp*, 9 Ind. App. 244, 36 N. E. 445.

And where the evidence showed that a railroad company had a station at a small town, and that stock was killed 1¼ miles west thereof, the jury was warranted in presuming that the depot grounds did not extend that distance. *Smith v. Chicago, M. & St. P. R. Co.* 60 Iowa, 512, 15 N. W. 303.

So, a point more than a mile distant from a depot, and which is not necessarily used by the railroad company in making up trains, although sometimes convenient for that purpose, is not within the exception to the obligation to fence. *Union P. R. Co. v. Knowlton*, 43 Neb. 751, 62 N. W. 203.

So, where there was a depot one side of a highway crossing and no fence 300 feet the other side, failure to fence beyond the crossing is not excused by proof that some freight was received and discharged there. *Moser v. St. Paul & D. R. Co.* 42 Minn. 480, 44 N. W. 530.

And it is the duty of a railroad company to fence at a point connected with its station grounds but bounded by private property, and where a fence might have been maintained without inconvenience to the public or danger to employees. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.) 101 N. W. 981.

Conflicting decisions.

Two decisions, one in Texas and one in New York, are not in line with the otherwise thoroughly settled doctrine.

Stock was killed near a depot at a point where a switch track was located, in Hous-

form of the lumber company and extends about 2,200 feet east of the depot. About 100 feet east of this passing track the defendant constructed a cattle guard with fences connected therewith on either side. From this point east the track is fenced, but it is not inclosed between the cattle guard and the west end of the depot grounds. The plaintiffs live and are in business at Bridal Veil. On the evening of April 11, 1904, they turned their horses out to graze on the uninclosed lands south of the depot as they had been accustomed to do for some time. During the night the horses strayed onto the track of the defendant, and were killed by its moving trains. The evidence tended to show that the horses entered upon the track west of the east end of the passing

track, but were run down and killed east of of the cattle guard. The court below directed a nonsuit on the ground that the place of entry was within the depot grounds of the defendant and at a place it was not required to fence. The statute makes a railroad company liable for the value of stock killed by its moving trains, engines, or cars, upon or near an unfenced track (Bellinger & C. Anno. Codes & Statutes, § 5139), and is broad enough to include animals killed at the depot grounds. It has, however, been held that the statute did not extend to depot grounds because the purposes for which they are used and the right of public convenience are inconsistent with the obligation to fence at that point. *Moses v. Southern P. R. Co.* 18 Or. 385, 8 L.R.A. 135, 23 Pac. 498; Sulli-

ton & T. C. R. Co. v. Simpson, 2 Tex. App. Civ. Cas. (Willson) § 670. It was proved that to have the road fenced at that point would cause much inconvenience in handling trains; but the court held that not a valid excuse for failing to fence the road, since, if so, it would virtually destroy the efficiency of the statute making it negligence *per se* to injure stock when the track is not fenced.

So, when the statute provides for cattle guards at all road crossings, road crossings adjacent to the station buildings of a railroad company cannot be held exempt from its purview. The court has no right to create exceptions, and say that, because a railroad company chooses to locate its station buildings not on, but near, a public highway crossing, and that thereby cattle guards may inconvenience it and the public, it is not bound to maintain them. Inconvenience is no excuse to them for omitting a plain statutory duty. *Bradley v. Buffalo, N. Y. & E. R. Co.* 34 N. Y. 427.

b. Extension beyond town limits.

The side tracks of a railroad company connected with a station, which are necessary for the transaction of the public business of the railroad, need not be fenced, even when part of them extend outside the corporate limits. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, 43 N. W. 1148.

So in a later hearing in the same case, reported in 30 Neb. 686, 46 N. W. 1015, it was held that a railroad company need not fence that part of its station grounds extending outside the limits of a city, town, or village, when such grounds are necessary for the proper transaction of its business as a common carrier.

So, it is for the jury to say whether a point where there are several tracks or switches used in connection with the station, but outside the limits of a town, is a part of the depot grounds because the transaction of business with the public requires that it be left open. *Bean v. St. Louis, I. M. & S. R. Co.* 20 Mo. App. 641.
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And so, where, outside of village limits, but adjacent thereto and at a point where there were a few public buildings, the railroad company maintained a switch which could not be reached for loading and unloading purposes if it had been fenced, the court held it to be ground open to the public, and therefore not required to be fenced any more than the part of the track actually within village limits, which, being ground open to the public, was not required by statute to be fenced. *Toledo, W. & W. R. Co. v. Chapin*, 66 Ill. 504.

But where the freight or passenger traffic of a town is not large, and there are no elevators or warehouses indicating a place at which considerable quantities of produce are received and shipped, and there is a space 1,900 feet in length from the depot within the town limits that could be used for the proper handling of trains and amply sufficient for the transaction of the business with the public, these facts justify a verdict that a point just beyond and outside the town limits cannot be considered depot grounds within the meaning of the exception to the fence laws. *Toledo, St. L. & K. C. R. Co. v. Franklin*, 53 Ill. App. 632.

c. Way stations; flag stations; sidings.

The courts have found extreme difficulty in determining when a stopping place is of sufficient importance to be denominated a station, and to have the grounds immediately surrounding it unfenced. The following cases present the variety of opinion which this question has elicited:

A point where passengers are permitted to get on and off trains and freight is sometimes thrown off, but no agent is there to take charge of it, is not a station or depot; and the company is bound, at that point, to erect fences along either side of its track. *Duncan v. St. Louis, I. M. & S. R. Co.* 111 Mo. App. 193, 85 S. W. 661.

So, a point within pasture lands, where there is no station agent or depot, but there are a section house, stock yards, side tracks, and switch yards, and the shipping of cat-

van v. Oregon R. & Nav. Co. 19 Or. 310, 24 Pac. 408.

The question for decision upon the trial, therefore, was whether the place where the animals of the plaintiffs entered upon the track of the defendant was within or without the depot grounds. If within the depot grounds, the plaintiffs cannot recover in this action, but if not, defendant is liable under the statute unless the plaintiffs were guilty of contributory negligence. The parties differ radically as to whether the question thus presented is one of law or of fact. The plaintiffs claim that it was a question of fact, and should have been submitted to the jury, while the defendant insists that it was a matter of law for the court. The rule is, we take it, that whether a railway company

shall fence its track at its depot grounds is a question of law, and, if the testimony shows that animals entering upon such grounds are injured or killed by moving trains, the owner cannot recover under the statute, and the liability of the company is for the court. *Moses v. Southern P. R. Co.* supra; *Eaton v. Oregon & R. Nav. Co.* 19 Or. 371; 391. 24 Pac. 413, 415; *Eaton v. McNeill*, 31 Or. 128, 49 Pac. 875; *Harvey v. Southern P. Co.* supra. But it is often a disputed question as to whether a certain point constitutes a part of the depot grounds; and, if the evidence is conflicting, or different inferences may be drawn from it, the question is for the jury, and not the court. Mr. Elliott says: "While it is purely a question of law whether or not a railway company

tle and other business are there transacted, and passengers are received, is not a station exempting the railroad company from fencing thereat. *Southern Kansas R. Co. v. McKay* (Tex. Civ. App.) 47 S. W. 479.

And a side track used only for loading and shipping tan bark, near where no depot or platform had been erected and no named station existed, was not depot grounds so that it need not be fenced. *Jaeger v. Chicago, M. & St. P. R. Co.* 75 Wis. 130, 43 N. W. 732.

A point within a village recently platted, where there are none of the concomitants of a station except a platform and side track, is not depot grounds. *Anderson v. Stewart*, 76 Wis. 43, 44 N. W. 1091.

A railroad company is not relieved from the duty of fencing for a distance of 40 rods each way when a station consists merely of a platform, the public convenience not requiring the erection of a building, nor access to the station and tracks. *Iowa C. R. Co. v. Gushee*, 49 Ill. App. 609.

One thousand six hundred feet, of siding, used only for the passage of trains and for the wood and tie traffic, at a point where no freighting is carried on and where the passenger traffic is limited to persons flagging the accommodation trains, no station having been erected or agent kept there, cannot be regarded as depot grounds within the meaning of the fence laws. *Hurt v. St. Paul, M. & M. R. Co.* 39 Minn. 485, 40 N. W. 613.

But in the following cases entirely similar stopping places have been held to be stations, around which fences are not required:

Thus, it is not necessary to have a depot and a station agent at a railroad point to constitute the point a station within the fence laws. The receipt and discharge of passengers and freight, and maintenance of a platform, are sufficient. *McGuire v. St. Louis, M. & S. E. R. Co.* 113 Mo. App. 79, 87 S. W. 564.

So, a point where a railroad company has established a flag station and siding where passengers are taken on and put off, and where freight is received and delivered, and where the switching of trains is necessary

for these purposes, is within the exception to the obligation to fence. *Gulf, C. & S. F. R. Co. v. Wallace*, 2 Tex. Civ. App. 270, 21 S. W. 973.

And so, a point upon a main track where there are a water tank, telegraph office, ticket office, house for station men, and passenger platform, is depot grounds within the meaning of the statute. *Peters v. Stewart*, 72 Wis. 133, 39 N. W. 380.

So, a place where passengers get on and off trains, where goods are loaded and unloaded, where cars are set out upon the side tracks to be loaded and unloaded and stored and taken up again into trains, is a station which may lawfully have depot grounds of reasonable extent. *Mills & L. C. Lumber Co. v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996.

A point upon the road at which trains stop daily, and passengers and freight are there taken and delivered, although no depot building has been built and no agent is kept there, is station grounds within the meaning of the fence laws. *Schneekloth v. Chicago & W. M. R. Co.* 108 Mich. 1, 65 N. W. 663.

In Indiana state railroad companies are not required to fence their tracks at sidings where freight or passengers are received or discharged. *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925; *Indiana, B. & W. R. Co. v. Sawyer*, 109 Ind. 342, 10 N. E. 105; *Becholdt v. Grand Rapids & I. R. Co.* 113 Ind. 343, 15 N. E. 886.

Where the evidence shows that very slight business is carried on at a station which is not of enough importance to build an office or station house, it is not necessary to leave a full half mile of track unfenced for the transaction of business. *Acord v. St. Louis Southwestern R. Co.* 113 Mo. App. 84, 87 S. W. 537.

It was held in *Chicago, M. & St. P. R. Co. v. Dumser*, 109 Ill. 402, that, when the legislature in absolute terms limits the exceptions to the statutory requirement that tracks must be fenced to that portion thereof within cities and villages, the exception will not apply to a station with its switches and side tracks maintained by the company

shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is a question of fact whether a certain point constitutes part of the depot grounds, or whether the erection of a fence at any particular place would interfere with the company's employees in the performance of their duties." 3 Elliott, Railroads, § 1202. In *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185, the unfenced portion of the right of way was half a mile in length and extended north beyond a switch which was 1,400 feet from the depot building. At a highway crossing a short distance south of the switch it was customary to load and unload freight. Between such crossing and the switch, plaintiff's colts

for the reception and discharge of passengers and freight at a point not within the limits of a city or village. The animal in this instance was killed 80 rods east of the station, but between the station and the end of a switch used in connection with it. This decision is later explained and practically overruled in *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114, where, in reaching a directly contrary conclusion to the one above stated, the court says that it was not necessary in the *Dumser Case* to decide that the company was derelict in duty in failing to fence its track at the depot, since the animal got upon its track and was killed at a point some distance therefrom, and that, for that reason, the judgment in favor of the plaintiff was properly affirmed; thus implying that the company was unquestionably under an obligation to fence at the point in question between the station and the end of a switch connected with it. After thus explaining the *Dumser Case*, the court proceeds, and decides that the statute must be held to include in its exceptions to points required to be fenced, also, stations not within the limits of cities or villages; that the statute, by its terms, relates to the road or track of the railroad; that the main feature at a station is not the road or track; and that it is the duty of the company at all times to provide ready and convenient means of access to its stations and depots; and that to require them to be fenced would be to cause delay and inconvenience to the public.

d. Switch limits.

1. In general.

As a general rule depot grounds are held to extend at least to the switch and side-track limits.

"Switch limits," and "station grounds" seem to be used as meaning the same thing in: *Southern Kansas R. Co. v. Cooper*, 32 Tex. 592, 75 S. W. 328.

Depot grounds, within the meaning of the fence laws, include the terminals and switch

came upon the right of way and were killed, and it was held that it was a question for the jury whether the place of entry was a part of the depot grounds. In *Rhines v. Chicago & N. W. R. Co.* 75 Iowa, 597, 39 N. W. 912, it was held that whether that part of the company's ground which was not the ordinary place of receiving or delivering freight, but where freight of a single shipper was handled, should be left unfenced, was a question of fact for the jury. And in *Dinwoodie v. Chicago, M. & St. P. R. Co.* 70 Wis. 160, 35 N. W. 296, it was likewise held to be a question of fact whether the defendant's right of way at a point 60 rods from the station building where there was a side track in addition to the main track was necessary and convenient and actually used

stands of all switches or side tracks at all depots and stations. *Gulf, C. & S. F. R. Co. v. Blankenbeckler*, 13 Tex. Civ. App. 249, 35 S. W. 331.

A point within switch limits was held to be within depot grounds, in *Gulf, C. & S. F. R. Co. v. Ogg*, 8 Tex. Civ. App. 285, 28 S. W. 347.

The space used for switches and side tracks is not required to be fenced. *Houston & T. C. R. Co. v. Boozer*, 2 Posey, Unrep. Cas. (Tex.) 454, *arguendo*.

A point between the station building and west switch was deemed, without question, within depot grounds, in *Eaton v. McNeill*. 31 Or. 128, 49 Pac. 875.

In *Downey v. Mississippi River & B. T. R. Co.* 94 Mo. App. 137, 67 S. W. 945, it is said that, if a town is unincorporated, a railroad company must fence its tracks therein, except where it needs to keep them open within reasonable switch limits for the convenient transaction of business.

A fence is not necessary within what may be called depot grounds, i. e., such portion as is necessary for the switches and other purposes connected with the depot; beyond such limits it is necessary. *Illinois C. R. Co. v. Finney*, 42 Ill. App. 390.

The fence law does not apply to depot grounds. In this instance depot grounds were stated to cover 5 or 6 acres, extending along on either side of the road, and used for loading and unloading freight, and including switches and side tracks. *Davis v. Burlington & M. River R. Co.* 26 Iowa, 549.

Where a railroad maintained a depot, stock pens, and a side track, and there were also a sawmill and flouring mill in the immediate vicinity of the side track, it was held not incumbent upon the company to construct fences upon either side at any point occupied by the side track. *Indiana, B. & W. R. Co. v. Leak*, 89 Ind. 596.

The east side of a track upon which there were a depot, sawmill, and other sidings, and a long switch, was held properly unfenced the extent of the switch, in *Indianapolis, P. & C. R. Co. v. Caudle*, 60 Ind. 112.

A point 40 yards within a depot and with-

for loading and unloading freight, so as to make it a part of the depot grounds, thus relieving the company from the duty of fencing it. And in *Bean v. St. Louis, I. M. & S. R. Co.* 20 Mo. App. 641, it was ruled that, where a cow was killed adjacent to a railroad station and at a place used by the railroad for switching purposes in connection with its station grounds, the court could not declare, as a matter of law, that the company was not bound to fence its track at that point. See also *Indiana, B. & W. R. Co. v. Hale*, 93 Ind. 79; *Chicago & E. I. R. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986; *McDonough v. Milwaukee & N. R. Co.* 73 Wis. 223, 40 N. W. 806. The depot or station grounds of a railway company is the place where passengers get on and off the trains and where freight is loaded and un-

loaded, and includes all grounds reasonably necessary or convenient for that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station. 3 Words & Phrases Judicially Defined, 2005 et seq.; 9 Am. & Eng. Enc. Law, 2d ed. p. 367; *Grosse v. Chicago & N. W. R. Co.* supra; *Grondin v. Duluth, S. S. & A. R. Co.* 100 Mich. 598, 59 N. W. 229. And where grounds have been appropriated, surveyed, and set apart by the railway company for station or depot purposes, it affords very strong, if not conclusive, evidence that their boundaries and extent are such as and no more than are necessary and proper, and

in switch limits, where it would be inconvenient to the public to fence the track, is within depot grounds. *Swanson v. Melton*, 4 Tex. App. Civ. Cas. (Willson) § 264, 17 S. W. 1088.

A spur track at a flag station used by the public need not be fenced. *Missouri, K. & T. R. Co. v. Willis*, 17 Tex. Civ. App. 228, 42 S. W. 371.

The finding of the court that the space where the animals came upon the railroad track was within the switch limits, and substantially that such switch limits were requisite for the business of the company and of the public and for the safety of employees, is conclusive on the question of the reasonableness of the length thereof. *Redmond v. Missouri, K. & T. R. Co.* 104 Mo. App. 651, 77 S. W. 768.

A railroad company is not required to fence along the line of its switch connected with its station, when all the switch is substantially used by the public in its transaction of business with the railroad company. *Cleveland, C. C. & St. L. R. Co. v. Myers*, 43 Ill. App. 251.

But the switch limits must not extend over a greater space than is reasonably necessary for the convenient transaction of the railroad company's business with the public, in order to come within the term "depot grounds," within the meaning of the fence laws.

It would be an improper construction of the statute to hold that station grounds extend as far as switching grounds, when the latter extend a long distance, apparently designed eventually to become a part of a double-track system. *Chicago, B. & Q. R. Co. v. Seveck* (Neb.) 110 N. W. 639.

So, where a switch connected with the depot extends along the main track for a considerable distance through an open prairie, it is just as necessary and practicable to have the road fenced as upon any other part of the road. *Morris v. St. Louis, K. C. & N. R. Co.* 68 Mo. 78.

A point 2 miles from the depot is not within the depot grounds although within 7 L.R.A. (N.S.)

or on the edge of the yard limits of a railroad company. *Nickolson v. Northern P. R. Co.* 80 Minn. 508, 83 N. W. 454.

Where switches begin 200 yards from a small station and then extend a quarter of a mile through uninclosed lands, the space occupied by them cannot be considered depot grounds, since it is manifest that they cannot be necessary for the transaction of business between the railroad company and the public. *Russell v. Hannibal & St. J. R. Co.* 26 Mo. App. 368.

In *Texas & P. R. Co. v. Billingsly* (Tex. Civ. App.) 37 S. W. 27, it is said that switch limits are not necessarily places which public necessity and convenience require should be left open and unfenced. They may be so and they may not be. They may extend far beyond the limits of public necessity. In such cases the right of way must be fenced to relieve the company of damages for killing stock in such limits.

Where, at the point at which a horse went upon the track, there is no station, the nearest building is 175 feet north, the nearest crossing is 175 feet south, and a yard track lies 60 feet each way, the adjoining ground being unoccupied for any purpose, the situation is not such that a fence could not have been maintained without interfering with the company's business transactions with the public or the safety of its employees. And the fact that the point under consideration was within the switch limits of the road does not change the situation. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 299.

The fact that there was a switch at a particular place does not raise the presumption that it was part of the station ground. The railroad company can always establish by proof what grounds are used for station purposes. *Comstock v. Des Moines Valley R. Co.* 32 Iowa, 376.

It is said in *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114, that such parts of side tracks as do not constitute part of the depot

their limits should not be curtailed or extended by the court or jury unless in a very clear case. 3 Elliott, Railroads, § 1194; Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265, 11 N. W. 152; McGrath v. Detroit, M. & M. R. Co. 57 Mich. 555, 24 N. W. 854; Rabidon v. Chicago & W. M. R. Co. 115 Mich. 390, 39 L.R.A. 405, 73 N. W. 386.

Now, there was no evidence in this case that the place where the plaintiff's horses entered upon defendant's track was within the limits of the station grounds, as set aside and designated by the defendant, or within such grounds, as hereinbefore defined; and therefore the court could not declare, as a matter of law, that defendant was not required to fence its track at such point. The north track constructed by the defendant in 1902, so far as the evidence shows, was in-

tended to be used for the passing of trains, and was in no way connected with or necessary to the use of the depot grounds; nor, indeed, that it was on such grounds. We think, therefore, that the question whether the point where the horses entered was within the depot grounds was a question for the jury, and should have been submitted to them. A claim is made that plaintiffs were guilty of contributory negligence in turning their horses out to graze upon the uninclosed lands near the depot; but whether this was such contributory negligence, under the circumstances, as will defeat a recovery, was for the jury. *Moses v. Southern P. R. Co.* supra; 2 Thomp. Neg. § 2004.

Judgment reversed, and new trial ordered.

yard may well be held to be within the statute.

2 Points between switch ends and depot building.

At points within the switch limits of a station where the company and public use the track for receiving and discharging freight, there is no duty on the railroad company to fence. To require such places to be fenced would cause delay and inconvenience to the public, and detract from the public character of a railroad. *Cleveland, C. C. & St. L. R. Co. v. Roper*, 47 Ill. App. 320.

Where a cow was killed by going upon the track within the limits of a side track and station grounds, the side track being used by the public and company in loading and unloading freight, every day or two, the year round, it was held that no recovery based upon the ground of a failure to fence could be had, since it was necessary that those parts of the track be kept open for the convenience of the public. *Cleveland, C. C. & St. L. R. Co. v. Abney*, 43 Ill. App. 92.

Where evidence shows that the public convenience requires access to a switch at a point between the end of the switch and a station house, that point is within the station grounds, so as to be within the exception to the fence laws. *Cleveland, C. C. & St. L. R. Co. v. Umphenour*, 63 Ill. App. 642; *Terre Haute & I. R. Co. v. Grissom*, 60 Ill. App. 114.

A point within switch limits and in the vicinity of a depot was regarded as within depot grounds, in *Swearingen v. Missouri, K. & T. R. Co.* 64 Mo. 73, because necessary for the transaction of business between the railroad company and the public.

A railroad company was held not liable for stock killed on account of a failure to fence from the ends of a switch to the station house, the point at which the stock entered upon the track being between one end of a switch and the station house, the station being situated in an unincorporated

village. *Louisville, E. & St. L. Consol. R. Co. v. Scott*, 34 Ill. App. 636.

But the court, in *Chicago, B. & Q. R. Co. v. Hans*, supra, seems to be of the opinion that a point 80 rods east of the station, but between the station and the end of a switch used in connection with it, was one where the railroad company was unquestionably under an obligation to fence.

3. Points beyond switch ends.

Perhaps the point of this question upon which the greatest difference of opinion exists is whether, or how far, depot grounds may extend beyond switch limits. Some of the courts squarely take the stand that they cannot to any extent.

Thus, the end of a side track is as far as depot grounds can extend for any possible public purpose. Between there and the highway is outside. *Plunkett v. Minneapolis, S. Ste. M. & A. R. Co.* 79 Wis. 222, 48 N. W. 519.

So, a point beyond switch limits and a quarter of a mile from the depot is one where the railroad company must fence. *Lepp v. St. Louis, I. M. & S. R. Co.* 87 Mo. 139.

A point 65 feet north of the head block and last switch in that direction, below which are the roundhouse and terminal grounds occupied by shops, etc., is not part of the depot grounds within the meaning of the fence laws. *Cox v. Minneapolis, S. Ste. M. & A. R. Co.* 41 Minn. 101, 42 N. W. 924.

In *Peyton v. Chicago, R. I. & P. R. Co.* 70 Iowa, 522, 30 N. W. 877, the stock in question was struck and killed by a train at a point on its main line of road about 140 feet beyond the end of side tracks, still further beyond which cattle guards had been placed. It was claimed that the point was within depot grounds because it was necessary to use the main line between the cattle guard and switches for the purpose of stopping trains and uncoupling cars to throw them into the switches, and that, since fences or cattle guards at this point would

endanger the lives of employees, it must be considered within the depot grounds. In refusing to support this contention, the court uses conspicuously clear language, saying: "The uniform holding has been that the company has no right to fence its track at such places as the public have the right to come upon the right of way to transact business with the company, as a carrier of freight or passengers,—such as at side tracks set apart and used for receiving and discharging freight. This would not include parts of the track not used for the purpose of the transaction of business between the company and the public. It would not include that part of the road where there are side tracks used for the convenience of the company, and not at stations. The damage was not done in this case at a point on the line where the public had any business with the road. The animals were killed outside of the switches and outside of the depot grounds. It may be true, as the defendant claims, that at that point it was necessary for the trainmen to use the track for the purpose of entering the switches, and that a fence and cattle guards across the track at the end of the side tracks would be an inconvenience, and possibly an increase of the hazard of coupling and uncoupling cars. But it is very plain that the right to fence existed, notwithstanding these facts. The theory of exemption from the statute requiring fences has always been founded upon the relation of the company to the public, and not to any other consideration. In the case at bar the depot grounds were plainly within the switches."

A verdict that a point between the end of a side track and cattle guard, the side track being connected with a partly abandoned station, was not within depot grounds, was sustained in *McDonough v. Milwaukee & N. R. Co.* 73 Wis. 223, 40 N. W. 806.

In some instances, while holding to the doctrine that the switch limits are the extent of the depot grounds, the courts recognize the element of necessity of public access as one which would change the rule.

Thus, a point 37½ feet outside of switch limits and 13 feet outside of town limits, shown to have been nonessential to the accommodation of the public, was held not within depot grounds, in *Chouteau v. Hannibal & St. J. R. Co.* 28 Mo. App. 556.

And a point upon a main track several hundred feet beyond a switch cannot be considered part of the depot grounds when there is no practical objection to its being fenced. *Blair v. Milwaukee & P. du Ch. R. Co.* 20 Wis. 254.

But, opposed to this class of cases above shown is another, which holds the public necessity of access not the only reason for exemption from the obligation to fence, but which regards the safety to employees and convenience of the railroad company in train operations as equally weighty reasons for making an exception to the statute.

Thus, in *Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507, it is said it is well settled that a railroad company is not required to fence its road where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in traveling or doing business with the company are interfered with; so a company need not fence between the end of a switch extending beyond the station house and a bridge crossing a highway, when the necessary cattle guards would, on account of the peculiar circumstances involved, endanger the lives of employees.

So, station grounds cannot be limited to the territory within the switches. At least as much of the track and grounds outside of the switches as is required and is in actual use for reaching the side tracks is a part of the station grounds to which the statutory requirement to fence does not apply. *Grondin v. Duluth, S. S. & A. R. Co.* 100 Mich. 598, 59 N. W. 229.

When a cattle guard could not be placed any nearer the head of a switch without endangering the lives of employees the company is not liable, as the switching is necessary to the transactions of the station or business with the public. *Pearson v. Chicago, B. & K. C. R. Co.* 33 Mo. App. 543.

There is no duty on the part of the railroad company to fence between a cattle guard and the end of a switch connected with a station, when by so doing the transaction of business would be hindered and the lives of employees endangered. *Jennings v. St. Joseph & St. L. R. Co.* 37 Mo. App. 651.

A railroad company is exempt from fencing between a cattle guard and the apex of a switch connected with a station, when its business would be thereby materially interfered with and the safety of employees endangered. *Grant v. Atchison, T. & S. F. R. Co.* 56 Mo. App. 65.

So, a railroad company is exempt from fencing at a point 95 feet distant from the apex of a switch, when the evidence tends to show that the switch limits are reasonable and cannot be contracted without materially interfering with handling of trains at the station. *Webster v. Atchison, T. & S. F. R. Co.* 57 Mo. App. 451.

A railroad company is not required to maintain cattle guards so near to the approach of its switches connected with the station as to interfere with the business of handling its trains. *Hurd v. Chappell*, 91 Mo. App. 317.

Evidence that an ordinary train must run to a bridge in order to switch back onto a side track, conceded to be on depot grounds, inclined the court to the opinion that the weight of evidence was in favor of that part of the railroad between the switch and the bridge being a part of the depot grounds; but it nevertheless refused to set aside a verdict to the contrary. *Fowler v. Farmers' Loan & T. Co.* 21 Wis. 77.

Prima facie, depot grounds include all that part of the right of way which is left unfenced between the switches and cattle

guards on either side of the platform, including the switches and side tracks. In some instances they may even be deemed to extend beyond the switch to that point to which an ordinary freight train must run in order to switch and run back upon its side track. *Mills & L. C. Lumber Co. v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996.

e. Private shipping points.

Consistently with the principle controlling this question, it has been held that a private shipping point must be fenced. The public convenience or necessity is not, in such a case, involved, and one individual's convenience is not paramount to the right of protection of any other individual.

Thus, where, at the point where an animal was killed, there were a private rolling mill and four or five tracks, one being the main track and the others being used for the accommodation of the rolling company, sometimes for others, and sometimes for switching; but there was no depot near,—the point in question could not be regarded as depot grounds, exempting the company from fencing it. *Kansas City, Ft. S. & G. R. Co. v. Hays*, 29 Kan. 193.

So, a point where a switch is maintained for the exclusive accommodation of a mill, although trains sometimes stop there as a matter of special accommodation to receive or discharge passengers or freight, is not a station, so as to exempt the railroad company from fencing at that point. *Foster v. Kansas City Southern R. Co.* 112 Mo. App. 67, 87 S. W. 57.

III. Extent of depot grounds a question for the jury.

a. In general.

It is the almost unanimous conclusion of the courts that the question of the proper extent of the depot grounds is one of fact, to be determined by the jury. *Wabash R. Co. v. Howard*, 57 Ill. App. 66; *Cole v. Chicago & N. W. R. Co.* 38 Iowa, 311; *Crenshaw v. St. Louis, K. & N. W. R. Co.* 54 Mo. App. 233; *McDonough v. Milwaukee & N. R. Co.* 73 Wis. 223, 40 N. W. 806; *Acord v. St. Louis Southwestern R. Co.* 113 Mo. App. 84, 87 S. W. 537.

It is for the jury, or the court sitting as a jury, to say throughout what distance it is necessary to leave tracks unfenced. *Downey v. Mississippi River & B. T. R. Co.* 94 Mo. App. 137, 67 S. W. 945.

The space needed for depot purposes depends upon the facts in each particular case. *Schafer v. St. Louis & H. R. Co.* 65 Mo. App. 201.

It is not competent to take the opinion of witnesses on the subject, but it is for the jury to say, whether or not a railroad should be fenced at a certain point. *Indiana, B. & W. R. Co. v. Hale*, 93 Ind. 79.

The extent of switch limits connected with

a station is a question for the jury. *Glasscock v. Missouri, K. & T. R. Co.* 82 Mo. App. 146; *Texas & P. R. Co. v. Billingsly* (Tex. Civ. App.) 37 S. W. 27.

It is for the jury to say whether cattle guards have been constructed at the first point near a station which would not interfere with the necessities of the public, the employees, and the company. *Cleveland, C. C. & I. R. Co. v. Newbrander*, 40 Ohio St. 15.

Whether a point a few rods from a depot building is within the limits of depot grounds is a question for the jury. *Habenecht v. Chicago, St. P. M. & O. R. Co.* 126 Wis. 521, 105 N. W. 910.

It is a question for the jury whether points within switch limits where stock was killed were within station grounds. *Rosenberg v. Chicago, B. & Q. R. Co.* (Neb.) 110 N. W. 641.

Whether it was necessary that intervening ground between a station and a street 900 feet west thereof should not be inclosed with a fence, in order that the public could have ready and convenient means of access to the station, is a question of fact for the jury. *Cleveland, C. C. & St. L. R. Co. v. Green*, 65 Ill. App. 414.

It is for the jury to determine from the evidence whether the public use and convenience require that a portion of the track on the opposite side of the highway from the station, and beyond a warehouse and other buildings alongside the track, be left unfenced. *Toledo, St. L. & K. C. R. Co. v. Thompson*, 48 Ill. App. 36.

Whether the existence of a switch on the opposite side of a crossing from a depot, which switch is used by the public for loading and unloading merchandise from the cars, excuses the company from the obligation to fence at that point, is a question for the jury. *Wabash R. Co. v. Warren*, 113 Ill. App. 172.

It is a question for the jury whether an animal killed by a train came upon the track upon such part of station grounds as are required to be open for the convenience of the public in the use of the railroad. *Terre Haute & I. R. Co. v. Grissom*, 60 Ill. App. 114.

Whether an animal entered upon a track where a station and grounds in connection therewith were maintained for the transaction of business with the public and the receipt and discharge of freight or passengers, and where it was necessary to keep the grounds open and unfenced for the use of the public, and where the placing of cattle guards would have endangered the safety of employees was an issue of fact for the jury. *Prather v. Kansas City & N. Connecting R. Co.* 84 Mo. App. 86.

It is a question of fact, to be ascertained from all the evidence, whether a given point is not only within claimed station grounds, but also whether the point was necessary for the company's use in conveniently and safely transacting its business, and for the accommodation of the public transacting

business at the station. *Johnson v. Chicago, B. & K. C. R. Co.* 27 Mo. App. 379.

It is a proper question for the jury whether a point upon the main track was within the depot grounds, which was 60 rods from the station, paralleled by a spur track, alongside of which was a ditch which prevented its use for loading and unloading cars, although towards the end, where the ground was level, it had been used occasionally for loading ties. *Dinwoodie v. Chicago, M. & St. P. R. Co.* 70 Wis. 160, 35 N. W. 296.

And it is a question for the jury whether a point about 300 feet south of a depot, and 240 feet south of the end of a switch, in a small village where traffic is light, is necessarily left unfenced for the safe and convenient transaction of business. *Brandenburg v. St. Louis & S. F. R. Co.* 44 Mo. App. 224.

And so, it is a question for the jury whether the distance between a cattle guard and the end of a switch 1,400 feet from the depot building and from the end of the switch to the depot, a distance in all of half a mile, is all depot grounds, and especially a point at a highway crossing a short distance from the end of the switch, between there and the depot. *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185.

It is a question of fact for the jury whether a point in question is reasonably required as a part of depot grounds, when the situation is as follows: The distance from a west switch to an east switch extending along past the depot, warehouses, etc., was 1,800 feet, and space to the extent of 200 feet at one end and 350 feet at the other, beyond the switch, was also left unfenced and claimed as a part of the depot grounds. Stock was killed at a point 150 feet beyond one of the switches, and the question was whether that point was within the depot grounds. *Snell v. Minneapolis, St. P. & S. Ste. M. R. Co.* 87 Minn. 253, 91 N. W. 1108.

Whether the public convenience and interest of the road require that a point on the track in defendant's yard, not used by the public at large, but for the greater convenience of a single shipper, be left unfenced, is a question for the jury. *Rhines v. Chicago & N. W. R. Co.* 75 Iowa, 597, 39 N. W. 912.

It is obvious that *WILMOT v. OREGON R. & NAV. Co.* has the support of many decisions to the conclusion reached therein on this point.

But, where the evidence conclusively shows that a point is within the depot grounds of a railroad company, and could not be fenced without great inconvenience to the public, the court errs in not peremptorily so instructing the jury. *Hillman v. Grays Point Terminal R. Co.* 99 Mo. App. 271, 73 S. W. 220.

The jury failed to agree as to whether a point within a quarter of a mile of a depot was upon the depot grounds. A motion for a new trial was made on the ground that the court should have required a finding 7 L.R.A. (N.S.)

from them in that regard. In overruling the motion, the court itself determined that the point in question, which is not further described, was not on depot grounds. *Monaahan v. Keokuk & D. M. R. Co.* 45 Iowa, 523.

A railroad company is not expected to fence such switch grounds as are necessary to remain open for the use of the public and the necessary transaction of business. The space to be kept open should be no more than is reasonably necessary, and what is necessary is a question the courts may determine. *Vanderworker v. Missouri P. R. Co.* 51 Mo. App. 166.

In one instance, speaking somewhat generally, however, the court says that whether a company is or is not obliged to fence its road at a given point is a question of law, and not of fact. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 299.

b. Effect of allotment as depot grounds.

The definite allotment by a railroad company of land around a station as station grounds has considerable weight in settling the question as to their extent. If the allotment is reasonable, considering the present needs of the company and public in the transaction of business, or, to some extent, the future needs of the road may be taken into consideration, an allotment is practically conclusive of the question but the courts are unanimous in reserving to themselves the ultimate determination, as a question of fact, whether or not an allotment is reasonable under all the circumstances, and, in case it is not, to determine what would be the proper limits.

Thus, it is a question of fact, to be determined by the jury from all the evidence, not only whether the point where animals strayed upon a track was within the claimed station grounds and switch limits, but also whether the point was necessary for the company's use in conveniently and safely transacting its business. The railroad company cannot arbitrarily determine the question, but it is subject to review by the courts, whose duty it is to submit the question to the jury. *Straub v. Eddy*, 47 Mo. App. 189.

The railway company is not the judge of what space is necessary for the transaction of its business with the public. Such questions are determined upon the evidence. *Pearson v. Chicago, B. & K. C. R. Co.* 33 Mo. App. 543.

Admitting that land necessarily used for station grounds need not be fenced, this does not exempt the railroad company from fencing land not necessary, but claimed as a part of its station grounds. *Atchison, T. & S. F. R. Co. v. Shaft*, 33 Kan. 531, 6 Pac. 908.

A railroad company, by fencing each side of its main track from a certain point, fixes that point as the limits of its station grounds. *Stewart v. Grand Rapids & I. R. Co.* (Mich.) 110 N. W. 126.

Where a railroad company has its depot or station grounds surveyed and platted, or

distinctly and definitely allotted, such survey or allotment and use would constitute a very strong, if not conclusive, proof of their necessary boundaries. The question of use is for the jury. *Cole v. Chicago & N. W. R. Co.* 38 Iowa, 311.

It is well settled that railroads are not arbitrarily to determine for themselves the question of the necessity of the space they claim for station grounds and switches. *Acord v. St. Louis Southwestern R. Co.* 113 Mo. App. 84, 87 S. W. 537.

"No doubt the question of what, or how much, ground, at any particular station, will be necessary for the convenience of business at that station, must, in the first instance, be determined by the company itself. But that determination cannot, considering the nature of the interests involved, in all cases be conclusive. . . . So it seems that cases may arise in which it may properly be a question for the jury whether the place where the animals were injured was within the limits of grounds which were reasonably necessary for depot uses, although they were actually used by the company for that purpose." *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185.

How much or how little land a railroad company purchases for depot grounds is immaterial; the jury must find whether the point in question was so used. *Fowler v. Farmers' Loan & T. Co.* 21 Wis. 77.

A railroad cannot arbitrarily determine for itself the question whether a space uninclosed, claimed for station use, depot purposes, and switch limits, was necessary for the convenient and safe transaction of its business and for the accommodation of the public; but, where evidence has been introduced tending to show that the railroad company might have fenced its road where animals strayed thereon, without causing inconvenience to the railway, or to those having business to transact with it, or to the public at such point, the jury should determine the question of the necessity of the land uninclosed for such uses. *Hillman v. Grays Point Terminal R. Co.* 99 Mo. App. 271, 73 S. W. 220, *arguendo*.

"The territory required for this purpose [station grounds], when ascertained and set apart, constitutes what is called depot and station grounds, and varies in amount, usually, according to the location and amount of business to be done, and the necessities and convenience of the company and public in doing their business at the station. These grounds, as we have seen, are not required to be fenced by the company, and, of course, cannot be made to extend from station to station. They are usually quite limited in extent, and are intended to furnish sufficient space for construction of side tracks, offices, passenger depots, freight houses, and other buildings, ways, and yards suitable and convenient for the speedy and safe reception and discharge of passengers and freight, and the storage of cars and other property belonging to the company and persons doing business with the road. The existence of

extent of these grounds is not to be determined by the continued actual use of any part thereof. When station grounds are laid out, their contemplated future use is not unfrequently of more consideration than the actual demands at the time in determining their shape and extent." *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555, 24 N. W. 854.

While the company, in the establishment of its stations and switch limits ought not to be restricted to the present, immediate use of all the space allotted in its plans, but should be allowed to take into consideration the prospective increase in business at such station, yet such calculation should be a reasonable one, and there should be some evidence in regard to it. *Johnson v. Chicago, B. & K. C. R. Co.* 27 Mo. App. 379.

It is not enough that the plans of the company contemplated, at some indefinite time in the future, the use of grounds claimed as depot grounds for increased business. The question is whether it is actually, reasonably so used at the time in question. *Cox v. Minneapolis, S. Ste. M. & A. R. Co.* 41 Minn. 101, 42 N. W. 924.

The criterion is not whether all the grounds set apart for depot and station purposes have been actually used, but whether, in view of the present or prospective needs of such grounds for station or depot purposes, the company has used a reasonable discretion in throwing them open for that purpose. *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620, 38 N. W. 599.

But, when grounds are appropriated and set apart by the company, their limits cannot be curtailed nor extended by a jury in a proceeding where they come collaterally in question, upon the mere showing that any part of the same were not in actual use at any particular time. *McGrath v. Detroit, M. & M. R. Co.* *supra*.

It will be seen, after a review of the above cases, that *WILMOT v. OREGON R. & NAV. CO.* places more weight upon an allotment by the railroad company of land as depot grounds than most of the prior decisions upon this point. It is still broad enough, however, to allow the courts to determine the extent of depot grounds in extreme cases of unreasonable allotment.

IV. Where burden of proof lies.

The burden of proving the necessity of leaving tracks unfenced at depot grounds is upon the railroad company. *Crenshaw v. St. Louis, K. & N. W. R. Co.* 54 Mo. App. 233; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Croft v. Chicago Great Western R. Co.* 72 Minn. 47, 74 N. W. 898; *Nickolson v. Northern P. R. Co.* 80 Minn. 508, 83 N. W. 454; *Marengo v. Great Northern R. Co.* 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117.

It rests with the railroad company to show that the place at which an animal entered upon a track within city limits was one which, under the law, it would not be

permitted to fence, where the city embraces an area of 36 square miles, a large portion of which is not built up or platted. *International & G. N. R. Co. v. Cocks*, 64 Tex. 154.

The burden is upon the railroad company to show that it was relieved from fencing at a point on a main track from 90 to 180 feet south of the south end of a spur at a flag station. *Missouri, K. & T. R. Co. v. Willis* (Tex. Civ. App.) 52 S. W. 625.

In one instance, however, it was held that the burden was upon the plaintiff to show that a point was not upon depot grounds. *Kyser v. Kansas City, St. J. & C. B. R. Co.* 56 Iowa, 207, 9 N. W. 133. M. M. M.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

McCLAUGHRY et al., Plffs. in Err.,
v.

JOSEPH B. KING, Sheriff, etc.

(— C. C. A. —, 147 Fed. 463.)

Reward—acceptance.

A reward offered for the arrest of a criminal is not earned by the giving of information which leads to his arrest.

(Hook, J., dissents.)

(June 23, 1906.)

Case Note.—Reward; what must be done in order to earn reward for arrest: — The questions as to necessity of knowledge of, and reliance upon, the offer of reward, as to who may earn the reward, time, and other conditions, are reserved for future treatment. This note is confined to the single question suggested by the title.

As said in *McCLAUGHRY v. KING*, it is generally held that a reward for an arrest is not earned by merely giving information which leads to the arrest. *Burke v. Wells, F. & Co.* 50 Cal. 218; *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140; *Lovejoy v. Atchison, T. & S. F. R. Co.* 53 Mo. App. 386; *Sias v. Hallock*, 14 Nev. 332; *Re Walker*, 9 Pa. Dist. R. 121; *Kinn v. First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012, 95 N. W. 969.

An arrest must be legal to entitle the one making it to a reward offered for the arrest. *Marking v. Needy*, 8 Bush, 22; *Moore v. Peace* (Ky.) 97 S. W. 762; *Morris v. Kasling*, 79 Tex. 141, 11 L.R.A. 398, 15 S. W. 226.

In *Goldsborough v. Cradie*, 28 Md. 477, it was held that a reward was not earned where the party for whose arrest it was offered was not absconding at the time of arrest.

And in *State ex rel. Lindley v. Clark*, 61 Mo. 263, it was held that a reward for the arrest of a fugitive was not earned if at the time of the arrest he was not a fugitive 7 L.R.A. (N.S.)

ERROR to the Circuit Court of the United States for the Ft. Smith Division of the Western District of Arkansas to review a judgment in favor of defendant in an action brought to recover the amount of a reward alleged to have been earned by plaintiffs. **Affirmed.**

The facts are stated in the opinion.

Argued before Sanborn, Hook, and Adams, Circuit Judges.

Messrs. Cravens & Cravens, A. C. Cunkle, and Arthur M. Jackson for plaintiffs in error.

Messrs. Cravens & Covington for defendant in error.

Adams, Circuit Judge, delivered the opinion of the court:

The petition filed below shows that the defendant, who was sheriff of Johnson county, Arkansas, on the occasion of the robbery of a bank and murder of one Powers in that county, offered a reward of \$2,750 "for the arrest of each of the parties convicted of such bank robbery and said murder;" that thereafter plaintiffs discovered that one West had been arrested by the police force of Evansville, Indiana, for vagrancy, and, being informed that he was suspected of being guilty of the Johnson county robbery and murder, and knowing that the reward of \$2,750 had been offered for his arrest,

from justice, but living openly and notoriously at his usual place of abode, without any concealment and accessible by the officers of the law at all times.

And in *Monroe County v. Bell* (Miss.) 18 So. 121, it was held that the statutory reward for the arrest of one fleeing, or attempting to flee, was not earned by arresting a person who, after killing another, remained at his home two days, and then went to another state and remained in one place until arrested, not concealing himself at either place, and his whereabouts being generally known.

In *Montgomery County v. Robinson*, 85 Ill. 174, it was held that one who, with a requisition, pursued a criminal into another state, and found him there confined in jail on another charge, but brought him back to the county where he committed the crime, earned the reward offered for his arrest.

In *Hogg v. Com.* 3 Ky. L. Rep. 470, it was held that the mere fact that the accused was persuaded to surrender, and not taken by physical force, did not deprive the person to whom the surrender was made of his right to the reward offered for the accused's arrest, there being no evidence of collusion or fraud.

But in *Currie v. Swindall*, 33 N. C. (11 Ired. L.) 361, it was held that, if the party for whose arrest the reward was offered surrendered himself of his own accord, with-

notified defendant that West was under arrest in Evansville under an assumed name of Charles Johnson; that defendant, acting upon that information, immediately went to Evansville, apprehended West, and took him back to Johnson county, where he was subsequently tried, convicted, and executed for the crime of murdering Powers; that plaintiffs, at the request of defendant, furnished evidence which largely contributed to the conviction of West. A demurrer interposed to this petition on the ground that it failed to state facts sufficient to constitute a cause of action was sustained, and, plaintiffs declining to plead further, final judgment was rendered in favor of defendant.

Was the ruling on the demurrer right?

A reward offered for the arrest of an offender is an offer or conditional promise to pay the person performing the required service a certain sum of money. The performance of the service is the acceptance of the offer, or performance of the condition on which the promise is made, and, when done, concludes a binding contract. The matter rests exclusively in the domain of contract, involving an offer and its acceptance. One desiring to offer a reward may fix his own terms and conditions. If they are satisfactory they must, like other propositions, be accepted as made. If unsatisfactory no one

out either force or persuasion, the claimant was not entitled to the reward.

An offer of a reward for the apprehension of any person who steals any "horse, mare, or gelding" is not earned by apprehending one who has stolen a mule. *Com. v. Edwards*, 10 Phila. 215; *Com. v. Davidson*, 4 Pa. Dist. R. 172.

In *Vitty v. Eley*, 51 App. Div. 44, 64 N. Y. Supp. 397, it was held that information leading to an arrest, extorted from the claimant through fear that he might be arrested himself for complicity, did not entitle him to the reward offered.

Part performance.

Where the entire reward is offered for an arrest coupled with some other condition, *e. g.*, the recovery of stolen property, or conviction, or delivery of the culprit, no part of the reward is recoverable unless all the conditions have been performed. *Van Horn v. Ricks Water Co.* 115 Cal. 448, 47 Pac. 361; *Hogan v. Stophlet*, 179 Ill. 150, 44 L.R.A. 809, 53 N. E. 604; *Partin v. Snider*, 8 Ky. L. Rep. 616; *Pool v. Boston*, 5 Cush. 219; *Jones v. Phenix Bank*, 8 N. Y. 228.

Nor will a reward for the arrest of two persons be apportioned where only one has been arrested. *Blain v. Pacific Exp. Co.* 69 Tex. 74, 6 S. W. 679.

In *Adair v. Cooper*, 25 Tex. 548, it was held that parties who merely accompanied

need accept them. The offer may be, and doubtless is, made according to the kind of service required. If the apprehension of a desperate character be required, it would naturally be made to persons who would brave the danger and assume the responsibility, either of making the arrest or causing it to be made. If, on the other hand, the apprehension of a different character is desired, personal bravery and responsibility might not be as much required as diplomacy, and the offer would naturally be addressed to one who would work up clues and give information.

From considerations like these, we well understand how an interested party may discriminate in the proposition he makes. It is obviously one thing to offer a reward for an arrest which involves danger and responsibility and quite a different thing to offer a reward for information which involves neither. The brave and strong of purpose only would naturally undertake the former, while the timorous and conservative might undertake the latter. One accepting the first offer would actually make the arrest, or cause it to be made, while one accepting the other offer might do the equally efficacious act, and the arrest might follow as a consequence, and he not be subjected to any personal danger or responsibility. The difference in the offer, as

the sheriff to another county, where he received the prisoner from the custody of the sheriff of such other county, by whom the prisoner had been previously arrested, were not entitled to a reward offered for his arrest and delivery.

In *Mosley v. Stone*, 108 Ky. 492, 56 S. W. 965, it was held that where, in making the arrest, the claimant, in his necessary self-defense, so wounded the felon that he died before he could be delivered to the jailer, he was entitled to the reward offered for the felon's arrest and delivery.

An offered reward for an arrest and delivery to a designated jail is not earned by an arrest and delivery to a constable (*Clanton v. Young*, 11 Rich. L. 546); unless the constable subsequently delivers the arrested party to the designated jail (*Williams v. Thweatt*, 12 Rich. L. 478).

In *Coffey v. Com.* 18 Ky. L. Rep. 646, 37 S. W. 575, it was held that an offered reward for arrest and delivery was earned by an arrest before, and a delivery after, the offer.

Effect of assistance of officers.

In *Stone v. Wickliffe*, 106 Ky. 252, 50 S. W. 44, it was held that the one making the arrest, being entitled to the assistance of the arresting officers, and to have a *posse comitatus* summoned if necessary, need not make the arrest personally and alone in order to earn the reward.

well as the difference in the performance, clearly shows that the two make different contracts. This is recognized and affirmed in the case of *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697. The Secretary of War had offered one reward of \$25,000 "for the apprehension of John H. Surratt," charged with being one of Booth's accomplices in the murder of President Lincoln, and at the same time announced that "liberal rewards will be paid for any information that shall conduce to the arrest" of Surratt. The trial court found that the claimant gave information that conduced to the arrest of Surratt, but that it did not constitute an "arrest" of him within the meaning of the offer. Mr. Justice Strong, in delivering the opinion of the court, says: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest,—persons who were not his agents," etc.

But in *Juniata County v. McDonald*, 122 Pa. 115, 15 Atl. 696, the rule of the preceding case was held not to apply where the officer was bound by law to make the arrest at all hazards; that in such case he would be acting for himself rather than for the reward claimed.

In *Swanton v. Ost*, 74 Ill. App. 281, it was held that the person who found the one for whose arrest a reward was offered, and pointed him out to an officer, who made the formal arrest, was entitled to the reward. See also, in support of this rule, *Crawshaw v. Roxbury*, *Haskell v. Davidson*, and *Ralls County v. Stephens*, cited and set out in *McCLAUGHEY v. KING*.

Arrest by agent of claimant.

One need not make the arrest in person. Where he employs and pays, or agrees to pay, another to make the arrest as his agent or servant, he is entitled to the reward. *Montgomery County v. Robinson*, 85 Ill. 174; *Pruitt v. Miller*, 3 Ind. 16; *Heather v. Thompson*, 25 Ky. L. Rep. 1554, 78 S. W. 194; *Ralls County v. Stephens*, 104 Mo. App. 115, 78 S. W. 291.

And where the reward is for an arrest and delivery the delivery may be made by an agent. *Stephens v. Brooks*, 2 Bush, 137.

Under Mississippi statute.

In Mississippi a statute provides that "any person who shall arrest anyone who

The following authorities are in harmony with the foregoing views, and sustain the contention that furnishing information merely which leads to an arrest is not the acceptance of an offer of a reward for making the arrest: *Kinn v. First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012, 95 N. W. 909; *Juniata County v. McDonald*, 122 Pa. 115, 15 Atl. 696; *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140; *Williams v. West Chicago Street R. Co.* 191 Ill. 610, 85 Am. St. Rep. 278, 61 N. E. 456; *Lovejoy v. Atchison, T. & S. F. R. Co.* 53 Mo. App. 386. The following authorities are relied on to sustain the contrary: *Crawshaw v. Roxbury*, 7 Gray, 374; *Bease v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747; *First Nat. Bank v. Hart*, 55 Ill. 62; *Haskell v. Davidson*, 91 Me. 488, 42 L.R.A. 155, 64 Am. St. Rep. 254, 40 Atl. 330; *Ralls County v. Stephens*, 104 Mo. App. 115, 78 S. W. 291. These cases have been carefully examined and considered and the principle of decision will be briefly stated.

In the *Crawshaw* Case a reward was offered by the city of Roxbury "for the apprehension and conviction" of any person who shall set fire to any dwelling house. A fire was subsequently set by an incendiary Plaintiff, *Crawshaw*, was at the fire, sought out three police officers of the city, and re-

has killed another and is fleeing, or attempting to flee, before arrest, and shall deliver him up for trial, shall be entitled to the sum of \$100." Under this statute, it is held that when the person charged with the crime has been once in custody of the officers of the law, and is by them discharged or permitted to escape, the reward cannot be earned by one who subsequently makes a new arrest. *Itawamba County v. Candler*, 62 Miss. 194.

But if the arrest was for assault, and, after being discharged by the magistrate, the wounded man dies, and thereupon the slayer flees, the person arresting him for the murder is entitled to the reward. *Newton County v. Doolittle*, 72 Miss. 929, 18 So. 451.

When the arrest has been made by one citizen, and the prisoner, escaping from him, is arrested by another, who delivers him to the custody of the proper officer, such other is entitled to the reward. *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128.

One earns the reward by arresting and delivering for trial the person who inflicted the mortal wound, although the wounded person does not die until after the arrest. *Martin v. Copiah County*, 71 Miss. 407, 15 So. 73.

One who arrests a fleeing murderer in another state, and notifies the proper sheriff in Mississippi, who goes and gets the accused, does not "deliver him up for trial." *Gould v. Chickasaw County*, 85 Miss. 123, 30 So. 710.

quested one of them to arrest one Clarke, whom he pointed out as the incendiary. Thereupon the officer was induced to and did arrest Clarke. The foregoing facts make it appear that Crawshaw made the officer his agent for making the arrest, and that in doing so the officer acted under the directions of Crawshaw. Some expressions are found in the charge of the court to the jury which obviously were made in the light of the facts just referred to and should be construed accordingly. Chief Justice Shaw, in announcing the opinion of the supreme court, disposes of the case on other grounds, and makes no reference, except to generally approve of the law as laid down in the charge, to the point now under consideration. In the Bease Case the doctrine of the Crawshaw Case is approved; emphasis being laid upon the fact that the incendiary was arrested by the officer at the request of Crawshaw. In the First Nat. Bank Case the reward was given to the plaintiff because his services were accepted and availed of by the persons offering the reward after he had informed them that he would claim the reward if he performed the services. The court held that, although the claimant was not embraced in the description of the persons to whom the reward was first offered, he was entitled to it by reason of the subsequent engagement made between the parties. In the Ralls County Case it distinctly appeared that the claimant directed an officer to arrest the suspected criminal, and the court there says that, although the officer was the first to lay hands on the suspect, "he did so as the agent, or, one may say, the arm of Stephens. He acted entirely for Stephens and by the latter's direction."

The foregoing cases practically announce the doctrine that, where a reward is offered for the arrest of a suspect, any person who either personally makes the arrest or induces another to act for him, as his agent, in so doing, is entitled to the reward. Concerning this doctrine there can be no difference of view. The only other case relied upon by counsel for plaintiffs is that of *Haskell v. Davidson*. That case contains expressions favorable to their view, but it is founded upon a state of facts which permit of a recovery on principles not out of harmony with those already stated. The defendant in that case had offered a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole \$35 therefrom." The plaintiffs were informed of this offer, and were thereby induced to enter upon an investigation of the crime. They discovered facts and circumstances strongly inculcating one Thompson, who was found and confronted with the charge by the plain-

tiffs, and thereupon made a full confession of his guilt to them and subsequently pleaded guilty to the indictment found against him by the grand jury. The arrest was but a matter of form, and was made by a deputy sheriff, who made no claim for the reward. It is in the light of such facts that the court says: "The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

Disconnected with the peculiar facts of that case, we doubt that the learned court would have announced the principle quite as broadly as it did.

Applying well-recognized rules governing the interpretation of contracts, and the reasoning indulged, and authorities considered, we think the true rule is that, when an offer of a reward is made for an "arrest" of a suspect, it is not accepted by the giving of information merely, concerning the whereabouts of the suspect, but is accepted only when one assumes the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. The petition in this case fails to make such averments, and was, for that reason, fatally defective.

The judgment is affirmed.

Hook, Circuit Judge, dissenting:

The offer of a reward and its acceptance by the performance of the service is a contract, but it is not different from other contracts in respect to the rules of construction that should be applied. In such contracts, as in others, regard should not be had to the mere letter to the exclusion of the spirit. "The fruit and profit of a nut lie in the kernel, and not in the shell." It matters not that the proponent of the reward is entitled to make his own terms. When he has done so it is then for the court to say what they mean and whether they were substantially complied with, and in doing so it is not unjust to him to deprive him of a shrewd, narrow meaning of his own words.

The reward offered was for the arrest of each one of the parties guilty of a robbery and murder in Arkansas. A man named West was suspected. The plaintiffs discovered that under an assumed name he was under arrest in Evansville, Indiana, for vagrancy and street begging. His identity was unknown to the police of that city, and his identity and whereabouts were unknown to

the Arkansas sheriff who offered the reward. Had not the plaintiffs acted he would have served his time at Evansville and disappeared. In this condition of affairs the plaintiffs, knowing of the reward and alone knowing of the identity and whereabouts of the accused, immediately notified the sheriff, who, acting thereon, at once went to Evansville, took him into custody, and removed him to Arkansas, where, with the assistance of plaintiffs, he was convicted and afterwards executed. It does not appear that anyone else than plaintiffs is claiming the reward. The Evansville police would not be entitled to it because what they did was in the mere performance of other duties and had no relation to the Arkansas crime or to the reward. The sheriff himself would not be entitled to it because his receiving possession from the police was a mere perfunctory service performed after the receipt of the important and necessary information from the plaintiffs. The man was already under arrest. He was where anyone who knew his identity could get him. It is not as if he had been at large. True, it may be said that he was not under arrest for the Arkansas crime until the sheriff arrived, but it seems to me to be quite a narrow construction to say that by simply laying a hand upon the accused and peacefully receiving him from the police the sheriff himself made the arrest and thereby escaped paying the reward he offered. Even if so narrow a meaning is to be given to the word "arrest," there is still reason for holding that when the sheriff went to Indiana he went for the plaintiffs and waived the personal performance of that unimportant service by them, since all that was vital and of consequence had already been done. The better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one who is entitled to it. He is the one who accomplishes the result,—who brings it about. It is not the man who, when all else is done, and when the accused is, as it were, tied to a stake, merely performs the letter of the final act without effort, skill, or enterprise. Such rule would conform to the spirit that actuated the offer of reward, and if it does it is the one that should prevail.

I think that the Massachusetts rule, expressed in *Crawshaw v. Roxbury*, 7 Gray, 374, and that of Maine shown in *Haskell v. Davidson*, 91 Me. 488, 42 L.R.A. 155, 64 Am. St. Rep. 254, 40 Atl. 330, is the reasonable one and is in harmony with those applied to contracts generally. In the *Roxbury Case* the reward was "for the apprehension and conviction of any person or persons who shall set fire to any dwelling house" etc. 7 L.R.A. (N.S.)

Thereafter a building was set on fire by an incendiary and consumed. The plaintiff was at the fire and sought out three police officers and requested them to arrest one Clarke for having set the fire. He pointed Clarke out to one of the officers and stated facts and circumstances tending to show that Clarke committed the offense. Clarke was arrested by this officer upon the information given, and afterwards confessed to him. Another police officer made the complaint. Clarke pleaded not guilty at the trial, but was convicted upon the testimony of the officers. The plaintiff's information upon which he accused Clarke and requested his arrest was hearsay, and therefore he was not summoned to attend the trial. The city having refused to pay the reward, the plaintiff brought action therefor, and, having recovered a judgment, the city took the cause to the supreme judicial court of Massachusetts, where it was affirmed. At the trial below the court instructed the jury as follows: "That the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and, as such, causing the arrest, and conducting the case to a conviction, or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender; that is, by giving such information to the city government of Roxbury, or to some officer authorized to act for them in making the arrest and prosecuting the offender to conviction upon the information so given; that in this case, the officers of the city having instituted and carried on the prosecution to conviction after the arrest, if the jury were satisfied that the facts disclosed by the plaintiff were such as induced the officer who arrested the offender to arrest him, and were material, and had a tendency to produce ultimate conviction, and without them Clarke would not have been convicted, unless upon his own subsequent conviction of guilt, the plaintiff would be entitled to the reward; and the fact that Clarke, subsequently to the disclosure of such information, made by the plaintiff, and upon which he was arrested, confessed his guilt, would not deprive the plaintiff of the right to recover, though Clarke's confession of guilt was produced in evidence upon his trial, and might have been the ground upon which he was convicted." Upon appeal, Chief Justice Shaw observed of this and other instructions: "The court are of opinion that the directions of the judge on the trial were correct in law, carefully guarded, and well adapted to the evidence before the jury."

In *Haskell v. Davidson* the reward offered was "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole \$35 therefrom." The plaintiffs, being informed of the offer, commenced an investigation of the crime, with the result that facts and circumstances were discovered tending strongly to inculcate one Thompson, who, upon being found and confronted with the charge by the plaintiffs, made a confession of his guilt and subsequently pleaded guilty to an indictment found by the grand jury. The formal arrest of Thompson, however, was on a *capias* issued by the court, and was made by a deputy sheriff. The supreme judicial court of Maine sustained a recovery by the plaintiffs. It said: "An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal. An offer of a reward for 'the arrest and conviction' of an offender cannot be taken literally. The person who, by reason of the offer, is induced to make an investigation, and finally obtains possession of sufficient facts to authorize the arrest of an offender, and his subsequent conviction, for the crime referred to in the offer, certainly cannot himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining, and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime, and his whereabouts, as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

The case of *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697, is not in point, because it appeared from the face of the proclamation of reward by the Secretary of War that he made a clear distinction between the apprehension of Surratt on the one hand and information conducing to the arrest on the other. It was his privilege to do so. The sum of \$25,000 was offered expressly for the apprehension, and it was specified in addition that "liberal rewards will be paid for any information that shall conduce to the arrest," etc. The claimant gave information, but other agencies effected the arrest. It is obvious that a man who asked and received a reward for information under such an offer should not also be rewarded for the apprehension of the fugitive by others. This 7 L.R.A. (N.S.)

feature of the case was particularly adverted to by the Supreme Court. I think the plaintiffs here fairly earned the reward offered and should receive it.

ARKANSAS SUPREME COURT.

W. H. MITCHELL, Appt.,

v.

ROGER YOUNG.

(— Ark. —, 97 S. W. 454.)

Landlord and tenant—rights of sublessee.

1. A decree canceling a lease, made by consent of the lessee's administrator and representatives of the lessor, in proceedings to which the sublessee is not a party, will not affect his rights under the sublease.

Appeal—bill of exceptions—sufficiency.

2. A bill of exceptions which shows inferentially and by natural implication, from the language used, that it contains all the evidence, is sufficient.

Record—exception—*nunc pro tunc* entry.

3. The record may be made to show an exception to the overruling of a motion for new trial by *nunc pro tunc* entry.

(November 5, 1906.)

Case Note.—Effect of surrender of original lease on rights of sublessee: —The rule that a voluntary surrender of a lease will not affect the rights of a sublessee is fully supported by authority, and is based upon the reasoning that the sublessee acquires a valid term in, and a right to the possession of, the part of the demised premises let to him for the time agreed upon, subject to be defeated only by the expiration of the term of his lessor or a re-entry by the original lessor for some condition broken; and that this interest, having passed out of the original lessee, cannot be surrendered by him. Among the cases supporting the rule, are *Baker v. Pratt*, 15 Ill. 568; *McKenzie v. Lexington*, 4 Dana, 129; *Trauerman v. Lippincott*, 39 Mo. App. 478; *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1069; *Eten v. Luyster*, 60 N. Y. 252; *Weiss v. Mendelson*, 24 Misc. 692, 53 N. Y. Supp. 803; *Oshinsky v. Greenberg*, 39 Misc. 342, 79 N. Y. Supp. 853; *Moskowitz v. Dirigen*, 48 Misc. 543, 96 N. Y. Supp. 173; *Hessel v. Johnson*, 129 Pa. 173, 5 L.R.A. 851, 15 Am. St. Rep. 716, 18 Atl. 754; *Cuschner v. Westlake* (Wash.) 86 Pac. 948; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Great Western R. Co. v. Smith*, L. R. 2 Ch. Div. 235.

So, also, it has been held, upon the same principle, that a surrender of the lease will not affect a mortgage of the leasehold estate (*Allen v. Brown*, 5 Lans. 280); nor the lien of a contractor for labor and materials (*Gaskill v. Trainer*, 3 Cal. 334); nor the rights of a purchaser of a building on the leased premises which the tenant had the

APPPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to obtain possession of a room claimed by defendant under a lease. Reversed.

The facts are stated in the opinion.

Mr. James A. Comer, for appellant:

Appellant's rights were in no way affected by the cancelation.

Wood, Land & T. § 499; 18 Am. & Eng. Enc. Law, p. 366.

Messrs. Bradshaw, Rhoton, & Helm for appellee.

Hill, Ch. J., delivered the opinion of the court:

Appellee, Young, as lessee of the Metropolitan hotel in the city of Little Rock, brought an action of unlawful detainer against Mitchell, the appellant, to obtain possession of a room in the lobby of said hotel occupied by Mitchell as a barber shop. On the trial before a jury the court directed a verdict for the plaintiff in said action, and Mitchell appealed.

The evidence develops these facts: The Metropolitan hotel was owned by one Young, and at his death passed to his heirs, and was probably controlled by the administrator. Torrey had a lease upon it, and during his lease he subleased the barber shop to Mitchell. This was in writing, and stipulated that, should Torrey get a renewal of his lease, it would carry a like renewal of Mitch-

ell's lease of the barber shop. Torrey did obtain a renewal, and recognized Mitchell's renewed lease. Mitchell held for about two years under the renewed lease, and Torrey died in possession of the leased premises. Thereafter Torrey's administrator and the Young heirs and the administrator of Young consented to an order of probate court canceling the Torrey lease, which had still some time to run. After this agreed cancelation of the Torrey lease, the hotel was leased to Roger Young, the appellee, who had knowledge of Mitchell's occupancy of the barber shop and of his lease thereof under Torrey. Mitchell was not a party to the surrender of the Torrey lease, and was not notified of the proceedings in the probate court, and has not consented thereto.

Where there is no covenant against subletting, a lessee has a right to sublease all or any part of the leased premises, and when he does so he cannot, by a surrender of the leased premises to the lessor, defeat the rights of his undertenant. The interests of the undertenant will continue as if there had been no surrender, the owner of the property becoming the direct landlord of the undertenant. The lessee could only surrender what belonged to him, and, having sublet part of the property, it is not his to surrender. The owner takes back the premises subject to the existing rights growing out of the original lease. These principles are found stated and applied in the following

right to remove at any time before the expiration of his term (*Adams v. Coddard*, 48 Me. 212).

A tenant from year to year, who has sublet part of the premises without any specification as to time, cannot affect the right of his subtenant to hold until the end of the year by surrendering to his lessor. *Brown v. Butler*, 4 Phila. 71.

Where the original owner enters upon a sublessee after the surrender of the original lease, he is guilty of trespass. *Krider v. Ramsay*, 79 N. C. 354; *Brown v. Butler*, supra.

The right of a subtenant to remove fixtures before or at the expiration of the term of the sublease cannot be affected by a surrender of the original lease. *Morrison v. Sohn*, 90 Mo. App. 76.

As a result of the foregoing rule, it has been held that where, after a surrender of the original lease, the owner of the premises demands and receives from the subtenant a greater rent than that stipulated in the sublease, the subtenant has no right of action against his immediate lessor for the amount so paid. *Ritzler v. Raether*, 10 Daly, 286.

The right of a subtenant to hold until the end of his term, notwithstanding a surrender of the original lease, is not affected by the fact that such original lease contained a covenant against subletting (*Brown v. But-*

ler, supra); though it would be otherwise if the provision against subletting took the form of a condition, unless the forfeiture should be waived by the conduct of the original lessor (*Trauerman v. Lippincott*, 39 Mo. App. 478).

But a sublessee, who is notified of the surrender of the original lease, and is required to pay rent to the owner of the premises, and subsequently pays rent due previous to the surrender to the owner's agent, and applies to him for a new lease, must be held to have assented to the surrender and the right of the owner to re-enter, and his subsequent tenancy is one at the will of the landlord. *Appleton v. Ames*, 150 Mass. 34, 5 L.R.A. 206, 22 N. E. 69.

But where the original lease is canceled for breach of condition therein, a different question is presented. The original lessee not being able to confer upon the sublessee any greater rights than he himself possesses, the subtenant's rights are measured by those of the original tenant, and the cancelation of the lease by its own terms as to one cancels it as to both. Among the cases involving this question, see *Bruder v. Geisler*, 47 Misc. 370, 94 N. Y. Supp. 2; *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123; *Cuschner v. Westlake* (Wash.) 86 Pac. 948.

authorities: *Krider v. Ramsay*, 79 N. C. 354; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Jones, Land. & T.* § 429.

It is urged that the bill of exceptions does not affirmatively show that it contains all of the evidence, but it does show inferentially and by natural implication from the language used that it contains all the evidence, and this is sufficient. *Leggett v. Grimmett*, 36 Ark. 496; *Overman v. State*, 49 Ark. 364, 5 S. W. 588.

It is said appellant did not except to overruling the motion for new trial, but that objection is removed by correction of the record by *nunc pro tunc* entry. It is sufficient if the record shows the exception. *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89.

Reversed and remanded.

IOWA SUPREME COURT.

JENNIE M. TUTTLE, Appt.,
v.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

(— Iowa, —, 104 N. W. 1131.)

Insurance—suicide—accidental means.

1. Death from suicide which springs from an insane impulse of a disordered or

insane mind is through external, violent, and accidental means, within the meaning of an accident insurance policy.

Same—conflict of laws—place of contract.

2. Handing an application and fee to the agent of an insurance company in one state, to be forwarded to the insurer in another state, does not render the former state the place of contract, although the policy is returned to the applicant in that state by mail, where the by-laws of the insurer provide that the association shall not be liable in any manner until the directors have accepted the application and a certificate has been issued, since the contract is complete when the policy is placed in the mail, in the absence of anything requiring personal delivery.

Same—completion of contract.

3. No proposal for absolute indemnity is contained in an application for insurance which will render necessary an acceptance to make binding a policy providing for the levying of an assessment to meet the obligation, where the method of raising the fund is not alluded to in the application.

Same—benefit certificate—exceptions.

4. The enumeration in the application for insurance in a mutual benefit association of certain exceptions from liability does not, by exclusion, prevent the operation of an exception of suicide contained in the insurer's by-laws, so as to render acceptance necessary to make binding a policy containing such exception, where the application makes the by-laws a basis of membership in the association.

Case Note.—Death from suicide as one caused through external, violent, and accidental means:—The authorities seem to be practically unanimous in holding that death from suicide is caused by accidental means within the meaning of a policy insuring against bodily injuries from "external, violent, and accidental means," if the insured was, at the time of the act, so insane that he did not understand the nature of the act or that death would result therefrom. Thus, *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685, holds that the act of the insured in hanging himself while insane is accidental within such a policy, as the expression "through external, accidental, and violent means" looks only to the "means" by which the injury is effected. In the court below, 27 Fed. 40, the court stated that the physical violence which terminated the life of the insured was the same as if it had come upon him from sources outside of himself and for which he was not responsible; and that although, in the darkness enveloping his mind, his own hand adjusted the fatal noose, the act was no more attributable to his voluntary agency than if, as a sane man, walking the street in the darkness of night, the same fatality, without co-operation on his part, or even consciousness of danger, had overtaken him.

And in *Blackstone v. Standard Life & 7 L.R.A. (N.S.)*

Acci. Ins. Co. 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156, the court held that the death of the insured, caused by cutting his own throat while insane without knowing the result of his act and not intending thereby to kill himself, is an accidental death and an external injury, within the terms of a policy insuring against bodily injuries sustained through external, violent, and accidental means. In this case the court says that, "where one is so far beside himself, his intellect so darkened and obscured, that he may be neither morally nor legally responsible for his own acts and conduct; and, in such condition, produces his own death,—it cannot be any more said to be his act than though the act had been committed by another, or the insured had placed himself upon some dangerous height and had fallen involuntarily and been dashed to pieces."

And in *Grand Lodge I. O. M. A. v. Weitling*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59, the court states that there is a substantial concurrence of judicial decision in America on the proposition that if, at the time of the suicidal act, the assured was so affected with insanity as to be unconscious of the act, or of the physical effect thereof; or was driven to its commission by an insane impulse which he had not the power to resist,—the act of self destruction is regarded as though it were the result of accident, or some irresistible external force.

Same—waiver.

5. Waiver of the defense of suicide by an insurer is not effected by mailing blanks for proofs of loss with knowledge of the facts, under the express statement that they are for the convenience of the attorneys of the beneficiary, and with the distinct understanding that no rights are waived.

(Weaver, J., dissents in part.)

(October 24, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Polk County in defendant's favor in an action brought to enforce the amount alleged to be due on mutual benefit certificates. **Affirmed.**

The facts are stated in the opinion.

Messrs. John G. Park, E. H. McVey, and C. F. Mead, for appellant:

The suicide of an insane person is an accident.

Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. ed. 236; *Accident Ins. Co. v. Crandall*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Connecticut Mut. L. Ins. Co. v. Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct.

Rep. 155; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99.

The company cannot, by any contrivance or device whatever, evade the effect and operation of the laws of the state where it is doing business.

Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 439; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 46 Am. St. Rep. 335, 40 N. E. 489.

Instruments sent by mail from one state to another, to take effect in the latter state, are governed by the law of the latter state.

Chatham Bank v. Allison, 15 Iowa, 357; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Phoenix Mut. L. Ins. Co. v. Simons*, 52 Mo. App. 357; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565.

Defendant was not authorized to accept by mail.

The insanity must, however, be such as to render the insured unconscious of the nature of the act, of its physical result, in order to be considered accidental. Thus, in *Fidelity & C. Co. v. Weise*, 182 Ill. 496, 55 N. E. 540, Reversing 80 Ill. App. 499, the court states that self-destruction cannot be classed as an accident, unless it appears that the person committing suicide was unconscious of the act, or of the physical effect thereof, or was driven to the commission of the deed by an insane impulse which he had not the power to resist.

And in *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 892, 31 N. W. 170, the court holds that the suicide of the insured cannot be considered as a death by accident if the act was done for the purpose of self-destruction, and the insured was not unconscious at the time of inflicting the fatal wound, even though he was insane, and his insanity was produced by a fall several weeks before the act was committed.

The holding of *TUTTLE v. IOWA STATE TRAVELING MEN'S ASSO.*, that the injury would not be considered to have been caused by accidental means if the insured was sane at the time of committing suicide, is supported by a statement in *Fidelity & C. Co. v. Weise*, supra, that, if the insured committed suicide while sane, his death would not be accidental within the meaning of such a policy.

And that death by suicide would not be considered accidental within the meaning of such a policy seems to be implied by the statement of the court in *Merrett v. Preferred Masonic Mut. Acci. Assn.* 98 Mich. 338, 57 N. W. 169, in which the circum-

stances attending the death of the insured were equally consistent with any one of several different means of death, including suicide; that, until there was some evidence tending to show that death resulted from accident rather than from design or natural causes, there was nothing to go to the jury.

But in *Logan v. Fidelity & C. Co.* 146 Mo. 114, 47 S. W. 948, the court seems to intimate that death by suicide would be considered accidental within such a policy by stating that, if one holds a general life policy and an accident policy, and is "killed by lightning, or commits suicide, so that he may be said to have died by accidental means," there should be a recovery on both policies; and that a stipulation against liability in case of suicide should be no more a defense against suit on the accident policy providing against death from accidental cause than in the case of suit on the general life policy. The question at issue in this case was whether an accident policy covering loss of life from external, violent, and accidental means was within the provision of Mo. Rev. Stat. 1889, § 5855, prohibiting the defense of suicide in all suits on policies of insurance on "life," unless the insured contemplated suicide at the time of his application.

The means employed in committing suicide will have a determining effect on the question whether the death was caused by external and violent means. Thus, in the case of hanging, as in *Accident Ins. Co. v. Crandal*, supra, or of cutting one's throat, as in the case of *Blackstone v. Standard Life & Acci. Ins. Co.* supra, the death is clearly caused by such means. But in the case of suicide by taking poison, or by inhaling gas,

Scottish American Mortg. Co. v. Davis, 96 Tex. 504, 97 Am. St. Rep. 932, 74 S. W. 17; Crown Point Iron Co. v. Aetna Ins. Co. 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653; Milliken v. Pratt, supra; Baum v. Birchall, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; John A. Tolman Co. v. Reed, supra; Ferrier v. Storer, 63 Iowa, 487, 50 Am. Rep. 752, 19 N. W. 288.

The certificate did not take effect until delivery.

17 Am. & Eng. Enc. Law, 2d ed. p. 539; Folks v. Yost, 54 Mo. App. 59; Milliken v. Pratt and John A. Tolman Co. v. Reed, supra; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Knights Templar & M. Life Indemnity Co. v. Berry, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511; Wall v. Equitable Life Assur. Soc. 32 Fed. 273; White v. Connecticut Mut. L. Ins. Co. 4 Dill. 177, Fed. Cas. No. 17,545.

The by-laws varied from the application. The offer must be accepted in its exact terms.

1 May, Ins. 4th ed. § 50; Mutual L. Ins. Co. v. Young, 23 Wall. 85-106, 23 L. ed. 152-154; Cotton v. Southwestern Mut. L. Ins.

Co. 115 Iowa, 729, 87 N. W. 675; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Baker v. Johnson County, 37 Iowa, 186.

If the policy differs from the application in any particular, neither insured nor applicant is bound until the latter accepts.

Bacon, Ben. Soc. § 2696; La Compania Bilbaina v. Spanish-American Light & P. Co. 146 U. S. 497, 36 L. ed. 1058, 13 Sup. Ct. Rep. 142; Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849; Provident Sav. Life Assur. Soc. v. Hadley, 43 C. C. A. 25, 102 Fed. 856; Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. 59 C. C. A. 545, 124 Fed. 25.

Applicant was not chargeable with notice of the by-laws.

2 May, Ins. 4th ed. p. 1288; Fidelity Mut. F. Ins. Co. v. Lowe, 4 Neb. (Unof.) 159, 93 N. W. 749; Given v. Rettew, 162 Pa. 638, 29 Atl. 703; Kister v. Lebanon Mut. Ins. Co. 128 Pa. 553, 5 L.R.A. 646, 15 Am. St. Rep. 696, 18 Atl. 447; Kausal v. Minnesota Farmers' Mut. F. Ins. Co. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; 1 Joyce, Ins. §§ 317-393; Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816;

the question would be different. While no decisions have been found as to whether death by poison taken with suicidal intent would be considered as caused by external or violent means, several decisions have been rendered on such point where the poison was taken by mistake and without any intent to destroy life; and the question as to whether the death was caused by such means would seem to be precisely the same in both cases. On this point, the authorities are divided. Thus, Dezell v. Fidelity & C. Co. 176 Mo. 253, 75 S. W. 1102, and Mutual Acci. Asso. v. Tuggle, 39 Ill. App. 509, Reversed on other grounds in 138 Ill. 428, 28 N. E. 1066, hold that death from an overdose of poisonous medicine is covered by such a policy.

And in Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, Reversed 35 Ill. App. 17, and Travelers' Ins. Co. v. Dunlap, 59 Ill. App. 515, Affirmed in 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, the court rendered a similar decision where the poison was accidentally taken.

But in Bayless v. Travellers' Ins. Co. 14 Blatchf. 143, Fed. Cas. No. 1,138, the court held that a mistake in taking an overdose of opium which had been prescribed to induce sleep, resulting in death, was not covered by such a policy, as violence could not fairly be said to be an ingredient in the act of taking the medicine, although it was destructive in its action and death resulted.

And in Hill v. Hartford Acci. Ins. Co. 22 Hun. 187, the court held that, although death from poison taken by mistake without any intention to take poison was death through accidental means, it was not death from external and violent means.

7 L.R.A. (N.S.)

In Richardson v. Travelers' Ins. Co. 46 Fed. 843, the policy insured against death resulting alone from external, violent, and accidental means, and expressly excepted from its provision death by inhaling gas. The court states that there was no visible sign of violence or external injury on the body of the insured, and that when found he was lying on his side in bed as if asleep, with no distortion of limb or features, or other evidence of violence, pain, or suffering. The court held that the company was not liable, under the clause excepting death from inhaling gas, and also because it was uncertain from the evidence whether the death was the result of accident, or whether it was occasioned by suicidal act and intent. No decision was actually made as to whether death was caused by external and violent means, although there seems to be a clear intimation that it was not due to violence.

As to unintentional inhaling of gas while asleep, see note to Aetna L. Ins. Co. v. Fitzgerald, 1 L.R.A. (N.S.) 422.

As to insanity as affecting conditions as to suicide in life insurance policy, see note to Mutual L. Ins. Co. v. Wiswell, 35 L.R.A. 258.

As to effect of provision avoiding policy if death results from suicide, "sane or insane," see note to Billings v. Accident Ins. Co. 17 L.R.A. 89.

As to when death or injury may be deemed to have been caused by accidental means, though the voluntary act of the insured was the primary cause thereof, see note to Fidelity & C. Co. v. Carroll, 5 L.R.A. (N.S.) 657.

Union Mut. L. Ins. Co. v. White, 106 Ill. 67; Conover v. Mutual Ins. Co. 1 N. Y. 290; Somers v. Kansas Protective Union, 42 Kan. 619, 22 Pac. 702.

The enumeration of a large number of excepted risks in the application was an exclusion of all others.

Anderson's Law Dict. 437; Slane v. McCarrall, 40 Iowa, 61; Des Moines v. Gilchrist, 67 Iowa, 210, 56 Am. Rep. 341, 25 N. W. 136; District Twp. v. Dubuque, 7 Iowa, 262; Smith v. Covenant Mut. Ben. Asso. 16 Tex. Civ. App. 593, 43 S. W. 819; Smith v. German Ins. Co. 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236.

The mere reference in the application to the by-laws did not compel Tuttle to accept the contract offered him.

Miller v. Hillsborough Mut. F. Assur. Asso. 44 N. J. Eq. 226, 14 Atl. 278, Overruling 44 N. J. Eq. 224, 10 Atl. 106; Doane v. Millville Mut. M. & F. Ins. Co. 45 N. J. Eq. 274, 17 Atl. 625; Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694; Supreme Lodge A. O. U. W. v. Hutchinson, supra; Rothschild v. Rio Grande Western R. Co. 84 Hun, 103, 32 N. Y. Supp. 37, Affirmed without opinion in 164 N. Y. 594, 58 N. E. 1091; Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167; Warnebold v. Grand Lodge A. O. U. W. 83 Iowa, 23, 48 N. W. 1069; Sovereign Camp W. W. v. Fraley, 94 Tex. 200, 51 L.R.A. 898, 59 S. W. 879; Pacific Mut. L. Ins. Co. v. Frank, 44 Neb. 320, 62 N. W. 454; McKenney v. Diamond State Loan Asso. 8 Houst. (Del.) 560, 18 Atl. 905.

The mailing to John A. Tuttle, at Kansas City, Missouri, of a different contract from the one applied for, constituted a counter proposal by the defendant association, and gave to Tuttle the right of acceptance or rejection.

Provident Sav. Life Assur. Soc. v. Hadley; Born v. Home Ins. Co.; Batie v. Allison; Gilbert v. Baxter; and Baker v. Johnson County,—supra; Mohrstadt v. Mutual L. Ins. Co. 52 C. C. A. 675, 115 Fed. 83; Travis v. Nederland L. Ins. Co. 43 C. C. A. 653, 104 Fed. 486; 1 Joyce, Ins. §§ 58-63; Supreme Council A. L. of H. v. Anderson, 61 Tex. 296.

If the applicant gives his consent at his domicile, that domicile is the place of the contract.

Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 C. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Mutual Ben. L. Ins. Co. v. Robison, 54 Fed. 580; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; 1 May, Ins. 4th ed. § 66a; 7 L.R.A. (N.S.)

Knights Templar & M. Life Indemnity Co. v. Berry, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511; 1 Joyce, Ins. §§ 231, 232; Hicks v. National L. Ins. Co. 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690.

Defendant, after becoming aware of the facts, led plaintiff into additional expense and trouble, and waived all defenses.

Corson v. Anchor Mut. F. Ins. Co. 113 Iowa, 641, 85 N. W. 806; Brown v. State Ins. Co. 74 Iowa, 428, 7 Am. St. Rep. 495, 38 N. W. 125; Bloom v. State Ins. Co. 94 Iowa, 359, 62 N. W. 810; Hollis v. State Ins. Co. 65 Iowa, 454, 21 N. W. 774; Marthinson v. North British & M. Ins. Co. 64 Mich. 372, 31 N. W. 291; Titus v. Glens Falls Ins. Co. 81 N. Y. 410; New York L. Ins. Co. v. Baker, 27 C. C. A. 658, 49 U. S. App. 690, 83 Fed. 647; Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278.

On petition for rehearing.

Parties cannot, by stipulations, annul the laws of a state.

Dolan v. Mutual Reserve Fund Life Asso. 173 Mass. 197, 53 N. E. 398; New York L. Ins. Co. v. Block, 12 Ohio C. C. 224; Seyk v. Millers' Nat. Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443; 1 Cooley, Briefs on Insurance, pp. 567, 654, 661; Horton v. Home Ins. Co. 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944; Com. v. Nutting, 175 Mass. 156, 78 Am. St. Rep. 483, 55 N. E. 895.

The contract as construed by the court was a fraud upon Tuttle, unless he had the right of rejection or approval on its receipt.

1 Cooley, Briefs on Insurance, p. 826; Rainsbarger v. Union Mut. Aid Asso. 72 Iowa, 191, 33 N. W. 626; Bailey v. Mutual Ben. Asso. 71 Iowa, 691, 27 N. W. 770; Hart v. National Masonic Acci. Asso. 105 Iowa, 724, 75 N. W. 508; Wood v. Farmers' Life Asso. 121 Iowa, 44, 95 N. W. 226; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 193.

Messrs. Sullivan & Sullivan, for appellee:

If insured took his own life while insane, plaintiff cannot recover.

Scarth v. Security Mut. Life Soc. 75 Iowa, 346, 39 N. W. 658; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; Streeter v. Western Union Mut. Life & Acci. Soc. 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779; Pierce v. Travelers' L. Ins. Co. 34 Wis. 389; Salentine v. Mutual Ben. L. Ins. Co. 24 Fed. 159; Riley v. Hartford Life & Annuity Ins. Co. 25 Fed. 315; Penfold v. Universal L. Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Scherar v. Prudential Ins. Co. 63 Neb. 530, 56 L.R.A. 611, 88 N. W. 687; Sutcliffe v.

Iowa State Traveling Men's Asso. 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90.

It was an Iowa contract and governed by Iowa law.

Baker v. Spaulding Bros. 71 Vt. 169, 42 Atl. 982; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Johnson v. New York L. Ins. Co. 109 Iowa, 708, 50 L.R.A. 99, 78 N. W. 905; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; Marden v. Hotel Owners' Ins. Co. 85 Iowa, 584, 39 Am. St. Rep. 316, 52 N. W. 509; State v. Williams, 46 La. Ann. 922, 15 So. 290; Voorheis v. People's Mut. Ben. Soc. 91 Mich. 469, 51 N. W. 1109; Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 165, 50 S. W. 281; Seamans v. Knapp-Stout & Co. Co. 89 Wis. 171, 27 L.R.A. 362, 46 Am. St. Rep. 825, 61 N. W. 757; State Mut. F. Ins. Asso. v. Brinkley Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157.

Variance between application and contract does not change the situs.

Commonwealth Mut. F. Ins. Co. v. William Knabe & Co. Mfg. Co. 171 Mass. 265, 50 N. E. 516.

Tuttle was chargeable with knowledge of the by-laws when he made application to become a member.

Coles v. Iowa State Mut. Ins. Co. 18 Iowa, 425; Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041; Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895; Clark v. Mutual Reserve Fund Life Asso. 14 App. D. C. 154, 43 L.R.A. 393; McLendon v. Woodmen of the World (McLendon v. Sovereign Camp, W. W.) 106 Tenn. 695, 52 L.R.A. 444; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Niblack, Ben. Soc. 134, 136.

The acceptance of the application and issuing of the certificate from the home office made the contract complete, and no further act was required.

Rogers v. Equitable Mut. Life & Endowment Asso. 103 Iowa, 337, 72 N. W. 538; Winchell v. Iowa State Ins. Co. 103 Iowa, 189, 72 N. W. 503; Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 13 L. ed. 187.

The place of the acceptance is the place of the contract.

May, Ins. 4th ed. § 66; Elliott, Ins. §§ 31, 33; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Fidelity Mut. Life Asso. v. McDaniel, 25 Ind. App. 608, 57 N. E. 645; Commonwealth Mut. F. Ins. Co. v. Fairbank Canning Co. 173 Mass. 161, 53 N. E. 373; Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; Gal- loway v. Standard F. Ins. Co. 45 W. Va. 237, 7 L.R.A. (N.S.)

31 S. E. 969; Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694; Triple Link Mut. Indemnity Asso. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19; Allen v. Massachusetts Mut. Acci. Asso. 167 Mass. 18, 44 N. E. 1053.

Certificate, constitution, and by-laws are construed together, and form the contract.

Theunen v. Iowa Mut. Ben. Asso. 101 Iowa, 558, 37 L.R.A. 587, 70 N. W. 712; Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; Clark v. Mutual Reserve Fund Life Asso. and Binder v. National Masonic Acci. Asso. supra.

Proofs of death are conditions precedent to the right of recovery.

Ruthven Bros. v. American F. Ins. Co. 92 Iowa, 316, 60 N. W. 663; Rundell v. Anchor F. Ins. Co. (Iowa) 101 N. W. 517; Keenan v. Missouri State Mut. Ins. Co. 12 Iowa, 126; Ervay v. Fire Asso. of Philadelphia, 119 Iowa, 304, 93 N. W. 290.

To require a party to do what he is required by the contract to do is not a waiver.

Fitchpatrick v. Hawkeye Ins. Co. 53 Iowa, 335, 5 N. W. 151; Rundell v. Anchor F. Ins. Co.; Keenan v. Missouri State Mut. Ins. Co.; and Ervay v. Fire Asso. of Philadelphia,—supra.

Ladd, J., delivered the opinion of the court:

Atrophy of the optic nerve had all but destroyed the eyesight of the assured, John A. Tuttle, and, according to his notion, "the pleasures of earth had gone" and "all was getting blank." Utterly wanting in that courage which buoyed the blind bard:

"Against Heaven's hand or will nor bate a jot,
To argue not
Of heart or hope; but still bear up and steer
Right onward,"

—he "burst the ties that bound him to this world." He had been a member of the Iowa Traveling Men's Association since May 1, 1897, and in this action his beneficiary demands the indemnity of \$5,000, stipulated in its articles of incorporation and by-laws on account of an injury "effected through or by external, violent, and accidental means." If his life was taken by his own voluntary act while in the possession of all his faculties, it is needless to say that the injury was not "through or by accidental means." If, however, the assured's act, causing death, sprung from an insane impulse of a disordered and unsound mind, it was neither voluntary nor intentional, but "through and by external, violent, and accidental means." On this point there is some conflict of opinion, but this view is sustained by the better reason and by the great weight of authority. Accident Ins. Co. v. Crandal. 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 686; Black-

stone v. Standard Life & Acci. Ins. Co. 74 Mich. 614, 3 L.R.A. 486, 42 N. W. 156; Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; 19 Am. & Eng. Enc. Law, 2d ed. p. 75.

But the sixth article of incorporation excepted liability in case of death by "suicide while sane or insane," and this condition was valid. *Scarth v. Security Mut. Life Soc.* 75 Iowa. 346, 39 N. W. 658. Recovery, then, in the absence of any waiver, must be denied, unless it shall be found, as appellant contends it should be, that the contract between the assured and the association was entered into in Missouri, and therefore should be construed according to the laws of that state. This is the main question in the case, for, under the statutes of Missouri, as construed by its court of last resort, suicide as such is not a defense, unless contemplated at the time of the application for insurance, "and any stipulation in the policy to the contrary shall be void" (Mo. Rev. Stat. 1889, § 5855). *Logan v. Fidelity & C. Co.* 146 Mo. 114, 47 S. W. 948; *Brassfield v. Knights of Maccabees*, 92 Mo. App. 102. This statute relates not merely to the remedy, but enters into and forms a part of the contract of insurance made within the state. *Jarman v. Knights Templars & M. Life Indemnity Co.* 95 Fed. 70.

Where, then, was the contract made? The association was organized under the laws of Iowa in 1892, with its principal place of business in the city of Des Moines, Iowa. It employed no agents to solicit applications for membership, but relied on the good offices of its members to induce others to enter the association. To this end, blank applications were inclosed, with notices of assessments and other communications, with the thought that traveling men would direct the attention of their acquaintances of that vocation to the merits of the organization. The deceased resided in Kansas City, Missouri, and April 29, 1897, signed an application, in so far as material, as follows: "Home Office, 305 Youngerman Block, Des Moines, Iowa, Application for Membership. Iowa State Traveling Men's Association. Formed for Mutual Benefit for Traveling Men Only. Benefits: \$25.00 weekly indemnity, 52 weeks. \$5,000 in case of death. \$5,000 loss of both arms or both legs. \$5,000 loss of both eyes. \$1,250 loss of one eye. \$1,250 loss of one hand or one foot. \$2,500 for total disability over two years. (Fill this blank and forward to F. E. Haley, Sec'y and Treas., Des Moines, Iowa.) I herewith enclose \$4 and apply for membership in the Iowa State Traveling Men's Association. Such membership to be based on the follow-

ing statement of facts, which are warranted to be true and complete: [Here follow 21 questions and answers.] I do warrant the above to be true, and I hereby agree with the said association that I will comply with the requirements of its constitution and by-laws, which, with this declaration, shall be the basis of membership between myself and the said association. I also agree that the said association shall not be liable under its certificate of membership in any manner, except for bodily injuries sustained through external, violent, and accidental means, nor shall said association be liable for any injury sustained by me while under the influence of intoxicating liquors or narcotics, or which shall happen on account of, by reason of, or in consequence of, the use thereof; nor for accidental death, loss of limb or sight, disability resulting wholly or partially, directly or indirectly, from any of the following causes, conditions, or acts, or when I am under the influence of, or affected by, any such cause, condition, or act, to wit: Disease; bodily or mental infirmity; hernia; orchitis; fits; vertigo; sleep walking; medical or surgical treatment or amputation (amputation necessitated solely by injuries sustained and made within fifty-two weeks after the accident excepted); voluntary taking of poisons; contact with poisonous ivy; intentional injury inflicted by me; voluntary overexertion; wrestling; racing. And I also agree that this application does not entitle me to any benefits for, or on account of, any injuries sustained by me before it is accepted by the board of directors." He was recommended by Edward Somers, who mailed the application, with the membership fee of \$4, at Kansas City, to the secretary of the association at Des Moines. It was received by the latter May 1st, and thereupon promptly "approved and accepted" by the board of directors, and a certificate of membership, together with a copy of the constitution and by-laws, mailed at Des Moines to assured's address at Kansas City.

Counsel for appellant argued that, under this state of facts, the jury might have found that the contract between the association and the assured was effected at Kansas City, and base their contention on two grounds: (1) That Tuttle, in handing the application and fee to Somers, delivered these to the association at Kansas City, and, as he had not made use of the mails in so doing, there was no implied authority given to the association to deliver the certificate and other papers by post, and therefore these were not delivered until they reached him at Kansas City. (2) That the certificate was not responsive to the application, in that the articles and by-laws contained conditions not contemplated by the applica-

tion, and hence the contract was not effected until the subsequent consent of Tuttle in Kansas City, manifested by the retention of the certificate and the payment of assessments. These will be considered in the order stated.

The first amounts to an assertion that the proposition to become a member was both made and accepted in Missouri, and for this reason the contract was there consummated. But neither of these contentions can be sustained. Somers neither received nor expected compensation, though he may have been in a sense the agent of the association within the meaning of the Missouri statute, that one "who shall receive or receipt for any money from other persons, to be transmitted to any such insurance company or association either in or out of the state [but not authorized to do business in the state] for a policy or policies of insurance issued by such company or association . . . shall be deemed to all intents and purposes an agent . . . of such company or association." Section 5915, Rev. Stat. Mo. 1889. But Somers was not the agent in doing something no one but the board of directors could do. The by-laws of defendant provided that "no person shall be considered as a member, nor shall this association be liable in any manner to any person as a member herein, until said directors have accepted his application, and a certificate of membership has been issued to him." Indeed, the application indicated that, as a condition to insurance, the action of the board of directors was essential. So that, in any event, Somers could not act for the association in passing on the application, and the assured was fully aware that it must be forwarded to Des Moines and there presented to and acted upon by the board of directors of the association. The proposition was to the board of directors, and not to Somers, and, though without information as to any arrangement between them, it may well be assumed, in view of the distance and nature of the business to be transacted, that, in placing the application in the hands of Somers, Tuttle contemplated that he would transmit it to the association by ordinary mode, approved by usage and the general custom of the world; that is, by the government post. Nothing in the application indicated that a response through Somers was desired. It was directed by Tuttle to the association, and the desire of a direct response only was to be inferred. Indeed, the by-laws exacted that it be issued to him. But was authority to respond by mail to be implied? The request to communicate an acceptance by mail may be inferred (1) where the post is used to make the offer and no other mode is suggested, and (2) where the circumstances are

such that it must have been contemplated that the post would be made use of in returning an answer. 9 Cyc. Law & Proc. p. 295. In what other way could the assured have anticipated a response? His application had been forwarded by the post. The matter to be transmitted back was suitable for the mails. The distance was such as to preclude thought of personal delivery. There was nothing in the letter of Somers to indicate that it was to be delivered through him, or that either he or Tuttle so desired. We think authority to post the certificate and other papers clearly implied from the circumstances disclosed. The correct rule is well stated in *Henthorn v. Fraser* [1892] 2 Ch. 27: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." In that case the proposition was handed to plaintiff, who resided at Birkenhead, while at Liverpool. On the following day, at 3:50 p. m., he mailed an acceptance at Birkenhead, which did not reach the defendant's office until 8:30 o'clock of the same evening. On the same day defendant posted a letter withdrawing the offer before 1 o'clock, and it reached plaintiff at 5:30 o'clock in the afternoon. From the residence of plaintiff in another place and the fact that he would likely return there before acting on the offer, having been allowed fourteen days, it was inferred that an answer by mail was contemplated, and, as the contract was completed by mail in the acceptance before plaintiff had knowledge of the attempt to withdraw the offer, it was upheld as completing the contract which was enforced specifically.

The authorities relied on by appellant do not obviate the conclusion stated. In *Scottish-American Mortg. Co. v. Davis*, 96 Tex. 504, 97 Am. St. Rep. 932, 74 S. W. 17, one Couts submitted personally a proposition to buy land. This was accepted with a modification. Thereupon Couts mailed a letter of acceptance, but before it was delivered intercepted it, and procured its return by the postal authorities before its delivery to the seller, and the court held that he was not bound, for the reason that the proposition had not been submitted through the mails, and therefore no implication arose authorizing a response to be so transmitted, and, as the letter was never actually delivered, he was not bound. Whether such an inference might arise from other circumstances was not considered. Other cases cited, as *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, where the instrument sued on was forwarded to take effect in another state, have

no bearing on the question at issue. In the circumstances of this case, we have no hesitation in holding that it was contemplated that the mails should be used in forwarding the certificate and other papers to Tuttle, and that such certificate was "issued to him" when duly executed by the officers of the association, inclosed in an envelope duly addressed and stamped, and deposited in the United States mails at Des Moines. See *Ferrier v. Storer*, 63 Iowa, 487, 50 Am. Rep. 752, 19 N. W. 288; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409.

The second ground of counsel's argument, that the contract was made in Missouri, is founded on the proposition that, to constitute a contract, the acceptance of the offer must assent to it entirely and add nothing to it. If the acceptance interposes a new condition, a contract is not effected until this is assented to by the party making the offer. Appellant insists that the conditions of the indemnity contained in the constitution and by-laws were not such as contemplated by the application, in that (1) absolute indemnity was proposed, while that provided was that which might be raised by assessment, and (2) that an exception of death from "suicide while sane or insane" is found in the articles of incorporation, though excluded from the application. It will appear from an examination of the application that the manner of raising the various sums mentioned is not alluded to. For all that appears, they may be raised by any of the methods ordinarily resorted to by life insurance companies. The applicant cannot, then, be said to have proposed any particular method, nor the association in preparing the blank forms to have made any representations with reference thereto. This contention must then be rejected. Decisions construing policies or certificates to stipulate absolute indemnity are not in point, for here the statements are contained, not in the policy or certificate, but in the application therefor; and, when construed in connection with the certificate, which merely declared Tuttle a member and that he was "entitled to all the benefits accruing from such membership, under the provisions of the constitution and by-laws of this association," no doubt can remain that a promise of absolute indemnity was not intended, but such as was provided by the articles of incorporation. Moreover, the application expressly so indicated, as will hereafter appear. An examination of the application will disclose that many exceptions from liability are stated, and from this enumeration it is said that the inference should be drawn that all others were excluded, and therefore that the applicant did not ask for insurance

including another exception found in the articles, namely, "death by suicide while sane or insane;" and so defendant, in issuing the certificate to Tuttle, added a condition, and for this reason the contract was not effected until the latter accepted at Kansas City.

But this contention overlooks a very material portion of the application, which reads: "I hereby agree with the said association that I will comply with the requirements of its constitution and by-laws, which, with this declaration, shall be the basis of membership between myself and the said association." It is to be noted that the first clause binds the applicant to observe his duties and obligations due to the association as a member, and this, even though extended to changes in the articles or by-laws, will not authorize the association by amendment to interfere with the other and distinct relations between the association, as insurer, and the member, as insured, as by reducing the amount of indemnity to be paid. *Newhall v. Supreme Council A. L. of H.* 181 Mass. 111, 63 N. E. 1; *Bragaw v. Supreme Lodge*, 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905. By the second clause the constitution and by-laws, with the declaration, is made "the basis of membership between myself and the said association." The application was on the express condition that the articles of incorporation (called constitution) and by-laws were to form the basis of the contract constituting him a member of the association. If, then, exceptions are to be found in the articles not enumerated in the application, they cannot be regarded as new conditions, but the rather of those proposed, though not specifically mentioned. Indeed, the second by-law declared that the certificate of membership, together with the application therefor and the articles of incorporation and by-laws "constitute the contract between the member and this association," and it was undoubtedly in view of this that the stipulation quoted was inserted in the application.

We have not adverted to the contention that defendant was "doing business" in Missouri; for, even though this be true, it could have no bearing in fixing the *locus in quo* of the particular contract.

The plaintiff also pleaded a waiver of the defense of suicide. In support thereof, it was made to appear that her attorneys wrote to the association on the 17th day of July, 1901, saying: "Mrs. Tuttle is ready to furnish proofs of death and to comply in every respect with the rules and by-laws of the association. If you will kindly forward to us blanks for the proper presentation of the claim, we will see that the same are executed and filled out, and will promptly send them to you. Your early answer here-

to will greatly oblige." To this the secretary of the association responded in a letter dated July 20th, but postmarked July 22d, at 5:30 P. M.: "Mr. Tuttle was at the time of his death a member of the association in good standing. We beg, however, to advise you that the association gives to its members and their beneficiaries indemnity only on account of total disability or death caused by accident. There is nothing in your letter to indicate that Mr. Tuttle died as the result of an accident. However, at your request, we forward you blanks. In forwarding you these blanks, it is with a distinct understanding that no rights the association may have are waived. These blanks are sent you for your convenience." The association's attorney had gone to Hutchinson, Kansas, to investigate the cause of death on the 17th and returned on the 21st of July, and the evidence was such that the jury might have found that he had informed the secretary that deceased had committed suicide before the above letter was mailed to plaintiff's attorney, who thereafter at considerable expense had procured the proofs of loss and forwarded them to the association. At their request a few days later a copy of the application and of the articles and by-laws was sent to them.

The plaintiff argues that the principle often applied, that where the insurer, after learning of facts establishing a forfeiture, requires the preparation of proofs of loss, he thereby waives the forfeiture, is applicable. We think otherwise. Nothing was done by plaintiff at the instance or request of the association, nor did its letter carry any assurance, save that the blanks were forwarded merely for their convenience. Proofs of death were exacted as a condition precedent to payment of loss by the by-laws, and the courtesy exhibited in supplying these blanks at the insured's request ought not alone to be construed into a waiver of a defense, which the insurer was then under no obligation to disclose. The test to be applied is whether the acts and conduct of the insurer are inconsistent with the intention to insist on this defense. *Lake v. Farmers' Ins. Co.* 110 Iowa, 473, 81 N. W. 710, and, as seen, nothing which the association wrote or forwarded can bear such a construction. The court rightly held there was no evidence of waiver.

Affirmed.

Weaver, J., dissenting:

I dissent from the proposition that the certificate is to be treated and construed as an Iowa contract. The application was solicited, made, and delivered in Missouri. The first premium was paid in Missouri. The defendant, without any order or direc-

tion from the assured, sent the certificate to him in Missouri. The defendant, in thus doing an insurance business in that state, became subject to its statutes, and its contracts so made are to be construed and enforced according to its laws. *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962. To hold otherwise and assist the defendant in defeating or avoiding the laws of our sister states is to open the door to the nullification of our insurance statutes, so far as they apply to foreign corporations doing business in this jurisdiction.

Rehearing denied.

MISSOURI SUPREME COURT. (Division No. 2.)

ALBERT F. WOAS, Appt.,
v.

ST. LOUIS TRANSIT COMPANY, Resp't.

(198 Mo. 664, 96 S. W. 1017.)

Carrier—injury to passenger by missile—liability.

1. That the motorman of a street car sees a person with something in his hand near the track at a place where the car is not required to stop for passengers, making violent motions toward the car, does not charge him with notice that his failure to stop the car will result in the throwing of a missile at himself which may strike and injure a passenger, and charge him with the duty of protecting the passenger, so as to render the company liable for injury to the passenger by his neglect so to do.

Evidence—indefiniteness.

2. A mere offer of evidence that, prior to the throwing of a missile at a street car to the injury of a passenger, other missiles had been thrown at cars for failure to stop them, is too indefinite.

(October 17, 1906.)

Case Note.—Presumption of negligence in case of injury to passenger by missile thrown from outside:—That the rule that the mere happening of an injury to a passenger while in the hands of a carrier will raise a presumption of negligence is subject to the qualification noted in the case in hand, that the evidence must, in some tangible way, connect the carrier, or its servants, or some of the appliances of transportation, with the happening of the injury, is well established; and this qualification plays an important part in cases of the kind under discussion.

Thus, it was held in *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14, that an injury

A PPEAL by plaintiff from a judgment of the Circuit Court for the city of St. Louis in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Warren D. Isenberg and F. R. Suits, for appellant:

It is the duty of a carrier of passengers to protect its passenger from injury, violence, insult, and ill treatment, from whatever source arising, whether at the hands of its servants, other passengers, or third persons.

5 Am. & Eng. Enc. Law, 2d ed. p. 541; Connell v. Chesapeake & O. R. Co. (Ball v. Chesapeake & O. R. Co.) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22; Dean v. St. Paul Union Depot Co. 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54; Louisville & N. R. Co. v. McKenna, 13 Lea, 280; Hutchinson, Carr. 2d ed. § 551a; Eads v. Metropolitan R. Co. 43 Mo. App. 536; Illinois C. R. Co. v. Laloge, 113 Ky. 896, 62 L.R.A. 405, 69 S. W. 795; Spangler v. St. Joseph & G. I. R. Co. 68 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607; Spohn v. Missouri P. R. Co. 87 Mo. 80; Sira v. Wabash R. Co. 115 Mo. 135, 37 Am. St. Rep. 386, 21 S. W. 905; Sullivan v.

Jefferson Ave. R. Co. 133 Mo. 8, 32 L.R.A. 167, 34 S. W. 566; Jackson v. Grand Ave. R. Co. 118 Mo. 200, 24 S. W. 192; Clark v. Chicago & A. R. Co. 127 Mo. 208, 29 S. W. 1013; Sweeney v. Kansas City Cable R. Co. 150 Mo. 385, 51 S. W. 682; Farber v. Missouri P. R. Co. 116 Mo. 91, 20 L.R.A. 350, 22 S. W. 631; Paden v. Van Blarcom, 100 Mo. App. 185, 74 S. W. 124; Meade v. Chicago, R. I. & P. R. Co. 68 Mo. App. 92; Wright v. Chicago, B. & Q. R. Co. 4 Colo. App. 102, 35 Pac. 190; Winnegar v. Central Pass. R. Co. 85 Ky. 553, 4 S. W. 237; Savannah, F. & W. R. Co. v. Boyle, 115 Ga. 836, 59 L.R.A. 104, 42 S. E. 243; Bosworth v. Union R. Co. 25 R. I. 202, 55 Atl. 490; Fewings v. Mendenhall, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127.

Messrs. Boyle & Priest and George W. Easley, with Mr. George T. Priest, for respondent:

To hold this defendant liable it must first be shown that the plaintiff was injured as the result of a direct assault upon him while a passenger upon defendant's car; second, that defendant had reasonable grounds for anticipating that an attack would be made on plaintiff and had the means at hand to prevent it.

Connell v. Chesapeake & O. R. Co. (Ball v. Chesapeake & O. R. Co.) 93 Va. 44; 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Chicago & A.

to a passenger on a railroad train, sitting next to an open window, by a blow on his eye by some hard substance, probably a piece of coal, hurled with considerable force while the engine of another train was directly opposite the window, passing in another direction, where there is nothing to explain the cause of the accident, does not create a presumption of negligence against the carrier.

And in *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L.R.A. 416, 23 Atl. 989, it was held that the mere fact that a passenger seated in a car at an open window was struck on the arm by a missile which he did not see and which could not be found, with sufficient force to fracture the arm, without evidence that anyone was near the train on the outside, who could have inflicted the injury, does not raise a presumption of the carrier's negligence.

No presumption of negligence on the part of a railroad company arises from injury to a passenger by the fall upon a train of a rock which became detached from the natural hillside more than 300 feet from the top of the cut through which the train ran. *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 130, 22 L.R.A. 351, 38 Am. St. Rep. 835, 27 Atl. 858.

Where a passenger on an open street car is injured by falling sawdust blowing into

her eye while the car is passing beneath an elevated structure which is part of the carrier's railway system, but the cause of the fall of such sawdust is not shown, there is no presumption of negligence on the part of the carrier. *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 572, 66 N. E. 421.

The mere unexplained fact that a stream of water entered the window of a railway car, wetting and injuring a passenger, is not sufficient evidence to raise a presumption of negligence on the part of the railway company. *Spencer v. Chicago, M. & St. P. R. Co.* 105 Wis. 311, 81 N. W. 407.

But where there is something to connect the injury with the means of transportation, or an act of the carrier's servants, a presumption of negligence arises.

Thus, in *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797, it was held that, where an injury to the eye of a passenger was shown to have been caused by a red-hot cinder from the locomotive of the train, the burden was upon the carrier to prove due care.

So, where a person, while waiting on a depot platform for his train, was struck by a block of coal falling or thrown from a passing train, there is a presumption of negligence on the part of the railroad. *Louisville & N. R. Co. v. Reynolds*, 24 Ky. L. Rep. 1402, 71 S. W. 516.

R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22; Wright v. Chicago, B. & Q. R. Co. 4 Colo. App. 102, 35 Pac. 196; Fewings v. Mendenhall, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127.

Gantt, J., delivered the opinion of the court:

On the 3d of March, 1903, plaintiff filed in the circuit court of the city of St. Louis an amended petition, which, in substance, stated that on the 14th of April, 1902, the defendant was a public carrier of passengers for hire, and as such controlled and operated a street railway along and over Easton avenue, in the city of St. Louis, a street running in an easterly and westerly direction, and on said day plaintiff took passage on one of defendant's east-bound cars at or near Clara avenue, and paid his fare, and was accepted as a passenger on said car. While plaintiff was a passenger on said car, the defendant, its agents, and servants failed and neglected to exercise such care and vigilance and caution as was their duty to do towards plaintiff, and was negligently, improperly, and unlawfully conducting itself; that the plaintiff became exposed to great danger, and in consequence of such negligence and unlawful conduct on the part of defendant, its agents, and servants, was greatly and permanently injured in and about his face and on the right side thereof; that, before the said car reached King's highway, a street running in a northerly and southerly direction across said Easton avenue, some person took a position upon the track of the defendant upon which said car was running, and made violent and threatening motions at and towards the front of the car and at and towards the motorman in charge and running said car on which plaintiff was a passenger, and said motorman saw, or could have seen, said person's threatening motions, attitude, and conduct, and could have reasonably anticipated, in view of the circumstances, that the car was in danger of being attacked, and the passengers thereon liable to be injured, but notwithstanding said threatened danger the said motorman took no steps to prevent an attack upon said car, and took no steps to protect the passengers thereon from said danger, but threw the power on said car in full force and apparently tried to run over the said person on the track; that, when the car was in close proximity to the said person on the track, the said person threw a rock or missile of some hard substance through the front of said car, and said missile struck the plaintiff in the face with great force and violence, permanently injuring the

7 L.R.A. (N.S.)

vision of his right eye and paralyzing some of the muscles on the right side of his face, whereby plaintiff has undergone and will undergo much pain and suffering, both mentally and physically, and caused plaintiff to pay out large sums of money for medicine, medical care and attention, and lose much time from his work; that there was in force and in effect at that time an ordinance which defendant was bound to obey, which provided that east-bound cars should be stopped on the east side of intersecting streets to take on passengers where requested, signaled, or motioned by any person standing on said appropriate corner desiring to take passage on such cars. The petition sets forth the ordinance (§ 1761 of article 6 of ordinance No. 19,991 of the city of St. Louis, approved April 3, 1900); and it is further alleged that §§ 1762 and 1772 of said ordinance provide a penalty for the violation of § 1761 for failing to stop said cars upon the request of persons desiring to take passage thereon. It is then alleged that a number of people waiting on the east side of King's highway, and on the south side of Easton avenue, desiring to take passage on the car of which plaintiff was a passenger, signaled the motorman to stop said car so that they might take passage thereon, but the said motorman and servant therein in charge of said car failed, neglected, and refused to stop the same; that the person who threw said missile was provoked thereto by the unlawful conduct of the defendant, its agents, and servants in failing to stop said car at King's highway; that the servants of the defendant then and there could have reasonably anticipated the happening of the said injury to the plaintiff; that at divers times and at sundry other occasions prior to the injury to the plaintiff other persons had hurled missiles at the cars of the defendant on account of the failure of the servants of the defendant to stop said cars as required by said ordinance, and that such persons had been prosecuted for throwing missiles at said street cars; that plaintiff had been damaged in the sum of \$10,000, for which he prayed judgment.

The answer was a general denial of each and every allegation in the petition. The cause was tried before the court and a jury on the 24th of November, 1903, and at the close of the evidence the jury returned a verdict for the defendant. At the commencement of the trial the defendant objected to any testimony under the petition on the ground that it did not state facts sufficient to constitute a cause of action, and because the petition showed on its face that whatever injury was sustained by the plaintiff was due to the wrongful act of a stranger to the defendant, over whom defendant had

no control whatever, and there was nothing in the pleading to render the defendant responsible for the wrongful act of the said stranger. The court overruled this objection and the defendant duly excepted. The plaintiff then offered to prove that prior to the 14th of April, 1902, missiles had been thrown at the cars of the defendant company on account of the failure of the defendant's servants to stop its cars and allow passengers to board the same, and also to prove that prosecutions had been had against such persons for such unlawful conduct, all of which testimony the court excluded at the request of the defendant, to which action of the court the plaintiff excepted. Plaintiff next offered in evidence § 1761 of the Municipal Code of St. Louis which was pleaded in the petition, and also § 1762 providing a penalty for a violation of § 1761, and also the acceptance of the provisions of said ordinance by the defendant company.

The plaintiff, in his own behalf, testified that he was a linotype operator, and that on the 14th of April, 1902, he took passage on an east-bound Easton avenue car, about a quarter to 6, to go to his work. He paid his fare and took his seat on the right side of the car, fronting east on the second seat from the front of the car; that, when the car approached King's highway, he noticed a man standing in the middle of the street with something in his hand, making violent motions towards the car. The motorman was standing on the platform in front of the car handling his motor. The next thing that the plaintiff remembered was he was on the operating table, and the doctor was taking the glass and broken bones out of his face and teeth. He testified to the wages he was earning before he was hurt and to the amount of his physician's bills, and to the length of time lost from his work on account of the injury. He did not see the man throw anything. He only knew that, when he came to his senses, he was on the operating table in Dr. Parker's office. Dr. Rice testified to the serious nature of the plaintiff's injuries; that, when he reached the plaintiff at Dr. Parker's office, Dr. Parker had already bandaged him up and sent him home. The cheek bone was fractured and the muscles were partially paralyzed, so that he could not close his jaws. John Jack testified that he was a member of the police force and saw a person throw something on the evening of the 14th of April, 1902, at an Easton avenue east-bound car near King's highway. He could not swear that it was a rock, but, whatever the missile was, it struck the vestibule, and broke the pane of glass in front of the vestibule, but whether it struck any person or not he could

not say. This was the substance of the plaintiff's evidence. The court, at the request of the defendant, instructed that under the pleadings and the evidence the plaintiff was not entitled to recover, and thereupon the jury returned the verdict for the defendant. Within four days plaintiff filed his motion for a new trial, alleging, among other things, error on the part of the court in refusing competent evidence on the part of the plaintiff and in sustaining the demurrer to the evidence, which motion was, by the court, overruled, and the plaintiff excepted.

Two grounds are assigned for a reversal of the judgment, the principal of which is that the court erred in not submitting the case to the jury upon the evidence, and the second is the refusal of the court to permit the plaintiff to show that, on account of the defendant's refusal to stop its cars in accordance with the ordinance, various persons had made attacks upon the cars by throwing missiles at them.

1. In support of this first contention plaintiff invokes the law as to the duty of the carrier of passengers to protect its passengers. A carrier of passengers is required to exercise the highest degree of care in respect to the equipment of its road and transportation facilities, in providing suitable machinery in the operation of its cars, in the employment of competent and faithful servants and agents, and generally as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier. In respect to these matters the rule in this state has always held such carriers to a strict accountability. It will be readily seen from the accompanying statement that both the petition and the evidence demonstrated that the act which resulted in the plaintiff's injury in this case was not committed by an employee or a fellow passenger, or by anyone having any connection or relation whatever with the company, but by a stranger, over whom the defendant had no control whatever. It is insisted by the plaintiff, however, that it was the duty of the defendant, in view of the fact that other persons had committed criminal trespasses by hurling stones at the cars of the defendant, to have exercised the utmost care and vigilance to guard and protect the plaintiff while a passenger on this car from acts of violence at the hands of evil-disposed persons, whether under the control of the defendant or not, and that the act of the man who threw the missile which struck the plaintiff could have been reasonably anticipated by the defendant's motorman, and could have been guarded against and prevented.

In *Batton v. South & North Ala. R. Co.* 77

Ala. 591, 54 Am. Rep. 80, it was held that, while it is the duty of a railroad company as a common carrier to protect its passengers against violence or disorderly conduct on the part of its own agents or other passengers and strangers when such violence or misconduct may be reasonably expected and prevented, yet it is not liable in an action for damages for a wrong when it is not shown that the company had notice of any facts which justify the expectation that a wrong would be committed; and the court in its opinion says: All the cases upon the subject impose the qualification that the wrong or injury done the passenger by strangers must have been of such a character as that it might reasonably have been anticipated or naturally expected to occur. And this statement of the rule has been approved by this court in *Sira v. Wabash R. Co.* 115 Mo. 135, 136, 37 Am. St. Rep. 386, 21 S. W. 905, and in *Connell v. Chesapeake & O. R. Co.* (*Ball v. Chesapeake & O. R. Co.*) 93 Va. 44, 32 L.R. A. 792, 57 Am. St. Rep. 786, 24 S. E. 467. And it is quite generally ruled by the courts of this country that the liability of the defendant carrier in such a case grows not out of the fact that the passenger was injured, but out of the failure of the carrier's servants to afford protection after they have reasonable grounds for believing that violence to the passenger is imminent; and it is necessary, therefore, in all such cases, to bring home to the conductor or other agent or officer of the company knowledge or opportunity to know that the injury was threatened, and to show that, by his prompt intervention, he could have prevented or mitigated it. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Britton v. Atlanta & C. Air-Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749. It is clear in this case that the burden of showing negligence was upon the plaintiff, and that the presumption of negligence which arises in favor of a passenger traveling on a train from the mere fact of an accident has no application to a case like this. Such a presumption only arises where the injury can be reasonably attributed to some defect in track, cars, or machinery, or the movement of the train, or the conduct of the servants in charge thereof. In *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, it was said: "If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. . . . Were it worth while, abundant authority might be cited to show that the law does not require anyone

to presume that another may be . . . an active wrongdoer. . . . It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action." In *Fredericks v. Northern C. R. Co.* 157 Pa. 103, 22 L.R.A. 300, 27 Atl. 689, a passenger was injured by the criminal action of certain parties breaking the locks of a switch and uncoupling cars which stood on a side track and causing loaded coal cars to run out on the main track with which plaintiff's car collided, and it was held by the supreme court of Pennsylvania that the company was not liable for these malicious acts of a stranger of which it had no notice. To the same effect is the decision in *Deyo v. New York C. R. Co.* 34 N. Y. 9, 88 Am. Dec. 418, in which a train was thrown from the track through the culpable act of some unknown person, who maliciously drew the spikes which fastened the chairs and the rails, whereby a passenger was injured. In *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534, 75 Am. Dec. 258, it was said: "If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences unless its agents have been remiss in not discovering them." In *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14, it appeared that the plaintiff was a passenger on the defendant's train, and while reading a newspaper in his seat at an open window was struck in the eye by a hard substance and seriously injured. On the trial the court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence from the mere happening of the accident, and that it therefore devolved upon the defendant to rebut that presumption and show it was not negligence. The supreme court held that this instruction was erroneous because the accident occurred from something extraneous to the railroad and the appliances of travel, and that it was necessary for the plaintiff to go further and affirmatively prove that there was negligence. The court pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose from the mere happening of the accident. In the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by different testimony just as in any ordinary case between strangers. The foregoing cases sufficiently indicate the principles which must govern in the decision of this case.

It being conceded that plaintiff's injury resulted from the unlawful, wanton, and

wicked act of a stranger, over whom defendant had no control, was there anything in the evidence which would justify the circuit court in submitting to the jury whether the defendant could have reasonably anticipated that this stranger would have hurled the rock or other missile into the car where plaintiff was seated in time for the defendant's motorman to have taken steps to have prevented it. While plaintiff urges in his petition that the party who threw the stone stood on the track on which defendant's car in which plaintiff was riding was moving, the plaintiff's evidence clearly shows that this party was not on the track, but stood between the east and west bound tracks, and not on the corner where a passenger was authorized to hail the car to stop. It is too plain for argument that the motorman was under no obligation to stop the car for a party not at the proper point. There is not the slightest pretense that this motorman had any reason to expect this party to be on the track at this place until his car approached him; nor is there the slightest evidence that he had any right to anticipate that this stranger would violate the law by throwing a deadly missile at the motorman. The question at bar has been so recently and ably discussed by the supreme court of Minnesota, in the case of *Fewings v. Mendenhall*, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, that we quote from that case the conclusions of law applicable to the facts before us. We premise our quotation, however, by remarking that in this case there was no mob or other circumstances which characterized the Minnesota case. The defendant in that case was the receiver of the Duluth Street Railway Company and as such was operating the road. "On May 2, 1899, a general strike was inaugurated by the employees of the company, which was maintained until after the plaintiff was injured as hereinafter stated. The defendant procured other men to take the places of the strikers and continued to operate the street-car lines. On Sunday evening, May 7th, the plaintiff took passage in the car operated by the defendant at Superior, in the state of Wisconsin, for Duluth. While the car was going northerly along Garfield avenue, in Duluth, and as it approached Michigan street, a young man not in any way . . . under the control or direction of defendant threw a stone at the car in which plaintiff was so riding, which passed through the window thereof and struck plaintiff on the head, whereby he was seriously injured." Plaintiff sued the receiver and based his right to recover on the alleged negligence of the defendant in failing to take proper precaution to prevent injury 7 L.R.A. (N.S.)

from acts of that kind. It was held that the defendant was not guilty of negligence in attempting to operate the cars during the strike. Said the court: "It is insisted that that act of the boy who threw the stone in question was such as the defendant might, from the circumstances and conditions of the strike, reasonably have anticipated and could have guarded against and prevented. We have been cited to no case where the high degree of care essential as to matters within the control of the carrier has been extended and applied with all its force and strictness to acts of persons beyond its control, and for which it was in no way responsible, directly or indirectly. Some cases cited and relied upon by the plaintiff do not sustain his position."

The court then reviewed a large number of cases, and showed that they had no application to the question under discussion, and then proceeded as follows: "A number of other cases are cited and relied upon by counsel wherein the general rule is stated substantially as contended for by him, namely, that a carrier of passengers is required to exercise the utmost vigilance to protect passengers from insult and injury from whatever cause arising; but an examination of them shows that they are all cases where the carrier had permitted third persons to enter upon its premises or cars and thereafter failed to exercise a proper degree of care to restrain them from acts of lawlessness, and there can be no question as to their soundness. The question before us is whether this strict rule applies to the act of a stranger such as here shown. That it does not is sustained by some very respectable authorities. *Tall v. Baltimore Steam Packet Co.* 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L.R.A. 416, 23 Atl. 989; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 21, 5 Am. St. Rep. 483, 14 N. E. 22. In our opinion it would be unjust to require a carrier of passengers, either a steam or street railway company, to exercise the utmost care and vigilance to guard and protect passengers from criminal acts of strangers, persons not under its control, or subject to its orders, and for whose acts it is not in any way responsible. And we hold, without further discussion as respects the acts of such strangers, that carriers of passengers are liable for the exercise of ordinary care and prudence only. Such carrier is liable for all injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances, and which ordinary care and prudence, had they been exercised, would have

prevented. . . . The familiar rule that evidence of an accident is prima facie proof of negligence against the carrier can have no application to this case because the act resulting in the injury did not arise from any act or omission of defendant. The presumption of negligence in such cases arises only where the thing causing the injury complained of was under the exclusive control of the carrier or its servants or employees. The act complained of here being that of a stranger, it was incumbent upon plaintiff affirmatively to prove that defendant failed to exercise proper care to prevent it. The question arises whether the evidence was sufficient to charge defendant with negligence in this respect." The court then discussed the two theories advanced by the plaintiff. One was that the defendant might have protected the plaintiff by stretching a heavy canvass over the windows outside of the car, or have caused its leather curtains to have been pulled down. The other was to have informed the plaintiff that violent and lawless acts were being committed by the strikers and their sympathizers. The court held that ordinary care did not require of the defendant to take doubtful or unreasonable precaution to guard against the lawless acts of strangers, and that, as to the duty to notify the plaintiff of the violent conduct of some of the strikers, that plaintiff was bound to know of those things as much as the defendant, and it was unreasonable to suppose that, had defendant given plaintiff this warning, it would have had the effect of protecting him; and the court held that, upon the whole record, the evidence was insufficient to charge the defendant with actionable negligence.

Another leading case on this subject is that of *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22. In that case a railroad company stopped at a place not a usual stopping place and took aboard laborers who had taken the place of some strikers. The police guarded the laborers until they entered the train. When the train stopped at a railroad crossing, 1½ miles beyond, it was boarded by a mob, who attacked the laborers as scabs and shot the plaintiff, a passenger on the train at the time. Scott, J., speaking for the majority of the court, said: "With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger to and consequent injuries to passengers must depend in a large measure on the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for

his own personal safety, it will be exonerated from liability. In other cases and under other circumstances it will, no doubt, be the duty of the carrier to exercise the utmost care, skill, and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care, and skill, and diligence, could have been reasonably and practically foreseen and anticipated in time to prevent injury. . . . Prior to the time the plaintiff was injured the box cars containing these laborers had been assailed, and it might reasonably have been inferred that danger to passenger cars on the same account was imminent, and common prudence should have induced the taking of extraordinary precautionary measures. . . . Under the circumstances, the law would charge defendant with negligence in stopping a train filled with passengers, in the midst of a howling, revengeful, lawless mob, to take on persons whom the mob were seeking an opportunity to maltreat. . . . Defendant ought reasonably to have anticipated the mob might attack its train to reach the object of their vengeance so soon as it had passed from the protection of the police, and precautionary measures should have been taken . . . to prevent the injury to passengers. The verdict is a sufficient warrant for the conclusion that reasonable precautions were not observed." Magruder, J., entered a most vigorous dissent from the conclusions reached by the majority.

It is to be observed that in this case the opinion of the majority of the court is predicated upon the fact that the circumstances themselves charge the defendant with notice of the danger to its passengers from an attack of a mob of strikers, and the duty of the carrier under such circumstances to exercise that skill and diligence commensurate with the threatened danger. In both of the cases last cited it is to be observed that the plaintiffs proceeded upon the theory that the carrier was advised of the danger to its passengers and failed to exercise the proper care for their protection. It is obvious that the facts of the case at bar are wholly dissimilar from those two cases, in that in this case there was a total absence of any mob or other public disturbance which would of itself indicate to the defendant any danger to its passengers on the car on which plaintiff was riding. Here the act which caused the injury was the wanton, unlawful act of one man who had assumed to himself the prerogative of punishing the motorman for not stopping the car where he thought it ought to be stopped. In the *Fewings Case* and in the *Pillsbury Case* the assaults were aimed at the passengers on the cars, and not merely at a motorman or engineer. It was

the threatened injury to the passengers and notice thereof upon which those actions were grounded. In this case it is not pretended that the motorman had any notice of any impending attack upon the plaintiff or the other passengers, nor was any attack made directly upon the passenger, but the attack was directed solely against the motorman, and it was only because of its mis-carriage that plaintiff was injured. All the evidence shows that the attack was made with the sole intention and purpose of injuring the motorman, and to hold that the defendant, under this evidence, was bound to anticipate injury to its passengers would be contrary to reason and common sense. The motorman was standing alone in the vestibule, controlling the action of his car; and it would be utterly unreasonable to hold that he could reasonably anticipate that a person attempting to strike him would inflict injury upon the passengers in the coach. As already shown by the authorities cited, the motorman was not bound to anticipate that this stranger who was hailing his car would be guilty of a criminal assault upon himself or upon his passengers. The circumstances in evidence did not indicate any purpose on the part of this lawless offender to maltreat the passengers on that car. That carriers of passengers are not liable for injuries caused by missiles thrown by strangers which they have no right to anticipate is established by a large number of well-considered cases. *Pennsylvania R. Co. v. McKinney*, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14; *Fewings v. Mendenhall*, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L.R.A. 416, 23 Atl. 989. Knowledge of the existence of the danger, or of facts and circumstances from which danger may be reasonably anticipated, is necessary to fix the liability of the carrier for damages sustained in consequence of failure to guard against it.

In view of the foregoing legal principles and the evidence in this case, we think the circuit court correctly sustained the demurrer to the evidence, as the plaintiff wholly failed to bring himself within any rule of law which would render the defendant liable for the assault of the person made upon its motorman.

2. The only remaining ground is that the court excluded certain evidence offered by the plaintiff to show that, prior to the 14th of April, 1902, certain persons had thrown missiles at the defendant's cars on account of their failure to stop and allow passengers to board the car. It is obvious that the evidence sought to be adduced had no limitations whatever, save that missiles were thrown at the defendant's cars at some time

prior to April 14, 1902. The questions asked would have permitted the witnesses to have told of sporadic cases of the throwing of missiles at defendant's cars during a period extending over years prior to the 14th of April, 1902. Moreover, the question did not indicate that such conduct was by any means general or of such frequency as to indicate that it would be repeated on the occasion on which plaintiff was hurt. The evidence sought to be elicited was entirely too indefinite to be of any probative effect whatever. We are cited to the case of *Indianapolis Street R. Co. v. Dawson*, 31 Ind. App. 605, 68 N. E. 909, from the appellate court of Indiana. The evidence offered in this case falls far short of the testimony which was ruled competent in that case. We think the court committed no error whatever in excluding the testimony for the reason that it was entirely too indefinite as to time, and for the further reason that it did not purport to show any such state of affairs as to bring home notice to the defendant of any danger to the plaintiff of the assault by which he was injured.

The judgment of the Circuit Court must be, and is, affirmed.

Burgess, P. J., and Fox, J., concur.

NORTH CAROLINA SUPREME COURT.

CHARLES DUFFY, JR.,

v.

FIDELITY-MUTUAL LIFE INSURANCE COMPANY, Appt.

(142 N. C. 103, 55 S. E. 79.)

Insurance—assessment—notice—by-law.

A by-law of an insurance company that the mailing of notices of assessments may be conclusively shown by the certificate of an officer of the corporation who is not required to be personally cognizant of the fact is unreasonable and void.

(September 25, 1906.)

Case Note.—Mode of proving the mailing of notice of maturity of premiums or assessments:—Research has served only to confirm the impression entertained by the court in the case in hand as to the absence of any other decision passing upon the validity of a by-law or contract provision making the certificate of an officer or employee of an insurance company conclusive evidence of the mailing of notice of the maturity of premiums or assessments.

But it has been held that an affidavit as to the publication and mailing of a paper published by an insurance order through which calls for assessments were made is admissible. *Rambousek v. Supreme Council*, M. T. 119 Iowa, 263, 93 N. W. 277.

Testimony of the secretary of a benefit association as to the customary method of

APPEAL by defendant from a judgment of the Superior Court for Craven County in plaintiff's favor in an action brought to recover damages for the alleged wrongful cancellation of an insurance policy. Affirmed.

Statement by Connor, J.:

This action is prosecuted by plaintiff for the alleged wrongful cancellation of a policy of insurance by defendant; plaintiff claiming as damages the premiums paid and interest thereon. Defendant admitted the cancellation, and justified by alleging that, plaintiff having failed to pay premium when due, the policy, by its terms, became void. The controversy arises upon the question whether the notice of the assessment was given to plaintiff according to the terms of the policy and by-laws of the association. The two issues material to be considered in disposing of this appeal are: "(1) Was a notice of

assessment of July 1, 1903, which was payable July 31, 1903, duly directed to the plaintiff at New Bern, North Carolina, which address appeared at the time on the books of the company, deposited on July 1, 1903, postage prepaid, in the postoffice in Philadelphia? Answer: No. (2) Was the notice of July 1, 1903, assessment received by plaintiff at his address in New Bern, North Carolina? Answer: No." It was in evidence that, at the date of the policy, April 12, 1883, and by its terms, the assessments were due and payable to Joel Kinsey, Trustee, at New Bern, North Carolina; that payments were made to said trustee until some time prior to July 1, 1903, when the by-law was so amended that the assessment became payable to the company in Philadelphia; that, after the change in the by-law, plaintiff made several payments of assessments by sending same to Philadelphia. Defendant introduced article 5, § 9, of the by-

sending out notices is competent for the purpose of proving that a particular notice was mailed, although he had no distinct or independent recollection thereof, and in the majority of cases did not personally see the letters or envelopes containing the notices put in the letter box or postoffice, but turned them over to his clerk for mailing. *National Union v. Shipley*, 92 Ill. App. 355.

Testimony by the secretary of such an association as to his custom of mailing a notice to each member, although he has no independent recollection of the particular notice in question, is prima facie evidence that notice was given. *National Union v. Hunter*, 99 Ill. App. 146, Affirmed in 197 Ill. 478, 64 N. E. 356.

Such testimony will warrant the jury in finding that notice was sent. *Backdahl v. Grand Lodge*, A. O. U. W. 46 Minn. 61, 48 N. W. 454.

But it has been held that, where the secretary had no personal recollection of mailing the notice in question, though he felt sure that he had mailed it, and there was some inferential evidence to the contrary, the proof was not sufficient. *Payn v. Mutual Relief Soc.* 2 How. Pr. N. S. 220.

Evidence showing that a notice of assessment was placed in an envelope addressed to the assured, and put upon a desk from which it was the habit of the mail carrier, every time he delivered letters, to take the letters so left, and presumably deposit them in the postoffice, was held insufficient to justify a holding that the notice was ever mailed, in *Malloy v. Supreme Council*, C. M. B. A. 93 Iowa, 504, 61 N. W. 928.

And in *Hastings v. Brooklyn L. Ins. Co.* 138 N. Y. 473, 34 N. E. 289, it was held that, where the secretary of the insurance company testified that he wrote and signed an order notifying the insured that his policy would be canceled for nonpayment of his premium note, and inclosed it in a sealed envelope directed to the insured, with a

notice upon it to return unless delivered, which was put in a basket in the office where letters for mailing were usually placed; and the porter in the office testified that his business was to take the letters from the basket and mail them, that he mailed all letters found in the basket, but had no recollection of ever seeing or handling this particular letter; and where, on the other hand, it was shown that no such letter was found among the letters or papers of the deceased, and, aside from what the porter testified as to mailing, there was no fact or circumstance shown that would warrant the conclusion that he had received it,—it could not be held, as a matter of law, that the facts shown established the mailing of the letter, although they might warrant such a finding by the jury.

Evidence that the usual course of business required the sending of notice of assessment, and that the books of the company indicated that such notice was sent, is not conclusive as to the fact of sending, although it may be considered by the jury, *King v. Masonic Life Asso.* 87 Hun, 591, 34 N. Y. Supp. 563.

Where testimony is given that the secretary, by the aid of another, made out notices of assessment to all members in good standing, placing them in a cupboard, afterward comparing them with a list of such members, when they were placed in a trunk or box, and the agent of the company went with it as it was conveyed to the postoffice and saw them delivered, and signed the list on the books to indicate their delivery at the postoffice, no person being able to testify that the notice in question was one of those delivered, or that the assured was one of such members in good standing; and it appeared that the assured never received such notice, and that previous notices of assessment had been sent to her very irregularly,—the question as to whether such notice was actually mailed is for the jury.

laws, as amended, as follows: "A printed or written notice directed to the address of a member, as it appears at the time on the books of the association, and deposited in the office at Philadelphia, shall be deemed a legal and sufficient notice of mortuary calls and dues. A certificate made by the treasurer or bookkeeper showing such facts shall be taken and accepted as conclusive evidence of the mailing of such notice." Defendant thereupon introduced a certificate made by O. C. Bosbyshell, treasurer, stating that on July 1, 1903, a notice of assessment, directed to the plaintiff, was deposited in the postoffice of the city of Philadelphia inclosed in an envelope, postage prepaid, etc., concluding: "And this certificate is made by me, the treasurer of said company, in conformity with the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct transcript of the records of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk," etc. Following this certificate is the affidavit of S. E. Haines, clerk, who states that he has charge of the preparation and mailing of notices for premiums upon policies issued by defendant. That on the 7th day of July, 1903, he deposited the notices referred to in certain sheets attached, addressed to the persons named, etc. This affidavit bears date July 1, 1903, and attached thereto is a sheet showing notice of assessment mailed to plaintiff at New Bern, North Carolina. There is no controversy regarding the amount of the assessment. Plaintiff was asked the following question: "Did you ever receive any notice or demand for payment of assessment for July 1, 1903?"

Jackson v. Northwestern Mut. Relief Assn. 78 Wis. 463, 47 N. W. 733.

By the New York statute requiring the mailing of a notice of the maturity of a premium as a condition precedent to the forfeiture of a policy for nonpayment of premium, it is provided that the affidavit of the person authorized by the statute to mail such notice shall be presumptive evidence of such notice having been given.

But where no proof is offered that the person making the affidavit was one of the persons mentioned in the statute as authorized to mail the notice, other than statements contained in the affidavit itself, such affidavit is not admissible in evidence. *Fischer v. Metropolitan L. Ins. Co.* 37 App. Div. 575, 56 N. Y. Supp. 280. (In affirming this case in 167 N. Y. 178, 60 N. E. 431, the court of appeals declined to express an opinion on this point.)

An affidavit which fails to show that the notice related to the policy in suit, and which does not give the contents of the notice that its sufficiency may be determined, is insufficient to show compliance with the 7 L.R.A. (N.S.)

Defendant objected. Objection overruled. Defendant excepted. Answer: "I have never received a notice for July, 1903." The defendant requested certain special instructions, which are set out in the opinion. The jury answered both issues in the negative. From a judgment upon the verdict defendant appealed.

Mr. John W. Hinsdale, for appellant:

The parties have the right to contract that the certificate of the treasurer as to mailing shall be conclusive of the fact.

Re New York, L. & W. R. Co. 98 N. Y. 452.

The contract does not oust the jurisdiction of the court.

Pioneer Mfg. Co. v. Phoenix Assur. Co. 106 N. C. 28, 10 S. E. 1057; *Scott v. Avery*, 5 H. L. Cas. 811; *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Condon v. South Side R. Co.* 14 Gratt. 302; *Yeomans v. Girard F. & M. Ins. Co.* Fed. Cas. No. 18,136; *Perkins v. United States Electric Light Co.* 21 Blatchf. 310, 16 Fed. 515; *Connecticut F. Ins. Co. v. Hamilton*, 8 C. C. A. 114, 16 U. S. App. 366, 59 Fed. 264; *Western Assur. Co. v. Hall*, 112 Ala. 324, 20 So. 449; *Holmes v. Richet*, 56 Cal. 313, 38 Am. Rep. 56; *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142; *Ball v. Doud*, 26 Or. 20, 37 Pac. 72; *Denver S. P. & P. R. Co. v. Riley*, 7 Colo. 495, 4 Pac. 786; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 66, 5 Pac. 627; *Meyers v. Pacific Constr. Co.* 20 Or. 609, 27 Pac. 586; *Union P. R. Co. v. Anderson*, 11 Colo. 301, 18 Pac. 28; *Sweet v. Morrison*, 116 N. Y. 32, 15 Am. St. Rep. 384, 22 N. E. 280; *Campbell v. American Popular L. Ins. Co.* 1 MacArth.

statute. McCall v. Prudential Ins. Co. 98 App. Div. 225, 90 N. Y. Supp. 644.

And, though the contract may be regarded as having been made in New York, the statutory provision referred to, since it merely prescribes a rule of evidence, has no force outside of the state of New York, and will not make such affidavit admissible in an action brought in courts of another state. *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43.

Where the clerk of an insurance company, testifying by deposition, in response to a question whether he had "mailed" such a notice, answered, "Yes," but went on to state that he personally deposited a notice in the postoffice, but did not state that the postage thereon was prepaid, the proof of mailing was held insufficient, in *Provident Sav. Life Assur. Soc. v. Nixon*, 19 C. C. A. 414, 44 U. S. App. 316, 73 Fed. 144.

Evidence of the nonreceipt of such notice by the assured is admissible to rebut the presumption raised by such affidavit. *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 796.

246, 29 Am. Rep. 602, and note; Niagara F. Ins. Co. v. Bishop, 154 Ill. 17, 45 Am. St. Rep. 109, 39 N. E. 1105; Veazie v. Bangor, 51 Me. 514; Wilson v. York & M. R. Co. 11 Gill & J. 73; Johnson v. Howard, 20 Minn. 373, Gil. 322; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 121, 44 N. W. 1056; Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 10, 8 S. W. 632; McNees v. Southern Ins. Co. 61 Mo. App. 340; Butler v. Tucker, 24 Wend. 449; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 266; United States v. Ellis, 2 Ariz. 257, 14 Pac. 302; Tally v. Parsons, 131 Cal. 519, 63 Pac. 834; New Telegraph Co. v. Foley, 28 Ind. App. 419, 63 N. E. 57; Vanderwerker v. Vermont C. R. Co. 27 Vt. 130; McAvoy v. Long, 13 Ill. 147; Howard v. Allegheny Valley R. Co. 69 Pa. 489; O'Reilly v. Kerns, 52 Pa. 214; Faunce v. Burke, 16 Pa. 469, 55 Am. Dec. 519; Monongahela Nav. Co. v. Fenlon, 4 Watts & S. 210; Lauman v. Young, 31 Pa. 306; Scott v. Liverpool, 3 De G. & J. 334, 28 L. J. Ch. N. S. 230; Milner v. Field, 5 Exch. 829; Palmer v. Clark, 106 Mass. 373; London Tramways Co. v. Bailey, L. R. 3 Q. B. Div. 217; Lynn v. Baltimore & O. R. Co. 60 Md. 404, 45 Am. Rep. 741; Richardson v. Mahon, Ir. L. R. 4 Eq. 486.

The contract does not invade the province of the court, or interfere with the due administration of justice.

Collins v. Pettitt, 124 N. C. 726, 32 S. E. 975; Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85, 172 U. S. 557, 565, 43 L. ed. 552, 555, 19 Sup. Ct. Rep. 281; Denver, S. P. & P. R. Co. v. Riley, 7 Colo. 494, 4 Pac. 786; London Tramways Co. v. Bailey and Campbell v. American Popular L. Ins. Co. supra.

Mr. W. W. Clark also for appellant.

Messrs. O. H. Guion and W. D. McIver for appellee.

Connor, J., delivered the opinion of the court:

In the view which we take of this appeal, several of the questions presented by the exceptions and argued in the brief become immaterial. The injury to which the first issue is directed lies at the threshold of the controversy. The answer to that question, in our opinion, is decisive of the case. The authorities cited by the learned counsel for defendant fully sustain the validity of the contract contained in the policy, declaring that by mailing the notice, properly addressed, to the plaintiff the defendant discharges its duty in that respect. The authorities are practically uniform in holding that a by-law of an assessment insurance company providing that notice may

be given members of assessments by mailing, properly addressed, is valid and binding upon the members. Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso. 63 Md. 86; Epstein v. Mutual Aid & Ben. L. Ins. Asso. 28 La. Ann. 938; Niblack, Ben. Soc. § 260. It is equally well settled that the by-laws of such association when assented to by the member, as provided in the charter, constitute the measure of duty and liability of the parties, provided they are reasonable, and not in violation of any principle of public law. There was evidence proper for the consideration of the jury tending to show that Dr. Duffy knew of the change in the by-law by which the assessment became payable in Philadelphia. The authorities are uniformly to the effect that when the duty is imposed upon the company to mail the notice, in order to sustain a forfeiture, it must show affirmatively that the notice was mailed, properly addressed, within the time fixed. "The giving of notice is a condition precedent, and good standing is not lost by a failure to pay an assessment, of which no notice was given through the fault or misconduct of a supreme lodge, or society, or its officers." Niblack, Ben. Soc. § 257. In the absence of any contract or by-law to the contrary, actual notice must be shown, not only mailing, but the receipt of the notice. But, as we have seen, the parties here have contracted that mailing shall be taken as notice. The defendant seeks to show conclusively by the certificate of the treasurer that the notice was mailed, and excepts to the testimony of plaintiff that it was not received. For the purpose of sustaining this exception the defendant relies upon the by-law declaring that such certificate shall be taken as conclusive evidence of the fact of mailing. This contention presents the question whether the by-law so providing is valid. There can be no question that a corporation may make reasonable by-laws not inconsistent with its charter. "In its operation between the corporation and its members, a by-law, in order to be valid, must not to be unreasonable, oppressive, or extortionate." 10 Cyc. Law & Proc. p. 357; Allnutt v. Subsidiary High Court, U. S. A. O. of F. 62 Mich. 110, 28 N. W. 802. Whether a by-law is reasonable is a question of law for the court. 10 Cyc. Law & Proc. p. 358.

A diligent investigation by the learned and industrious counsel for both parties and ourselves fails to discover any authority or discussion of the exact question presented by this appeal. The numerous cases sustaining contracts by which the parties agree to submit questions arising between them to arbitration, or to the estimate of one or

more persons chosen in advance, give us but little aid in the solution of this question. "By-laws restricting the right to sue in the courts are generally void." 10 Cyc. Law & Proc. p. 361. While the by-law relied upon by defendant does not in express terms undertake to deprive the plaintiff of his right, in common with all other citizens, to sue in the courts for redress of his grievance, the practical effect of the right claimed to close the door to inquiry in respect to the controverted fact is to keep the promise to the ear and break it to the heart. If one of the officers of the corporation may, by an *ex parte* unsworn certificate, conclusively close an inquiry into the fact, it would be an idle thing to go into court and impanel a jury only to be told that no evidence will be heard by them. While the courts will, and should, cautiously exercise the power of declaring contracts, solemnly made by parties, void as being unreasonable, they should at the same time carefully scrutinize contracts, the purpose and effect of which is to prevent the citizen from having his rights passed upon and enforced by the courts of the state, by the means and methods which experience has shown to be best adapted to that purpose. It would seem that to sustain a by-law making such certificate presumptive evidence is as far as the courts should go in that direction. Without attributing to the officer any corrupt motive, we cannot fail to recognize the truth, taught by experience, that those whose duty requires the daily mailing of large numbers of letters cannot retain any personal memory of the particular letters mailed, and are compelled to rely upon the record made by them at the time. Such record should have, and always does have, great weight in establishing the fact recorded. It has never been held that such records made by persons engaged in private business are conclusive evidence of such facts. Based upon reasons of public policy, certain public records import absolute verity and may not be contradicted, but such reasons do not extend to private entries. The rules of evidence are relaxed to the extent of permitting them to be introduced as entries, within well-defined limitations. *Firemen's Ins. Co. v. Seaboard Air-Line R. Co.* 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; *Greenl. Ev.* § 120. To go beyond this, and allow private corporations, by means of by-laws, to make acts of their own officers conclusive evidence, is, so far as our researches inform us, without precedent, and we think would be an unreasonable and dangerous innovation upon common right.

It will be observed that the by-law does
7 L.R.A. (N.S.)

not require the certificate of the treasurer to state a fact within his own knowledge. He is not required to certify that he mailed the notice, or that he saw some other person do so, but may, as in this case he undertook to do, rely upon the statement of an office boy or any other servant or employee of the company. Certainly to permit such certificate to have the conclusive effect claimed would put every member of the defendant company in the absolute power of the corporation. It is said that there is a presumption, founded upon experience, that a letter duly posted, prepaid, and properly addressed reaches its destination. The jury have found upon the second issue that Dr. Duffy never received the notice. It appears from the mailing sheet that other notices mailed at the same time were received. The only reasonable explanation of this condition of the matter is that the notice was not mailed. The burden of proof was on the defendant to show the mailing. There is another view of the question upon which we think the testimony was competent. If a by-law of this character were valid, it should certainly be construed strictly and the certificate be required to comply with its terms. After stating the facts in regard to the mailing, the treasurer proceeds to say: "This certificate is made by me, the treasurer of said company, in conformity with the provisions of the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct transcript of the records of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk, and one of the sheets referred to therein." It is thus made apparent that he is relying upon the affidavit of Mr. Haines, which is attached to this certificate. His statement therefore is based upon hearsay, and we are thus invited to make a second departure from well-settled rules of evidence. To do so would further endanger the rights of the members of the association. We have carefully examined the numerous cases cited by counsel for the defendant, and, as conceded by them, they do not decide the question presented upon this record. The recognition by the courts of contracts to submit questions to arbitration is based upon a principle not applicable to this case. We are of opinion that his honor committed no error in admitting the testimony of Dr. Duffy. The jury having found the fact against the defendant's contention, upon the first issue, it is unnecessary to consider the other questions discussed in the brief. The by-law relied upon is unreasonable and invalid.

Upon an examination of the entire record we find no error.

OREGON SUPREME COURT.

ANNA OLIVER, Appt.,
v.
FRED SYNHORST, Resp't.

(— Or. —, 86 Pac. 376.)

Street—encroachment—estoppel.

A municipal corporation which fails to assert its title to a street dedicated to public use, and permits an abutting property owner to improve his property at large expense, with reference to what he supposes in good faith to be the true street boundary line, and maintain the improvements for a period of thirteen years, will be estopped from asserting a title which will practically destroy the value of the abutting property for residence purposes, and work irremediable injury to the owner.

(July 31, 1906.)

Case Note.—Effect of improvements by abutting owner with reference to what is erroneously supposed to be the street boundary line, to estop the municipality from asserting the true line: — The overwhelming weight of authority will be found to support the proposition that those rights and powers pertaining to municipalities that are public in their nature, such as the control of roads and streets, cannot be lost merely through the lapse of time and the laches of municipal officers. The question, however, whether title can be acquired to public highways by adverse possession is beyond the scope of this note, which is limited to cases presenting the specific question whether, by standing idly by and permitting an abutting owner to make improvements upon his property with reference to what he believes in good faith to be the correct line of the highway, the municipal authorities are to be estopped from establishing the true line, if its establishment would necessitate the removal of such improvements or their irremediable injury.

A review of the cases upon this point will make clear not only that there is an irreconcilable conflict of authority as to whether the municipal officers may ever be estopped by their conduct to assert title to a portion of a highway claimed by an adjoining owner, but also that, even among those courts that have sought to apply the doctrine of equitable estoppel under such circumstances, no hard and fast principle has as yet been recognized that is capable of application to all cases. Judge Dillon's ideas, as set forth in the passages from his great work quoted in OLIVER v. SYNHORST, seem to have been very generally followed, with the result that every case is, indeed, almost a law unto itself.

The nearest approach, however, to a clear and consistent statement of the principle underlying the application of the doctrine of equitable estoppel to municipal corporations and their control of highways is found

A PPEAL by plaintiff from a judgment of the Circuit Court for Union County in defendant's favor in a suit to enjoin defendant from interfering with plaintiff's fence and property. Reversed.

Statement by Bean, Ch. J.:

This is a suit to enjoin the defendant, as street superintendent of La Grande, from removing or interfering with a fence and sidewalk of the plaintiff along the north side of lots 3, 4, and 5 in block 74 of Chaplin's addition to La Grande, and from destroying or in any manner interfering with her shade trees, ornamental trees, and shrubbery thereon. The complaint, after the preliminary allegations, avers that on July 14, 1884, Daniel Chaplin and C. H. Prescott, trustee, filed in the office of the clerk of Union county and caused to be recorded a plat of Chaplin's addition to the city of La Grande,

in the Illinois decisions. Thus, in Joliet v. Werner, 166 Ill. 34, 46 N. E. 780, it was held that a city was estopped to establish the true line of a street in such a manner as to take a strip of land more than 6 feet wide between an abutting owner's house and the street fence, and nearly 2 feet off the side of his house, where it appeared that such owner had built the house more than forty years before, and had been in actual possession of the land claimed by the city as part of the street for a period of more than thirty-five years, and the city had accepted the sidewalk as built by him about the same time as the house, and had itself afterwards constructed a sidewalk upon the same line, and had built a culvert up to such sidewalk, and had graveled the street along it, and had levied an assessment for the purpose of paying the cost of building the walk as then located. The court said: "While it cannot be maintained that, as respects public rights, municipal corporations are within ordinary limitation statutes, yet the principle of estoppel *in pais* may be applied to such acts by a municipal corporation as have been above designated. In applying the principle of an estoppel *in pais* the courts are left to decide the question, not by the mere lapse of time, but by all the circumstances of the case, and to hold the public estopped or not as right and justice may require."

And in Jordan v. Chenoa, 166 Ill. 530, 47 N. E. 191, a city was held to be estopped from asserting title to an alley, where it appeared that an adjoining property owner had been in the open and notorious possession thereof for more than twenty years, and had growing trees therein, and a house standing on a part of it, and a hedge fence growing across the end of it. To quote from the opinion: "Where streets and alleys have been dedicated and accepted they are held by the municipality in its public capacity. They are held in trust for the benefit of the general public, and when so held the

upon which was shown a street running east and west along the north side of block 74 and designated as O street, "but that the city of La Grande never accepted the donation of said O street along the north side of said block 74, and said street at said point was closed and by nature impassable until five or six years ago, when private individuals made a narrow grade or wagon track up the hill, along and some distance from the north side of said block 74, and the city exercised no right or control over said street until the fall of 1904, when the city council passed a pretended ordinance requiring a sidewalk to be built along the north side of said block 74; that in the fall of 1891 one T. D. Remington bought lots 4, 5 and 6 in said block 74, and built a fence around the same, and

built a large house on said lot 5, and planted shade trees around said lots, and since said time this plaintiff and her grantors have had said premises inclosed continuously up to where her fence now stands on the north side of lots 4 and 5 on O street, claiming in good faith to own the same, and that the plaintiff is the owner thereof, without any objections from said city of La Grande, and with the knowledge and consent of said city; and, about the year 1897, with the knowledge and consent of said city of La Grande, this plaintiff, at great cost, constructed an iron fence along the north side of said lot 5 and along the north end of said lot 4 about 150 feet on said O street in said city of La Grande, the same being along the same line where

statute of limitations will not run in favor of a private individual to bar the rights of the public. But, while the statute of limitations does not apply in cases of this character, the defense of equitable estoppel from abandonment or nonuser may be invoked." The court also approved the principle enunciated in *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759, that the doctrine of equitable estoppel would apply "where the public have long withheld the assertion of control over streets, and private parties have been, by the acts of those representing the public, induced to believe the streets abandoned by the public, and on the faith of that belief, and with the acquiescence of those representing the public, they have placed themselves, by making structures or improvements in the street, in a situation where they must suffer great pecuniary loss if those representing the public be allowed afterwards to allege that the street was not abandoned."

Joliet v. Werner, supra, was quoted at length and with approval, and its principles applied, in *Itasca v. Schroeder*, 182 Ill. 192, 55 N. E. 50, in which a city was held to be estopped from changing the location of a street so as to encroach upon the grounds of an abutting property owner, where it appeared that such change would necessitate the removal of half of a factory built more than thirty years, a portion of a blacksmith-shop, and a tenement house, and the cutting down of trees planted twenty years.

But this doctrine is of no avail where no valuable or lasting improvements have been made by the abutting owner upon the portion of the street claimed by him. Accordingly, it was held in *Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561, that a city was not estopped from building a sidewalk on the true line of a public street by the mere fact that a portion of it was fenced in, and along the fence a sidewalk was constructed by others than the municipal authorities. The court did not deny the proposition that a municipal corporation would be estopped where justice and right required that it should be, but did not consider sufficient for

such purpose the mere naked fact of possession by the property owner and nonuser for a long time by the public.

And in *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036, the court refused to hold a city estopped to establish the true line of a street, where it appeared that the only improvements placed upon the disputed land by the abutting owner were an inexpensive wooden picket fence, a maple tree about ten years old, a lilac bush, a creeping vine, and growing grass; deeming that the loss of these things did not present such a case of hardship and sacrifice that right and justice demanded an estoppel on the part of the public. The court said that the mere possession of a portion of a street was not sufficient to create an estoppel. Nor could any acts of abandonment on the part of the city officers, "though expressly made and declared, operate to create the estoppel, for it is not within the lawful exercise of the power of such authorities to abandon the streets which they hold for the use of the public, so that by the mere act of abandonment rights of the public therein may be lost. It must appear, to create an equitable estoppel against the public in cases such as that at bar, not only that the city authorities have long withheld the assertion of control over the portion of the street in question, and that private parties have been, by the acts of those representing the public, induced, in good faith, to believe the street has been abandoned by the public, but also that, on the faith of that belief, and with the acquiescence of those representing the public, such private party has erected structures on the street, or made improvements thereon, of such lasting and valuable character that to permit the public to assert the right to repossess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped."

The principle under consideration was also asserted by the supreme court of South Carolina in *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 757, 15 S. E. 951, in which it

plaintiff's grantor constructed said fence in the fall of 1891; and, with the like knowledge and consent of said city, the plaintiff and her grantors hauled earth at great cost, and filled in said lot from her said fence to her dwelling house, and improved said lot and ground, and made a fine lawn thereon, and planted valuable shade and ornamental trees along said fence, and planted and propagated a very fine rose garden within said inclosure and next to said fence and made improvements on her said dwelling house at great cost, all of which was done in good faith by this plaintiff and with the knowledge and consent of said city of La Grande many years ago, and without any objections from said city, the plaintiff believing them to be on her own land; that,

several years ago, the plaintiff, being the owner of lot 3 in said block 74, the same being on a steep hillside, blasted out and excavated said lot at great expense, and constructed a barn thereon, and left sufficient room between the barn and the supposed north line of said lot for the convenient use and occupation of said barn, and so that hay and feed could be hauled along said barn and inside of the supposed north line of said lot for delivery in said barn; all of which was done with the full knowledge and consent of said city of La Grande, and without any objections being made by said city, and at great expense to this plaintiff; that, in about the year 1897, this plaintiff, with the consent of said city of La Grande, and at considerable expense, constructed a sub-

was held that, while mere adverse possession, for the statutory period, of a public highway, could not confer title thereto, the fact that such possession was accompanied with other circumstances which would render it inequitable for the public to assert its right to such highway would, upon the principle of estoppel, protect one so encroaching, against the assertion of its right by the public, "in order to prevent manifest wrong and injustice." The court illustrated this by stating that where a party, under an honest conviction of right, had taken possession of a portion of a highway "and expended his money in erecting buildings thereon, without interference on the part of the public, these, or, perhaps, other, circumstances, connected with adverse possession for the statutory period, may afford good ground for estoppel."

This language was quoted, and the controlling principle of the foregoing case applied, in *South Bound R. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340, in which an injunction was refused to restrain abutting owners who had encroached upon the line of a street from prosecuting actions to obtain compensation for the depreciation of the value of their property, resulting from the construction and operation of a railroad through such street, even though a portion of such owner's claim against the railroad company was based upon the increased injury to their property, arising from their encroachment upon the street.

It is difficult to determine from the Iowa decisions just what is regarded by the supreme court of that state as the determining factor in cases calling for the application of the doctrine under discussion, whether it be estoppel on the part of the municipality, or adverse possession on the part of the adjoining owner. Thus, in *Davies v. Huebner*, 45 Iowa, 574, it was said: "There are cases where the nonuser [of a highway] has continued for such a length of time, and private rights of such a character have been acquired by long continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands the

public should be estopped from asserting the right to open the highway. The first requisite to establish such estoppel should be that the adverse possession should continue for ten years, by analogy to the statute of limitations. Then it should be shown that there was a total abandonment of the road for at least the period of ten years." Applying this principle, it was held that, where a portion of the highway had been fenced in and cultivated for more than ten years, and there had been an entire nonuser by the public of that portion for nearly thirty years, and one of the adjoining owners had built his dwelling house so that part of it was within that portion of the highway, the public should be estopped from claiming any right to such portion. It was also held, as to another portion of the same highway, which was also claimed by an adjoining owner, that, inasmuch as it had been inclosed but a short time, the right of the public thereto had not been impaired. But upon the latter portion no improvements seem to have been made, the opinion being silent in that regard.

And in *Crismon v. Deck*, 84 Iowa, 344, 51 N. W. 55, in which it appeared that the owner of land adjoining a highway had built a house and barn, set out a hedge and fruit trees, dug a well, and made other improvements with reference to the line of his land upon the road as established by a survey duly made, and remained in open and undisputed possession of the land to such line for more than ten years, and such line was, during all that time, recognized by the public as the true line of the road, it was held that an injunction would lie to restrain the road supervisor from removing such of these improvements as were found to be in the highway by a subsequent survey. This opinion well illustrates the difficulty of determining just what the Iowa court, as before intimated, would deem the controlling factor of its decision, since it further appeared that the purpose of the authorities in removing such improvements was to grade the portion of the road upon which the trees stood, and which was bordered by the hedge, and to

stantial sidewalk along the north side of her said lots 4 and 5 and up against her said iron fence the entire length of said lots on what was supposed to be the south side of said O street, and that said sidewalk is now there in good condition for use, and that subsequently she extended her said sidewalk along the north end of lot 3 and on the south side of O street, and that the sidewalk so extended is now there in good condition for use as a sidewalk and that no part of said sidewalk is dangerous or in need of repairs; that said O street of said city of La Grande, as platted by said Daniel Chaplin, runs east and west along the north side of plaintiff's said premises, and, if any part thereof is inside of plaintiff's said fence, such part has never been opened for public use,

and has been inclosed and improved by the plaintiff and her grantors with the full knowledge and consent of said city of La Grande, and without any objections being made thereto, ever since the fall of 1891; that the said dwelling house of plaintiff is worth not less than \$3,000, and the north side of said dwelling house is within about 16 feet of said iron fence above set out, and the whole architectural effect of said dwelling house and premises would be destroyed if said fence were removed 7 feet or any other distance south of its present location, and all of the improvements on said premises, including said dwelling house, were made by the plaintiff and her grantors with the full knowledge of the city of La Grande; that she and her said grantors believed and

dig a shallow ditch on the side of the road next to such owner's land, and the court thought that no ditch was required, and that the trees should not be removed as long as they did not obstruct the road, nor prevent its necessary improvement. The court also seemed to have been influenced in its decision by the fact that, if the line of the road should be relocated as the road supervisor intended, the value of the improvements would be seriously impaired.

But in *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197, in which it appeared that the street in question had been occupied in part by an adjoining owner with a mill race for a period of ten years under a claim of right, it was held that the city was not estopped to abate the mill race as a nuisance. The court said: "Had the city or the public, were that possible, induced or encouraged the defendant's grantor to construct the race, this would constitute an element of estoppel. But the race was constructed without right, though under claim of right and in reliance thereon. The claim of right fails. The city, representing the public, has lost no right by delay in bringing this action to restore the street to the public use. . . . Defendant cannot interpose the statute of limitations, and surely delay in pursuing a remedy against it does not estop the city."

And in *Bigelow v. Ritter* (Iowa) 108 N. W. 218, it was held that the county authorities were not estopped from removing a fence erected upon a public highway by an adjoining owner merely because of the erection of such fence thirty-five years before, and the planting of a willow hedge on the bank of a stream which flowed through the portion of the highway fenced in. In this case the court declared that title to a portion of the highway could not be acquired against the public by adverse possession alone. "The public may be estopped by its conduct, but the statute of limitations will not run against the sovereign or its agencies."

In *Cincinnati v. Evans*, 5 Ohio St. 594, it was held that an adjoining property owner

had a right to remain undisturbed in a building claimed by a city to be within a street, and that the city authorities had no right to remove or destroy it in a summary manner, where it appeared that such owner had in good faith erected the same upon the apparent and reputed line of the street as it was shown him by the city surveyor when he began to build, and that he had from that time and during a period of more than twenty-one years continued in the uninterrupted, exclusive, and adverse possession of the ground upon which it was located. The court adopted the conclusions of an earlier case, *Cincinnati v. First Presby. Church*, 8 Ohio, 298, 32 Am. Dec. 718, that the statute of limitations would apply to municipal corporations in the same manner and to the same extent as to natural persons, and, as a consequence, that notorious and uninterrupted possession, by a private individual under a claim of right, of land dedicated to a city for streets for more than twenty-one years, would bar the claim of the city to its use. This case, standing alone, would, of course, be without the scope of this note. But in *Lane v. Kennedy*, 13 Ohio St. 42, the court, in distinguishing the case at bar from other cases, made use of the following language: "Nor is it like the case of *Cincinnati v. Evans*, supra, where the purpose of the possession and intended permanency were indicated by the erection, within the bounds of the street, of the front of a large and costly warehouse. The erection of such a building in such a place was ample notice to the city authorities that he [the abutting owner] thereby intended a permanent appropriation to his private and individual benefit of a portion of the public easement, and called for immediate and effective measures upon their part to prevent it. The case was, in this view of it, rightly determined; but, as will be seen by a reference to the facts therein stated, it might with equal, if not greater, propriety, have been placed upon the ground of an estoppel *in pais* on the part of the city authorities; the building having been located by the city surveyor and upon lines previously estab-

claimed that the north line of said premises was where said iron fence is now located." It is then alleged that on December 12, 1904, the defendant, as street superintendent, wrongfully and erroneously claiming that plaintiff's fence and sidewalk were 7 feet in the street, notified her to remove the same, and that if she did not do so within twenty-four hours he was directed by the city to remove it; that, if such fence and sidewalk are moved back to what is claimed by defendant to be the street line, they would be wholly on plaintiff's property and 6 or 7 feet south of her north line, and her shrubbery and shade trees would be destroyed to her irreparable damage and injury; "that, by reason of the facts above alleged, the defendant, as street superintendent of said city

of La Grande, and his successors in office, ought to be and they are estopped and precluded from claiming now or at any time, or proving or alleging, that any of the lands included within the plaintiff's said fence are or ever were any part of said O street, and from asserting or exercising any supposed right to remove the plaintiff's said iron fence or her said sidewalk onto her said lands, or in any manner to remove either said fence or said sidewalk from where they are now located, or to interfere with them, or either of them, in any way, or to open or widen said O street so as to include within said street any part of the lands which are inclosed within her said fence as aforesaid." The relief demanded is an injunction restraining the defendant and his successors in office

lished and built upon." In the case at bar it was held that title by adverse possession was not established merely by the erection of a fence inclosing a portion of a public highway not then used or required for the public travel, and its maintenance for upward of twenty-one years without any objection on the part of the authorities, upon the ground that there was nothing in the character of the fence which indicated an intention permanently to appropriate the land; but the decision is not placed upon the insignificant value of the fence, and, apart from the language used in distinguishing the Evans Case, does not notice the doctrine of equitable estoppel.

The theory upon which those decisions proceed which seek to apply the doctrine of equitable estoppel to municipal corporations in the matter of highways has been strongly criticized by Elliott on Roads & Streets, § 884, where it is doubted "if the doctrine of these cases can be sustained upon principle, —at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. In addition to this consideration, may be noted another influential one, . . . and that is, the private use of the public way was wrong in the beginning and wrong each day in its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and 7 L.R.A. (N.S.)

a wide departure from the rule laid down by the earlier decisions and confirmed by the modern authorities."

This position finds strong support in two Alabama cases: In Webb v. Demopolis, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289, the court doubted that the private use of a public highway, even when of a character subversive of its use by the public as a thoroughfare, could ever be perpetrated by the invocation of the doctrine of estoppel *in pais* against the municipality in which the highway lay. To quote from the opinion: "It would seem, on principle, that, inasmuch as the municipality has no alienable right in such highway,—none which could be lost through its laches, or through actual private possession under a claim of exclusive right,—but holds the *locus in quo* not only for itself and for its own citizens, but in trust for the public at large, whose rights therein are in no wise dependent upon anything the municipality may do or omit to do, that nothing done or omitted by a city in the way of allowing, or even inducing, persons to make erections on a street which obstruct and interfere with its use could or ought to estop the public to have such obstructions removed, or to have them removed at the suit of their trustee and agent, the municipal corporation. . . . And, if it were necessary to pass on the point in the present case, we should be much inclined to hold that no act or omission to act, on the part of the municipality, with reference to obstructions in public streets, could in any case raise up an estoppel against it to proceed in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street."

And in Harn v. Dadeville, 100 Ala. 199, 14 So. 9, which was a bill in equity by a town to have a dwelling house and fence removed which obstructed a street, relief was granted upon the ground that, as against the right of the municipality to its streets, neither nonuser, nor the rule of prescription, nor the statute of limitations, could be invoked to prevent its successful assertion.

A well-reasoned opinion denying the appli-

from interfering with the plaintiff's fence and sidewalk, shade trees, shrubbery, etc., and for a decree establishing her north line at the point where such fence is now located. The court below, on motion of defendant, struck out all that portion of the complaint which we have inclosed in quotation marks, and plaintiff declined to amend or plead further. The defendant answered, setting up that plaintiff's fence and sidewalk were 7 feet in the street and was an unlawful obstruction thereto, and that the defendant had been ordered by the city to remove such obstruction. These allegations were denied by the reply. When the case came on for trial the plaintiff declined to offer any testimony, and, after hearing that of the defendant, the court rendered a decree dismissing the complaint, and plaintiff appeals.

cation of the doctrine of equitable estoppel under such circumstances is found in *Wolfe v. Sullivan*, 133 Ind. 331, 32 N. E. 1017, which was an action by a city to abate a nuisance by encroachment upon the line of a street. It appeared that the street had been used by the public ever since the town had been laid out; that it was dedicated to the public use by the original plat of the town, duly recorded; that the fence which was claimed to be in the street line had been there for forty years; that no part of the land on the inside of the fence had ever been used by the public as a highway; that the fence had been built by the owners of the abutting property in good faith in the belief that they were the owners in fee of the land on the inside thereof, and that the public had no interest therein; that a brick sidewalk had been constructed along such fence without any objection from the city or its officers; and that shade trees had been set out with reference to the fence. It also appeared that other property owners on the same side of the street, under the same circumstances and belief, had built permanent improvements, consisting of fences, shops, stables, barns, and out buildings, all of which were made with the full knowledge of the city and its officers without any objection on their part; that said improvements were made in good faith and in the belief that the public had no rights in the land used therefor; and that the strip had never been accepted as a highway, but had been wholly abandoned by the public. The court held that these facts were not sufficient to constitute an estoppel, upon the grounds that, when the facts were equally known or accessible to both parties, there could be no estoppel *in pais*, and that any loss sustained by the property owners by reason of the abatement of the obstructions in the street was due to their neglect, and the neglect of those through whom they claimed, to ascertain the true line of the street before making such improvements. The court said: "The common-law maxim is, 'Once a

Messrs. Ramsey & Oliver, for appellant: As a way may be obtained and established by user, it may be lost by nonuser or abandonment.

Bayard v. Standard Oil Co. 38 Or. 438, 63 Pac. 614; *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, 42 N. W. 183.

Where the public has never exercised control, or has long withheld the assertion of its control, so that private parties have been induced to believe that a street has been abandoned, and on the faith thereof, and with the acquiescence of the public's representatives, have made structures or improvements on such abandoned street, or on their own land, in a situation where they must suffer great pecuniary losses if the public representatives are allowed to allege non-abandonment of the street, the doctrine of equitable estoppel applies.

highway, always a highway.' Highways belong to the public, and are under the control of the sovereign, either immediately, or through local governmental instrumentalities. The right of the public to the use of the highways is not barred by the statute of limitations. No one can acquire a right to the adverse use of a legally established highway, . . . no matter how long such use may continue, for each day's user is a nuisance. . . . There can be no such thing as a permanent, rightful, private possession of a public street."

These principles had already been asserted by the same court in an earlier case, *Sims v. Frankfort*, 79 Ind. 446, where Judge Elliott, in rendering the opinion of the court, used the following language: "It appears that both parties had at least equal opportunities of knowledge. The facts were as fully known to the appellant and his grantor as to the municipality. There was not ignorance on one part and knowledge on the other; there was certainly knowledge on the part of the appellant. The recorded plat was to him constructive knowledge of the limits of the street. So, too, were the boundaries of his own lot. There could not in such a case be a reliance upon the acts of the municipal authorities. Where both parties meet upon equal terms and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent concealment, there can be no equitable estoppel." In this case it was held that mere possession of a part of a street for the statutory period of limitation, by an abutting property owner, would not confer title, and in arriving at this conclusion, it was reasoned that, inasmuch as a municipal corporation had no right to divest the rights of the public in highways, it could not invest an intruder with title thereto by mere permissive neglect. Yet the learned justice seems to admit that there might arise such circumstances as would call for an application of the doctrine of estoppel, for he goes on to

Orr v. O'Brien, *supra*; Lee v. Mound Station, 118 Ill. 304, 8 N. E. 759; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 26; Schooling v. Harrisburg, 42 Or. 495, 71 Pac. 605; Northern P. R. Co. v. Ely, 87 Am. St. Rep. 779, note, 25 Wash. 384, 54 L.R.A. 526, 65 Pac. 555; 2 Dill. Mun. Corp. 4th ed. § 675; Goodrich v. Milwaukee, 24 Wis. 422; Peck v. Burr, 10 N. Y. 294; Lane v. Kennedy, 13 Ohio St. 42; Com. v. Miltenberger, 7 Watts, 450; Logan County v. Lincoln, 81 Ill. 156; Piatt County v. Goodell, 97 Ill. 84; Paine Lumber Co. v. Oshkosh, 89 Wis. 449, 61 N. W. 1108.

Messrs. C. H. Finn and F. S. Ivanhoe, for respondent:

A municipality has no power, by ordinance or otherwise, to authorize the construction by a private citizen of a projection extending into the street in front of his property for

any distance, even the smallest, so as to deprive the public of the right to use the street in its entirety.

People ex rel. Faulkner v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785.

Injunction will lie to prevent the city granting such purpresture.

Smith v. McDowell, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141; Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 Am. Rep. 286; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co. 82 Mo. 127; Dubach v. Hanibal & St. J. R. Co. 89 Mo. 486, 1 S. W. 86; Dill. Mun. Corp. 660; 3 Pom. Eq. Jur. 1359, and note; Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395; 2 Smith, Pub. Corp. 1601-1604; Barnett v. Johnson, 15 N. J. Eq. 481; Hibbard v. Chi-

say: "Whatever may be the rule where it appears that great expenditures have been made and acts done for which compensation cannot be fully made, it is plain that, where there has been a small expenditure of money for which full compensation can readily be made, title cannot be acquired in a public highway by estoppel. But back of this lies the fundamental doctrine that the municipal corporation has no power to sell or barter away the public streets, and, of course, no right to surrender them to a mere license. What it cannot alien for a full consideration, it cannot bestow as a mere gratuity."

And some of the earlier Indiana cases go far to support the proposition that a municipality might, by the conduct of its officers, be estopped to assert control over a portion of a highway appropriated by an abutting owner. For example, in Brooks v. Riding, 46 Ind. 15, though it was held that a city would not be estopped to establish the true line of a street merely by the fact that the authorities had permitted an abutting owner to occupy a small portion of the street not then needed by the public, the following language is found: "Where the lines of a street have been practically established by the occupancy and improvements of the lots bordering upon it, and the city authorities have recognized the correctness of the lines so established by permitting the owners to so occupy and improve their property, and have acquiesced in it for a considerable length of time, and to such an extent that to change the lines would work great wrong to the owners and disturb long-established lines and possession, the city or public authorities would undoubtedly be estopped from disturbing the lines so practically established, although an accurate survey should show that they were wrong according to the plat, and that the lots as occupied extended into the street as originally established."

And in Cheek v. Aurora, 92 Ind. 107, though the court refused to apply the doctrine (N.S.)

trine of estoppel because the structure which was sought to be removed as an encroachment upon a city street was of a temporary character and of no great value; and denied that the statute of limitations could affect the city as to its rights to its streets as trustee of the public.—it nevertheless admitted that there might be instances in which, through nonuser by the public, private rights might have grown up therein which the city would be estopped to deny.

Again, in Hamilton v. State, 106 Ind. 361, 7 N. E. 9, it was held that the public would be estopped to assert its right to a highway by means of criminal prosecutions against adjoining landowners for obstructing it, where it appeared that the highway in question had been maintained for more than twenty years, and the landowners had, in good faith and on the appearance of things, constructed fences along the supposed line. The court said that in such a case the presumption of abandonment would be indulged, and would be conclusive, when to disturb long-established lines would involve criminal consequences, or work serious injury to valuable improvements made in good faith; and added that, while the statute of limitations alone would not bar the right of the public to use a highway, yet, if by nonuser such appearances were created as would induce an adjoining owner to do acts which would indicate that in good faith he claimed as his own that which was in fact a part of the highway, and expended money on the faith of his claim by adjusting his property to the highway as he supposed or claimed it to be, the public would be estopped.

The application of this doctrine under such circumstances as are now under consideration seems also to be denied in New Jersey, since, in Tainter v. Morristown, 19 N. J. Eq. 46, where it was held that an adverse possession of twenty-seven years would not legalize an encroachment upon a highway, the court uttered the following significant words: "To protect highways from en-

cago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 258.

A purpresture cannot be acquired by prescription.

Waterloo v. Union Mill Co. 72 Iowa, 437, 34 N. W. 197; *Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809; 36 Century Dig. 2051, and citations.

Where a street is named and marked in a town plat, one who has bought and owns lots by numbers designated on that plat, and abutting on that street, is estopped to deny the dedication of the street in a suit to enjoin him from obstructing it.

Demopolis v. Webb, 87 Ala. 659, 6 So. 408, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289, and citations; *Shanklin v. Evansville*, 55 Ind. 240; *Lownsdale v. Portland*, 1 Or. 397, Fed. Cas. No. 8,579; *Carter v. Portland*, 4 Or. 340; *Hicklin v. McClellan*, 18 Or. 126, 22 Pac. 1057; *Meier v. Portland Cable R. Co.* 16 Or. 500, 1 L.R.A. 856, 19 Pac. 610.

encroachments, that it is the business of no one to resist, requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated and erected improvements on the public domain, or to the more innocent purchasers from them."

The same rule appears to obtain in Pennsylvania, for in *Com. v. Moorehead*, 118 Pa. 344, 4 Am. St. Rep. 599, 12 Atl. 424, in which the defendant was indicted for maintaining a common nuisance, which consisted in the erection and maintenance of a building upon a borough street, it was held that no title could be acquired against, or lost to, the public, by nonuser alone; and that public rights could not be destroyed by long-continued encroachment or permissive trespasses. In the language of the opinion: "The public is not deprived of its rights by encroachment. Buildings erected on public grounds or on highways acquire no right on account of time or expenditures." See also *Com. v. McDonald*, 16 Serg. & R. 390; *Com. v. Bowman*, 3 Pa. St. 202.

And in *Kopf v. Utter*, 101 Pa. 27, which was an action of trespass against the authorities of a certain borough for entering upon the plaintiff's premises and moving his front fence back from the street in accordance with what the defendants claimed to be the true line of the street in which the plaintiff's lot was located, and in which judgment was rendered for the defendants, though the trial court instructed the jury that, if the municipal authorities did anything to induce the plaintiff, or those under whom he held, to build up to the line claimed by him, the municipality, after twenty-one years, would be estopped from afterwards disputing it, the supreme court, in affirming the judgment, said: "In this instruction the plaintiff certainly got all and probably more than he was entitled to."

A good illustration of the guiding principle approved by Judge Dillon, that those 7 L.R.A. (N.S.)

Where the owner of land, in laying out a town, makes a map, marking off certain land as a public square, and sells lots with reference to such map, no formal acceptance is necessary.

San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 406; *Eureka v. Croghan* (Cal.) 19 Pac. 485; *Meier v. Portland Cable R. Co.* supra.

Limitation does not run against a municipal corporation in respect to streets and alleys dedicated to public use.

Giffen v. Olathe, 44 Kan. 342, 24 Pac. 470; *Smith v. State*, 23 N. J. L. 712; *Coffin v. Portland*, 27 Fed. 412.

Bean, Ch. J., delivered the opinion of the court:

The evidence does not accompany the transcript, and the only question for our consideration is whether the court erred in striking out the matter pleaded in the com-

cases wherein justice requires that an equitable estoppel shall be asserted against the public shall form a law unto themselves, is found in *Vicksburg v. Marshall*, 59 Miss. 563, where it appeared that an abutting property owner whose land lay upon a hill extending into a street removed the fence to the bottom of such hill and into the street, handsomely terraced his grounds, and adorned them with shrubbery and rare plants. It also appeared that the city street commissioner undertook to straighten the street by digging down part of these embankments, but was enjoined by the owner's agent, and that they compromised by the commissioner agreeing to cut down only a portion of the hill and to permit the owner to build in the street a brick wall and steps leading to his property. This agreement was, however, not ratified by the city, which insisted upon cutting away such part of the wall and hill and improvements as was necessary to straighten the street. It further appeared that the survey made by the city placed the line more to one side than the line which had been recognized by other persons building on the street, so that, if the street was run according to the city's survey, it would take property and improvements occupied by many proprietors upon that side of the street. The court held that, the streets being held by the city in trust for the public, adverse possession thereof by an abutting owner could not bar the right of the public to have the street opened, and that therefore the obstructions in the street beyond the line generally recognized should be removed. But it failed to carry this principle to its logical conclusion, and, though it thought "the probability" to be that the line established by the city's survey was the correct one, because it was shown that the other line had been to a considerable extent recognized as the true line by persons building on the street, it deemed it "possible" that

plaint as an estoppel. From these averments it appears, in brief, that Chaplin's addition to La Grande was laid out and platted in 1884, and O street thereon dedicated to the public. The street, however, was never opened or improved by the city, and it never assumed authority or control over it until the fall of 1904. In 1891 the plaintiff's grantor bought lots 4, 5 and 6, in block 74, abutting on O street, and, with the consent and knowledge of the city, built a fence along what he claimed and believed to be the north line of such property, erected a large dwelling house on lot 5 with reference to such supposed line, and planted shade trees and shrubbery and otherwise improved the property for a residence site, claiming in good faith to be the owner of the same. In 1897, after the plaintiff had purchased the property, she constructed an iron fence at the place where the former fence stood, and afterward hauled earth and filled up the

lot to such fence, and otherwise improved the property by planting shade and ornamental trees along the fence, making a rose garden inside of the inclosure near the fence, building a sidewalk just outside the fence, and otherwise improving the property at great cost, all of which was done in good faith with the consent and knowledge of the city authorities and under the belief that she owned the property so inclosed. Several years before the commencement of this suit she blasted out and excavated a part of lot 3 at great cost, and constructed a barn thereon, leaving sufficient room between it and the supposed street line for a driveway. The plaintiff's dwelling house is within 16 feet of the iron fence and the architectural effect thereof and the beauty and value of her home would be materially impaired if the fence is now removed, and her approach to her barn would be entirely cut off. The occupancy and improvement of the property

as to these persons the city was estopped to deny the correctness of that line. It therefore gave the property owner the benefit of claiming that line to be the true line, and enjoined the city from removing anything beyond that line.

Not only is the law upon this subject in a state of confusion, but even the court itself sometimes becomes confused, and in the same opinion will deny the application of the doctrine of equitable estoppel to municipalities in language broad enough to cover all cases, while admitting that there still might be cases where justice and right should require that the public be estopped to assert its right to an unused portion of the highway. A very good illustration of this confusion of mind may be found in the opinion in *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, in which it was held that an abutting property owner could not acquire title to a portion of a public highway by a mere occupation of the same for a much longer period of time than that required by the statute of limitations, upon the ground that such occupation, being by the mere sufferance and permission of the municipal authorities, was, for that reason, insufficient to establish title by adverse possession. The court, however, met the issues raised by the contention that municipalities might, by the lapse of time and the laches of their officers, lose control of public highways; and attempted to "fearlessly settle them for the public good." It was of the opinion that "the only logical conclusion that can possibly be reached is that the public easement in all the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith, by private interests, is a continuing public nuisance, subject to abatement whenever the growing necessities of the people require such easement for the uses to which the land to which it attaches was originally 7 L.R.A. (N.S.)

dedicated. . . . Nor does the doctrine of estoppel apply in such cases. . . . The statute of limitations is a mere legal estoppel, and, if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a lawbreaker or wrongdoer." Those passages from Judge Dillon, quoted in *OLIVER v. SYNHORST* (and, indeed, in nearly every case where this question is discussed), were criticized in the following language: "In this the rights of the people are confounded with the rights of the municipality. How can equitable estoppel, any more than the statute of limitations, deprive a sovereign of his rights, and permit his subjects to destroy them by their wrongful conduct. The use of their highways is a sovereign right, common to all the people, and of which they cannot be divested, except in accordance with their will and appointment for the public weal." In this connection, *Webb v. Demopolis*, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289, was cited to the effect that neither the acquiescence of a city "in an obstruction or private use of a street by a citizen, nor laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of a city to maintain a suit in equity to remove the obstruction." From such sweeping language the inference would be irresistible that this court surely meant to deny that the public could ever be estopped to assert its rights to highways, were it not for further statements made almost in the same breath with the above citation. "There may arise cases of particular hardship, where, through the negligence or mistake of the public officers, valuable and permanent improvements, under a bona fide claim of right, may be erected by the abutting lot owners, invading and destroying, without wrongful intent, the public easement in a portion of the adjacent street.

as referred to was made by the plaintiff and her grantor under the belief that the true north line is where the iron fence is now located and with the knowledge and consent of the city authorities. It thus appears that for more than thirteen years the plaintiff and her grantor have been in the open, exclusive, and peaceable possession of the strip of land now in controversy, and that they have made, without objection from the city authorities, valuable and permanent improvements thereon in good faith, believing that they were the owners thereof. The question for decision is whether, by reason of these facts, the city is now estopped to assert that the true street line is other than where the plaintiff's fence is located.

There is irreconcilable conflict in the cases as to whether the right of the public to use land dedicated for a street or highway may be extinguished by nonuser or adverse possession, due to the laches, negligence, or nonaction of municipal authorities. The weight of the adjudged cases seems to be that since such authorities have no right to sell, alienate, or dispose of the highways, except as provided by law, the statute of limitations will not run against them; and such is the rule now in force in this state by a recent statute. Or. Laws 1895, p. 57. The authorities on the question are so fully collated and commented upon in *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 278, 42 N. W. 183, and *Northern P. R. Co. v. Ely*, 25 Wash. 384, 54 L.R.A. 526, 87 Am. St. Rep. 775, 65 Pac. 555, that a mere reference to them is all that is essential in this connection. But, while the rule may be that the ordinary statute of limitations as such cannot be set up to defeat the right of the public to the use of a street or highway, there may grow up, in consequence of the laches of the public authorities, private rights of more persuasive force in the particular case than that of the public, and, if

"acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own that which is in fact a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped." *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Piatt County v. Goodell*, 97 Ill. 84; *Baldwin v. Trimble*, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108. Although Mr. Dillon is unwilling to assent to the doctrine that, as respects public rights, municipal corporations are within the ordinary limitation statutes, he says: "It will, perhaps, be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments," and that "there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require." 2 Dill. Mun. Corp. 4th ed. § 675.

This principle was applied by this court in *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605. May and Nixon had laid out an addition to the town of Harrisburg, and duly acknowledged and recorded a plat thereof in 1871. At that time the tract of land was inclosed with a fence which was thereafter maintained. None of the streets or alleys shown were opened except a portion of one street, although the proprietors sold lots with reference to the plat. Notwithstanding the making and recording of the plat dedicating the streets and alleys to the public,

Such mistakes are often occasioned by different surveyors, with different instruments. Such invasion is sometimes slight in comparison with the improvements made, and at other times it is much more serious, not only destroying the public easement, but interfering with the regularity and symmetry of the street. To abate such structures as an ordinary nuisance would be a tyrannical act of governmental power. . . . The mistake having been mutual, or occasioned by the negligence of the public, and the property owner being free from evil intent, the loss should fall on the people, as most able to bear it, rather than on the individual, who may be rendered bankrupt if he must endure it." Such cases were considered to be within the protection of that provision of the Constitution which forbids private property to be taken or damaged for public use 7 L.R.A. (N.S.)

without compensation. "Whenever private property is taken or damaged for public use, it must be done through the public officers, acting as the agents of the people. And for these same officers to mislead, either by acts of omission or commission, a private person into building a costly structure over the line of a public highway, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, would be taking and magaging private property for public use without just compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain. . . . Such exception does not apply to one who knowingly invaded a highway. He must bear the loss occasioned thereby, and not the public. It is his own injury, and he must endure it alone."

Nixon continued to occupy and cultivate one of the streets and subsequently sold the lots abutting thereon and conveyed his interest in the street. His grantee occupied and cultivated the street and erected a shed to his barn extending out over an alley. It was held that upon these facts the municipal authorities were estopped from opening the street because of their laches in permitting Nixon and his grantee to improve the same as a part of their premises. This case is decisive of the one at bar. Indeed, the facts call more strongly in the present case for the application of the doctrine of equitable estoppel than in the *Schooling Case*. In that case Nixon and his grantee knew that the land occupied by them had been dedicated to the public, and acted with full knowledge of that fact. Here, on the contrary, the plaintiff and her grantor supposed and believed that the portion of the street occupied by them was a part of their property and was included within the boundaries of their lots. Again, in the *Schooling Case* the opening of the street would not have seriously injured the plaintiff, while here the removal of the fence to what the defendant claims to be the true street line would, according to the allegations of the complaint, practically destroy the plaintiff's property for residence purposes and would work irreparable injury to her. She has, with the knowledge and consent of the city authorities, inclosed a part of the street and improved the same in good faith to such an extent that (if the allegations of the complaint are true) she would be seriously injured and damaged if she is now required to remove her fence and throw open that portion of the street occupied by her to the public, and is therefore entitled to invoke, as against the city, the doctrine of estoppel.

The decree of the court below will be reversed, and the cause remanded, with directions to overrule the motion to strike out, and for such further proceedings as may be right and proper.

TENNESSEE SUPREME COURT.

L. T. KAVANAUGH et al., Appts.,

v.

SECURITY TRUST & LIFE INSURANCE COMPANY.

(— Tenn. —, 96 S. W. 499.)

Insurance—accruing premium—notice.

1. Where for eight years an insurance company has permitted an assignee of a policy to pay the annual premium by notes falling due quarterly, and has always notified him when a note was falling due, the

policy cannot be forfeited for nonpayment of a note, unless the customary notice reached him.

Same—undelivered letter.

2. The mere mailing of a notice properly addressed and stamped is not, in the absence of a statute or contract provision, a compliance with a custom to give notice of the maturing of a note given for an insurance premium, where the letter never reaches its destination, although the custom has been to give notice by mail.

Same—payment after notice.

3. The duty of an insured promptly to pay his premiums is complied with in case, through miscarriage of the mail, a customary notice of the maturity of a premium does not reach him, if, upon subsequently receiving notice, he promptly pays the premium due.

Same—premium note—suspension of liability.

4. Under a clause in a note given for an insurance premium, that "for any loss occurring by death after this note is due and

Case Note.—Necessity that notice of maturity of premiums or assessments sent through the mail be received:—The cases bearing upon the question whether it is necessary, in order that a cancellation or forfeiture clause may become operative, that notice of the maturity of a premium or assessment which has been sent through the mail be received, may be divided into three groups: First, those in which the manner of giving notice is regulated by statute; second, those in which the matter is governed by contract provisions; and, third, those in which, as in the case in hand, no requirement is imposed on the insurer as to the way in which notice of maturity is to be given other than may result from the customary course of dealing between the parties.

In cases of the first group, the question whether it is necessary to show receipt of notice sent through the mail is obviously a matter of statutory construction.

In Iowa, under a statute providing that written notice of the maturity of a premium note "may be served . . . by registered letter addressed to the insured, . . . and no policy of insurance shall be suspended for nonpayment of such amount until thirty days after such notice has been served," it has been held that the service is complete when the registered letter is mailed, and not when it is received by the addressee (*McKenna v. State Ins. Co.* 73 Iowa, 453, 35 N. W. 519); and that such service is complete at the time the letter, properly addressed, is registered, and not when, by due course of mail, it reaches the office of its destination (*Ross v. Hawkeye Ins. Co.* 83 Iowa, 586, 50 N. W. 47).

By a New York statute it is provided that no policy of insurance can be declared forfeited or lapsed by reason of nonpayment of any premium when due, unless a written or

remains unpaid then said company shall not be liable," the policy is not forfeited by failure to make prompt payment, but the liability of the insurer is merely suspended during the default, permitting the insured by payment to restore the liability.

(May 19, 1906.)

A PPEAL by plaintiffs from a decree of the Chancery Court for Shelby County in defendant's favor in a suit to compel the restoration and payment of an insurance policy. Reversed.

Statement by Neil, J.:

The defendants issued a policy July 9, 1897, on the life of J. M. Bowen in the sum of \$5,000. This was assigned August 9,

printed notice stating the amount of such premium due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured. Under such statute, the fact that the notice is not received by the insured is immaterial (*McConnell v. Provident Sav. Life Assur. Soc.* 34 C. C. A. 663, 92 Fed. 769); although evidence of the nonreceipt is admissible to rebut the presumption raised by an affidavit that such notice was mailed (*Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 796).

The deposit in the postoffice of a notice duly stamped and properly addressed will, by virtue of the above statute, operate as full notice to the insured of its contents whether he ever received it or not. *New York L. Ins. Co. v. Scott*, 23 Tex. Civ. App. 541, 57 S. W. 677.

But such notice, to be effective, must be properly addressed (*Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43); and the statute is not complied with by sending notice to an unauthorized address; in which case the insurer is held to take the risk of actual delivery (*Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 17 N. E. 396).

And, where the insured had given notice of change of address, there can be no presumption that notice sent to the old address was received. *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157.

In cases of the second group, the question whether mailing of a notice is sufficient depends upon the construction to be given to the contract of the parties as to the manner in which notice is to be given.

In *Duffy v. Fidelity Mut. L. Ins. Co.* (N. C.) ante, 238, 55 S. E. 79, it is said: "The authorities are practically uniform in holding that a by-law of an assessment insurance company, providing that notice may be given members of assessments by mailing, properly addressed, is valid and binding upon the members."

Where a policy provided that "thirty days' notice before payment is due, except 7 L.R.A. (N.S.)

1897, to complainants, L. T. and W. K. Kavanaugh, to secure a debt due them from Bowen. There was an agreement, which was known to the company, that the complainants were to pay the premiums. The premium was \$223, payable annually, on July 15th, but an agreement was made with the company that the complainants should pay on that day \$55.75, and should give notes each for a like amount, maturing at three six and nine months. From 1897 to 1905 this plan was followed by both parties; notes being made payable at the Memphis National Bank, Memphis, Tennessee, and all notes were paid until the present controversy arose.

July 2, 1904, the defendant company notified the complainants that the premium of

when monthly payments are made, will be mailed to the insured from the home office to the last known address as it appears upon the books of the company. Failure to make any payment at the home office on or before the day when due, whether the insured does or does not receive such notice, hereby cancels this contract and releases the company and the insured from any further liability,"—it was held to be incumbent on the company to mail the notice to the last-known address of the insured, but that if it did so it was not responsible for his failure to receive it. *Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191, 73 Pac. 875.

In *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88, it was said that, where it was agreed in the policy that a written or printed notice of assessment, directed to the address of the assured as it appeared on the books of the company and deposited in the postoffice, or delivered by an agent of the company, or printed in a newspaper published by the company and forwarded as aforesaid, should be deemed legal notice, the intention was to provide for the mode of service, and not that these acts, except a delivery by an agent, should be accepted as notice.

The foregoing case was distinguished in *Weakly v. Northwestern Benev. & Mut. Aid Asso.* 19 Ill. App. 327, in which it was held that, where a by-law of a mutual insurance company provided that the secretary should cause notice of assessment to be sent to the last known postoffice address of every member, and that every member failing to pay his assessment within thirty days from the date of such assessment should stand suspended, the duty of the company was complete by mailing the notice of assessment; and that the failure of such assessment to reach the assured by reason of its miscarriage in the mail or the absence of the assured would not excuse nonpayment of the assessment within the prescribed time.

And in *Union Mut. Acci. Asso. v. Miller*, 26 Ill. App. 230, it was held that, where the by-laws of a mutual insurance association provided that the secretary should give notice of assessment and of annual dues,

\$223 would be due July 15th. Complainants replied: "Referring to your letter of the 2d, in reference to the Bowen policy, would like to ask if it would be agreeable to you for my brother and myself to pay this premium as heretofore; that is, one fourth cash and three notes at three, six, and nine months for the balance. If so, kindly forward the three notes, and my brother and I will sign same and return with check for the first payment." This was signed by L. T. Kavanaugh. The company replied: "We have yours of the 6th *in re* premium due on the Bowen policy, and it will be agreeable to us to accept one fourth cash and three notes for balance, which notes are herewith inclosed for signature." Upon receiving the notes the company wrote: "We have received from Mr.

W. K. Kavanaugh check for \$55.75 and three notes properly signed, in settlement of the premium on the Bowen policy, for which we hand you official receipt herewith." This receipt, after stating the number of the policy and amount of the premium and date of its maturity, continued: "Received the above-noted premium, payable in terms of the policy." The three notes were each for \$55.75, and matured October 15, 1904, January 15, and April 15, 1905. They were made payable at Atlanta, Georgia. This fact was overlooked by the complainant, who rested under the belief that they were payable, as all the others for the previous seven years had been, at the Memphis bank above referred to. The previous premiums had been paid to the agent in charge of the Nashville

"sending all such notices by mail to the last given postoffice address of each member, which shall be considered a legal notice," notice sent by mail was binding upon the assured, although not in fact received.

In *Northwestern Traveling Men's Asso. v. Schaus*, 51 Ill. App. 78, Affirmed in 148 Ill. 304, 35 N. E. 747, a constitutional provision of the association that, "upon receiving notice of an assessment, it is the duty of every member to remit the amount promptly to the treasurer of the association. A notice sent to the last address given shall be considered a legal notification,"—was construed as meaning that a notice sent by mail to the last given address of the member, allowing a reasonable and usual time for it to reach its addressed destination by due course of mail, would constitute a sufficient and legal notification, and would be considered as having been received by the member at the expiration of such time.

Where, by a policy of insurance, it was provided, relative to notice of assessment, that, "should the party whose life is hereby insured reside out of New Orleans, then he shall be notified by written notice deposited in the postoffice in the city of New Orleans, addressed to such address as has been left in writing at the office of the association with the secretary,"—the mailing of such notice was sufficient, although it was never received by the assured. *Epstein v. Mutual Aid & Benev. L. Ins. Asso.* 28 La. Ann. 938.

A by-law of a mutual insurance company which provided that the policy should become void "of the assured should neglect for the term of thirty days to pay his premium note or any assessment thereon when requested to do so by mail or otherwise" was construed, in *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.* 2 Allen, 82, as imposing upon the insurer only the duty of placing a notice in the postoffice, duly directed to the assured.

Where the charter of an insurance company required that the member should be notified by the secretary or otherwise, either by a circular or a verbal notice, of assessments, actual notice of the fact of the as-

essment is required, and the mere mailing of the notice is not sufficient. *Castner v. Farmers' Mut. F. Ins. Co.* 50 Mich. 273, 15 N. W. 452.

In *Forse v. Supreme Lodge, K. of H.* 41 Mo. App. 106, it was held that, where a by-law of a benefit society provided that notices of assessment should be "promptly delivered to each member, or deposited in the mails by the reporter, directed to the member at his last or usual place of residence or business," it was not necessary that such notice, when duly mailed, should be received, in order to be binding upon the member.

In *Survick v. Valley Mut. Life Asso. (Va.)* 23 S. E. 223, it was held that where a by-law of a mutual insurance company provided that any member failing to pay his *pro rata* assessment within thirty days from notification in person or from date of mailing same to his address would forfeit his rights in the association, the mailing of such notice was sufficient to bind the assured, and its failure to reach him by reason of miscarriage in the mail would not excuse the nonpayment of the assessment within the time prescribed.

Where the by-laws of a beneficial association expressly provided that the mailing of the official paper containing the notice of any assessment should constitute a sufficient service of such notice, and such by-laws were a part of the contract of the parties, a service of a notice of the assessment by mail is sufficient and effective. *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369.

But where the by-laws provide that notice of assessment may be mailed to or left at the last-known postoffice address or residence of a member, or handed to him in person; and, when so mailed or delivered, it shall be a legal and sufficient notice to the member,"—a notice sent through the mail to an erroneous address, and never received, is insufficient. *Waterworth v. American Order of Druids*, 164 Mass. 574, 42 N. E. 106.

Where the constitution of a mutual benefit association requires notice of assessment

office. The latter transaction was with the general agents of the company at the Atlanta office, Aaron Haas & Son, to whom the cash and notes were transmitted.

On October 8, 1904, Aaron Haas & Son deposited in the mail at Atlanta, Georgia, postage prepaid, a letter addressed to complainants at Memphis, Tennessee, advising them of the maturity of the premium note falling due October 15, 1904. This letter was not received by the complainants, and for that reason the note was not paid. It had been the custom of business between

the complainants and the defendant during the preceding seven years that the defendant should notify the complainants of the maturity of notes several days before the falling due thereof, and the complainants had relied upon this custom, and had always paid promptly upon receiving the notice. The note not having been paid at maturity, Aaron Haas & Son, on October 24, 1904, addressed a letter to the complainants, calling their attention to the fact, and adding: "As it was not paid when due, it will now be necessary for remittance to be accom-

to be given to members by "mailing them a notice to their last address as shown by the branch book," a notice sent to a different address is inoperative unless actually received. *Molloy v. Supreme Council, C. M. B. A. 93 Iowa, 504, 61 N. W. 928.*

And in *Supreme Lodge, K. of H. v. Dalberg, 37 Ill. App. 145, Affirmed in 138 Ill. 508, 28 N. E. 785*, it was held that, where the laws of a benevolent society provide for the giving notice of assessment either by delivery of the notice, or by mailing the same to each member at his last or usual place of residence or business, evidence showing only that notice was mailed to a member, it not appearing where the notice was sent, or that it was ever received by the member, is insufficient to establish a forfeiture for nonpayment of assessments.

In considering cases falling within the third group, it becomes necessary to make a further subdivision, taking, first, those cases where the giving of notice in some manner not specified is required either by contract provision (which includes provisions by constitution or by-law of mutual benefit associations), or by operation of law, as is the case where the insurance is forfeited by failure to pay an assessment within a certain time after it becomes "due," notice and demand then being considered essential to mature the assessment; and, second, those cases where no notice is required, except as the necessity may arise, as in the case in hand, from a custom prevailing between the parties.

Where a law or contract mentions notice, without any qualification, personal notice is meant. *Stewart v. Supreme Council, A. L. of H. 36 Mo. App. 319; Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Loomis, 43 Ill. App. 599, Reversed on another point in 142 Ill. 560, 32 N. E. 424; Benedict v. Grand Lodge, A. O. U. W. 48 Minn. 471, 51 N. W. 371; Northwestern Traveling Men's Asso. v. Schauss, 148 Ill. 304, 35 N. E. 747. See also cases, infra.*

But in *Stewart v. Supreme Council, A. L. of H. supra*, it was held that, where the by-laws of a benevolent society require the notification of every member liable to an assessment, though ordinarily such provision would be interpreted as requiring personal notice, yet the word "notify" might be given a different meaning by uniform usage of a society with which all its members are fa-

miliar; and that, where there was evidence of a custom of mailing notices of assessment, it was a question for the jury whether personal notice had not been dispensed with.

Where service of notice by mail is not authorized, an insurer using the mail to convey notice takes the risk that the notice shall reach the assured. *Merriman v. Keystone Mut. Ben. Asso. 138 N. Y. 116, 33 N. E. 738.*

It has been held that, where there is no provision as to the manner in which notice shall be given, it is sufficient for the insurer to show that a notice was mailed, and, in the absence of countervailing proof, it will be presumed that the notice reached the policy holder to whom it was addressed. *Merriman v. Keystone Mut. Ben. Asso. supra; Bettenhasser v. Templars of Liberty, 58 App. Div. 61, 68 N. Y. Supp. 505; Benedict v. Grand Lodge, A. O. U. W. supra.*

Where the articles of association provide that the treasurer shall notify members of assessments, and they shall pay the same within thirty days after receiving such notice, personal or actual notice is necessary; and the mailing of a notice duly stamped and addressed is only evidence of its receipt, the burden of proof being upon the sender to show that it was actually received. *Schmidt v. German Mut. Ins. Co. 4 Ind. App. 340, 30 N. E. 939.*

So, also, in *Courtney v. United States Masonic Ben. Asso. (Iowa) 53 N. W. 238*, it was held that, where it was provided that payment of assessments must be made within thirty days from date of notice on penalty of forfeiture, actual notice was necessary; and that, although a notice sent through the mail actually reached the residence of the assured, but was not opened in consequence of his serious illness, which terminated fatally, it was insufficient.

In *Continental F. Ins. Co. v. Adams, 8 Ky. L. Rep. 269*, it was held that, where the insurance policy made no definite designation as to the manner or place of payment, and the agent informed the insured when the contract was made that before he would be required to pay the various annual instalments of premium he would receive a notice from the company designating the person to whom the payment should be made

panied by a health certificate signed by the assured, Mr. Bowen, the same subject to our company's approval." A blank certificate was inclosed. To this letter the complainants on October 27th replied through L. T. Kavanaugh as follows:

Gentlemen:—

I am in receipt of your favor of the 24th, with health certificate inclosed. I have had no notice whatever of this note. As they have formerly been sent to the Memphis National Bank, Memphis, where they are made payable, I had overlooked the matter entirely. I hardly think it fair of you to have allowed this matter to go on without giving me some notice, but I herewith inclose you my check for the amount, with interest at 6 per cent from July 15th, and will ask that you mail me receipt. I have tried to locate Mr. Bowen, the insured, but I understand he is out of the city, but, under the circumstances, think you should accept this without the health certificate. However, I will have the certificate properly signed as soon as possible, and forward same to you. In future kindly send these notes here for collection, and they will be promptly paid.

Awaiting your prompt reply, I am,

Yours truly,

[Signed] L. T. Kavanaugh.

P. S. I heard to-day that Mr. Bowen is

in New Orleans, and have written but have no definite address. I understand he is in good health. Please return receipt and oblige

Yours truly,

L. T. K.

To this letter Aaron Haas & Son replied, insisting upon a health certificate. Referring to the place of payment of the note, they said: "This particular note was not payable in Memphis, but in Atlanta, and on October 8th we wrote you notifying you that it would fall due on the 15th. So we did all that we should have done, under the circumstances." Complainants at once set about to get the certificate of health required, and, being ignorant of the whereabouts of Mr. Bowen, only succeeded in getting a certificate from him on the 13th day of November, 1904, and then for the first time they became acquainted with the fact that he had had a stroke of paralysis in the preceding spring. Complainants at once set the certificate to Aaron Haas & Son, with letters explaining the facts, and this was referred by them to the New York office. After some correspondence the defendant company declared the policy forfeited because of the failure to pay at maturity the note above referred to, due October 15, 1904.

As already stated, complainants promptly tendered payment of the note due October 15, 1904, as soon as they received notice

and at what place, the mere act of the insurer in posting notice through the mail did not operate as notice.

In *Robbins v. American Mut. Aid Soc.* 11 Ky. L. Rep. 580, it was held that, where a contract of insurance was construable as requiring notice of the maturity of premiums in order to enforce a forfeiture for their nonpayment, no forfeiture would be declared under such a contract unless the notice was actually received by the assured; and that the mailing of the notice properly addressed and stamped was not sufficient.

So, where the constitution of a mutual insurance order required that the financier of the local organization should "notify all persons of the assessments and when in arrears for dues," the mere mailing of a notice of assessment addressed to the member cannot be deemed a compliance with such requirement. *Crockett v. Order of Red Cross*, 24 Ohio C. C. 421.

Where the lodge rules of a mutual benefit association require notice to be given by the secretary to members in arrears for dues, for nonpayment of which within a certain time thereafter members would be dropped, actual notice to the member must be shown. *Odd Fellows' Protective Asso. v. Hook*, 9 Ohio Dec. Reprint, 89.

Where the by-laws of a mutual insurance company require that "notice of such contributions shall be sent to each; and every member failing to pay such contributions

within thirty days from date of notice shall forfeit his or her claim to any and all benefits of the association;" and the manner of sending such notice is not prescribed,—actual notice must be given, and the mere sending of a notice by mail, unless it was received, will not work a forfeiture. *McCorkle v. Texas Benev. Asso.* 71 Tex. 149, 8 S. W. 516.

Though the constitution and by-laws of a mutual benefit society are silent on the subject of notice, and contain nothing dispensing with notice, but provide for the dropping of members who may neglect or refuse to pay an assessment for the period of thirty days from date of such assessment, before the association can complain of the neglect or refusal by a member to pay he must be given notice, and such notice must be personal. A notice mailed, but not received, is ineffective. *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Loomis*, 43 Ill. App. 599, Reversed on another point in 142 Ill. 560, 32 N. E. 424.

Where the contract of insurance contained no provision as to the giving notice of maturity of premiums, but a custom of giving personal notice had prevailed, it was held in *Grant v. Alabama Gold L. Ins. Co.* 76 Ga. 575, that such practice should be kept up, or notice of substitution for it of notice by mail be given to the insured.

from the company. They subsequently tendered the amount of the note due January 15, 1905, and this was likewise refused. Thereupon the original bill in this case was filed, in the lifetime of Bowen. In this bill the complainants insisted that the policy had not been forfeited, but was merely suspended during the time the note remained unpaid, according to its terms, and sought an injunction restraining the defendant from asserting that the policy had become void or was in any wise forfeited. Pending these proceedings Bowen died, and thereupon an amended bill was filed, claiming a recovery upon the policy and also a penalty under the statute.

The policy contains the following provision:

"Nonforfeitures—That if any payment on this policy be not made when due, this policy shall lapse and be *ipso facto* null and void. But, if full premiums on this policy be paid as already provided, for not less than three complete years, and the policy thereafter lapse, it can be surrendered within six months from the date of the lapse, for the amount of nonparticipating paid-up insurance stated in the following table, subject to the conditions of this policy, except as as to payment of premiums.

"That if the full premiums on this policy be paid as already provided for not less than five complete years at the option of the insured, it can be surrendered within six months from the date of lapse for the amount of cash stated in the following table"—setting out table.

The note due October 15, 1904, reads as follows:

July 15, 1904.

Three months after date we promise to pay to the order of the Security Trust & Life Ins. Co. \$55.75, with interest at 6 per cent, for value received, at Atlanta, Ga., hereby agreeing and admitting that this note is given as an extension of time for the payment of the premium, or part thereof, maturing this day on their policy on my life, but is not to be payment of said premium, or any part thereof, in any sense, nor is the same given or accepted as such, unless this note is paid at or before maturity.

This note is given said company upon this express understanding or agreement, that for any loss occurring by death after this note is due and remains unpaid, then said company shall not be liable.

[Signed] L. T. Kavanaugh,
W. K. Kavanaugh.

The chancellor dismissed the bill, and complainants have appealed and assigned errors.

7 L.R.A. (N.S.)

Messrs. Ewing & Williamson, for appellants:

The note provided for a suspension of liability rather than a forfeiture of the policy.

Dale v. Continental Ins. Co. 35 Penn. 38, 31 S. W. 266; Equitable Ins. Co. v. Harvey, 98 Tenn. 641, 40 S. W. 1092; Williams v. Albany City Ins. Co. 19 Mich. 451, 2 Am. Rep. 95; Mutual L. Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443; Kimbro v. Continental Ins. Co. 101 Tenn. 248, 47 S. W. 413; Hooker v. Continental Ins. Co. 69 Neb. 754, 96 N. W. 663; Houston v. Farmers' & M. Ins. Co. 64 Neb. 138, 89 N. W. 635; Robinson v. Continental Ins. Co. 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647; Hummel's Appeal, 78 Pa. 320; McEvoy v. Michigan Mut. L. Ins. Co. 3 Ohio C. C. 569.

Complainants were entitled to actual notice of the maturity of the note.

Schmidt v. German Mut. Ins. Co. 4 Ind. App. 340, 30 N. E. 939; Burhans v. Corey, 17 Mich. 282; Mullen v. Dorchester Mut. F. Ins. Co. 121 Mass. 171; Wachtel v. Noah Widows' & Orphans' Benev. Soc. 84 N. Y. 28, 38 Am. Rep. 478; Hermann v. Niagara F. Ins. Co. 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; Siebert v. Supreme Council, O. of C. F. 23 Mo. App. 268; Castner v. Farmers' Mut. F. Ins. Co. 50 Mich. 273, 15 N. W. 452; McCorkle v. Texas Benev. Asso. 71 Tex. 149, 8 S. W. 516; Mayer v. Mutual L. Ins. Co. 38 Iowa, 304, 18 Am. Dec. 34; Blackerby v. Continental Ins. Co. 83 Ky. 574; Atty. Gen. v. Continental L. Ins. Co. 33 Hun, 138; Helme v. Philadelphia L. Ins. Co. 61 Pa. 107, 100 Am. Dec. 621; Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; Aetna L. Ins. Co. v. Fallow, 110 Tenn. 720, 77 S. W. 937; Gunther v. New Orleans Cotton Exch. Mut. Aid Asso. 40 La. Ann. 776, 2 L.R.A. 118, 8 Am. St. Rep. 554, 5 So. 66; McQuillan v. Mutual Reserve Fund Life Asso. 112 Wis. 665, 56 L.R.A. 233, 88 Am. St. Rep. 986, 87 N. W. 1069, 88 N. W. 925; Rogers v. Burr, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Messrs. Smith & Trezevant and R. Lee Bartels, for appellee:

Nonpayment of the premium, or the premium note given as an extension of time in which to pay the premium, according to the express terms of the policy, rendered it *ipso facto* null and void.

Ressler v. Fidelity Mut. L. Ins. Co. 110 Tenn. 411, 75 S. W. 735; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; Fidelity Mut. L. Ins. Co. v. Price, 117 Ky. 25, 77 S. W. 384.

There is no obligation resting upon the insurer to follow up the notice and see that it is received.

2 May, Ins. § 356a; 2 Bacon, Ben. Soc.

§ 381; *Lothrop v. Greenleaf Stock & Mut. F. Ins. Co.* 2 Allen, 82; *Survick v. Valley Mut. Life Asso.* (Va.) 23 S. E. 223; *McKenna v. State Ins. Co.* 73 Iowa, 453, 35 N. W. 519; *Epstein v. Mutual Aid & Benev. Life Ins. Asso.* 28 La. Ann. 938; *McConnell v. Provident Sav. Life Assur. Soc.* 34 C. C. A. 663, 92 Fed. 769; *Otis v. Payne*, 86 Tenn. 663, 8 S. W. 848; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Phenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 403, 48 S. W. 968.

On petition for rehearing.

No notice of any kind was required because the parties had expressly waived it.

Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538; *Mutual Reserve Fund Life Asso. v. Minehart*, 72 Ark. 630, 83 S. W. 323.

Neil, J., delivered the opinion of the court:

1. In *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 396, 404, 405, 48 S. W. 968, the court quoted as laying down the proper rule the following from *Joyce on Insurance*, vol. 2, § 132, viz.: "If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due, and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the assured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured is, in consequence, put off his guard, such notice must be given, and, if not given, no advantage can be taken of any default in payment which it has thus encouraged; for the insured is entitled to expect the customary notification, and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circumstances, a fraud upon the assured which the courts have refused in numerous cases to countenance,"—citing *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 304, 18 Am. Rep. 34; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Home L. Ins. Co. v. Pierce*, 75 Ill. 428; *Grant v. Alabama Gold L. Ins. Co.* 76 Ga. 575. Other authorities to the same effect are *Guenther v. New Orleans Cotton Exch. Mut. Aid Asso.* 40 La. Ann. 776, 2 L.R.A. 118, 8 Am. St. Rep. 554, 5 So. 65; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806, 808, 5 N. E. 417; *Johns v. Insurance Co.* 2 W. N. C. 243; *Globe Mut. L. Ins. Co. v. Johns*, 4 W. 7 L.R.A. (N.S.)

N. C. 131; *Meyer v. Knickerbocker L. Ins. Co.* 51 How. Pr. 263; *Alexander v. Continental Ins. Co.* 67 Wis. 422, 58 Am. Rep. 869, 30 N. W. 727; *Atty. Gen. v. Continental L. Ins. Co.* 33 Hun, 138; *Heinlein v. Imperial L. Ins. Co.* 101 Mich. 250, 25 L.R.A. 627, 45 Am. St. Rep. 409, 59 N. W. 615; *Elgutter v. Mutual Reserve Fund Life Asso.* 52 La. Ann. 1739, 28 So. 289; *Mutual Reserve Fund Life Asso. v. Hamlin*, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614.

In *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 309, 18 Am. Rep. 38, the underlying reason is thus stated: "Every law should be reasonable, and it is reasonable only when it is adapted to human conduct. Courts should not so administer the law as to require of individuals a course of conduct which, to a majority of reasonable and right-minded men, is unusual and unnatural. Indeed, it would be impossible long to maintain a law which is at variance with the judgment and sense of justice of a majority of those upon whom it operates. Now, it must strike every reasonable mind that a majority of ordinarily prudent persons, who had been customarily notified of the time when premiums upon their policies became due, and who had received no notice of an intention to abandon the customary course would, in a particular case, expect and await a like notice. And, if such is the reasonable and natural result of the previous dealings of the company, it must govern its future conduct so as to accord with the reasonable expectation thus created; that is, having furnished a policy holder reasonable ground for expecting that he will be advised when his premium becomes due, the company must continue to give such notice until it furnishes the assured notice that he need no longer expect it. Any other construction would make the law a trap to insure the unwary."

In the absence of a statute, or of an express term in a contract, making sufficient the mere mailing of a communication containing information of the approaching maturity of the premium, it must appear that such communication was received before it can be operative as notice, and thereby effect a forfeiture of the policy upon failure to pay at the day. *Brattleboro East Soc. v. Reed*, 42 Vt. 76; *Continental F. Ins. Co. v. Adams*, 8 Ky. L. Rep. 269; *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88; *Castner v. Farmers' Mut. F. Ins. Co.* 50 Mich. 273, 15 N. W. 452; *Burhans v. Corey*, 17 Mich. 282; *Mullen v. Dorchester Mut. F. Ins. Co.* 121 Mass. 171; *Wachtel v. Noah Widows' & Orphans' Benev. Soc.* 84 N. Y. 28, 38 Am. Rep. 478; *McCorkle v. Texas Benev. Asso.* 71 Tex. 149, 8 S. W. 516; *Merriman v. Keystone Mut. Ben. Asso.* 63 Hun, 635, 18 N. Y. Supp.

305, 138 N. Y. 116, 33 N. E. 738; *Crown Point Iron Co. v. Aetna Ins. Co.* 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653; *American F. Ins. Co. v. Brooks*, 83 Md. 22, 35, 34 Atl. 373; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L.R.A. 956, 59 N. E. 818; *United States Mut. Acci. Asso. v. Mueller*, 151 Ill. 254, 37 N. E. 882; *Cronin v. Supreme Council*, R. L. 199 Ill. 228, 93 Am. St. Rep. 127, 65 N. E. 323; *State v. Connecticut Mut. L. Ins. Co.* 106 Tenn. 282, 294, 295, 61 S. W. 75.

We shall now refer more particularly to some of the foregoing authorities.

In *Brattleboro East Soc. v. Reed* it was held that notice of an assessment, sent by mail pursuant to a condition for a forfeiture in case of nonpayment after six months' notice, ran not from the time when the notice was deposited in the postoffice, but from the time when the party received it.

In *Continental F. Ins. Co. v. Adams* it was held that the mere act of posting notice through the mail did not operate as notice to the insured.

In *Protection L. Ins. Co. v. Palmer* it appeared that the policy provided the assured should, within thirty days from the date of notice, pay to the company the assessment, collection costs, and annual dues, and a failure to do so should render it null and void and of no effect. It was held that the provision concerning thirty days' notice meant from the day notice was received by the party to whom it was sent, and not from the day on which it was dated or mailed.

In *Castner v. Farmers' Mut. F. Ins. Co.* it appeared that it was provided by the charter of the mutual company that its members should be "notified by the secretary, or otherwise, either by circular or a verbal notice," of assessments made upon them, and, if payment was not made within sixty days, the insurance should be suspended. Notice was mailed in this case June 3d. The fire occurred October 5th. Plaintiff claimed that notice was not received until some time in September. It was admitted that within sixty days of its receipt a tender of the amount due upon the assessment was made and refused. It was held that the policy was not liable to suspension until the expiration of the specified time after notice was received.

In *Burhans v. Corey* (not an insurance case, but germane upon the subject of notice by mail) it was held that the mere mailing of notice was not sufficient; that it must have been received. In the opinion of the court it is said: "A party can be in no actual default who proceeds to comply with a notice as soon as he receives it, and to hold him guilty of a constructive default, when he has always been willing to do his duty, can only be allowed where he has consented

to run the risk of the safe transmission through a given channel." 17 Mich. 285.

In *Mullen v. Dorchester Mut. F. Ins. Co.* it appeared that there was a notice of assessment sent to a policy holder by mail, but not received by him. The directors of the company afterwards voted to cancel all policies the holders of which had not paid the assessment, and notice of such cancellation was sent to the policy holder by mail, but was not received. It was held there was no forfeiture.

In *Wachtel v. Noah Widows' & Orphans' Benev. Soc.* 84 N. Y. 31, 38 Am. Rep. 479, it was held: "In the absence of any agreement by the member or any provision in the charter or by-laws for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights or property; or, if that can be dispensed with, then in such other mode as will be most likely to effect its object."

In *McCorkle v. Texas Benev. Asso.* it appeared that there was a by-law that required notice of assessment to be sent to each member, and this by-law provided that "any person who shall fall in arrears for dues or contributions after thirty days' notice shall cease to be in good standing, and shall forfeit all rights and claims to any and all benefits of the association." It was the custom of the officer charged with the duty to mail such notice to each member. It was held that a reasonable construction of the by-laws required that notice should be in fact given to a member before a forfeiture would result from a failure to pay dues, etc., and that mailing to a member through the postoffice was not such notice. Referring to the case of *Castner v. Farmers' Mut. F. Ins. Co.* supra, the court said: "The rule laid down by the Michigan court, we think, is fair and just to both parties, and should be followed. To deprive a person of his property rights without any notice is contrary to reason, and such a claim should not be enforced by the courts unless the terms of the contract plainly require it."

In *United States Mut. Acci. Asso. v. Mueller* it was held that, where the by-laws of the association contained the provision that "payments are to be made . . . within thirty days of the date of the notice thereof," this meant from the date of the service of the notice, and not from the date of the writing; and in *Cronin v. Supreme Council*, R. L. it was held that, when the by-laws of a beneficial association provided that payments of assessments should be made within thirty days from the date of the notice, a member was not in default until thirty days from the time notice is received.

In *Crown Point Iron Co. v. Aetna Ins. Co.*

the question was whether the notice of the cancellation of a policy of insurance would date from the mailing of the policies or from the actual reception of the notice. Speaking on this subject, the court said: "It is contended by the defendants that the mailing of the policies with a letter stating the object sufficed to cancel them, because it was equivalent to the acceptance of a proposition by mail; and the following cases are cited, among others, in support of the position: *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Vassar v. Camp*, 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Brisban v. Boyd*, 4 Paige, 17. These were cases of contracting wholly by letter or telegram. It was long ago held that, if an offer made by mail is accepted by mail, the contract is complete from the moment the letter of acceptance is mailed, even if it is never received. *Vassar v. Camp*, supra. Those cases have no application here, because no negotiation was pending, and no contract was proposed. The plaintiff did not make any offer to the insurance companies that might or might not be accepted. It sought to do an act that would be binding on the companies, whether they were willing or not. That act was a surrender of the policies with the request that they be terminated, and the act could not be complete until the request reached the companies or their agent. The policies and notice might have been sent by a messenger, who would have been the agent of the plaintiff for that purpose. Having been sent by mail, it was none the less the agency of the plaintiff than if a messenger had been selected. It was necessary for the plaintiff, in order to terminate the policies, to have its notice actually reach the companies or their representative and the instrument selected for that purpose was the agent of the plaintiff, not of the defendant. If the plaintiff lost control of the letter as soon as it was mailed, that fact has no bearing except upon the nature of its relation to the agent that it empowered to deliver the package. It seems, however, that the writer of a letter may withdraw it from the office in which it is deposited, or from the office to which it is sent. *United States Postal Laws & Regulations*, §§ 531, 533. If the letter never reached the companies, they would not have been bound, or, if it reached them after a long delay, they would have been bound only from the date of receipt. So far as the delivery of such a letter is concerned, the law does not recognize the agency of the mail as of any higher or more binding character than that of an express company or a private individual, although it may presume that a letter duly mailed was received by the person to whom it was properly addressed." 7 L.R.A. (N.S.)

In *State v. Connecticut Mut. L. Ins. Co.* it was held that delivery of a letter or package containing several premiums on a life policy, to a postoffice or carrier within this state, addressed to the company at a point outside of the state, did not constitute delivery or payment of such renewal premium to the insurance company within the state; and that such delivery and payment did not become complete and effective until actual receipt of the premiums by the company at its office; and that the money remained in the meantime at the risk of the sender.

It is insisted that the contrary rule is laid down in the following authorities: 2 May, Ins. § 356a; Bacon, Ben. Soc. § 381; *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.* 2 Allen, 82; *Survick v. Valley Mut. Life Asso. (Va.)* 23 S. E. 223; *McKenna v. State Ins. Co.* 73 Iowa, 453, 35 N. W. 519; *Epstein v. Mutual Aid & Benev. Life Ins. Asso.* 28 La. Ann. 938; *McConnell v. Provident Sav. Life Assur. Soc.* 34 C. C. A. 663, 92 Fed. 769; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 573, 24 L. ed. 843; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 765, 1 Sup. Ct. Rep. 18; *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 403, 48 S. W. 968; *Otis v. Payne*, 86 Tenn. 663, 8 S. W. 848.

In the section referred to in *May on Insurance*, it is said: "In regard to the effect of a habit or usage of sending notice of the date when each premium becomes due, opinions differ. On the one hand, it is held that where, from the course of dealing between the parties, the insured has a right to believe that notice will be given to him of the amount due and the time it is to be paid, the company cannot, in the absence of such notice, set up the failure to pay. Usage makes the giving of notice a part of the contract. If, where there is a usage to give notice, none is sent, payment of the premium within a reasonable time will save forfeiture." Further along in the same section, it is said: "A failure of notice to pay a premium to reach the assured does not prevent the avoidance of the policy if the notice was properly mailed and directed,"—citing *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.* supra. "So, under the Iowa statute, requiring notice to be given to the makers of premium notes when they fall due, the service is complete on mailing a registered letter, or at least when it should be received in due course of mail,"—citing *McKenna v. State Ins. Co.* supra.

In *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.* supra, it appeared that the policy which controlled the matter contained a provision that, "if the assured should neglect for the term of thirty days to pay his premium note, or any assessment thereon, when

requested to do so, by mail or otherwise," etc.

In *McKenna v. State Ins. Co.* the court had under consideration a statute which provided that "such notice may be served either personally or by registered letter addressed to the assured at his postoffice address named in or on the policy," etc.

In *Survick v. Valley Mut. Life Asso.* it appeared that the by-laws of the defendant company provided that any member failing to pay his *pro rata* assessment within thirty days from notification in person, "or from date of mailing same to his address," should forfeit," etc. The decision of the court was placed expressly upon the provision as to mailing.

So, in *Epstein v. Mutual Aid & Benev. Life Ins. Asso.* the decision was based upon the ground that the policy provided that the insured should "be notified by written notice deposited in the postoffice in the city of New Orleans, addressed to such address as has been left in writing at the office of the association with the secretary."

McConnell v. Provident Sav. Life Assur. Soc. was also based on a statute providing for notice by mail.

The case of *New York L. Ins. Co. v. Eggleston* does not sustain the defendant's contention. It is true that the circuit judge charged the jury that, if the notice was mailed within such time as the insured would in due course of mail have received it, then he should be held to have received it. This portion of the charge, however, was not drawn in question or considered by the supreme court; but a previous portion inclosed in brackets which treated of the custom to give notice. In addition, the court, at the close of the opinion, adverted in pointed terms to the fact that the insured had never received any notice. There was evidence that notice had been mailed, and also evidence that it had not been received. In the case of *Phoenix Mut. L. Ins. Co. v. Doster* there is some language in the opinion, used in an incidental way, supporting the defendant's contention here; but in the later case of *Mutual Reserve Fund Life Asso. v. Hamlin*, 139 U. S. 204, 35 L. ed. 170, 14 Sup. Ct. Rep. 614, the same justice suggested a doubt of the correctness of that view, in the following language: "Whether the clause in the certificate of insurance relating to notice means anything more than that proof of mailing a notice according to the defendant's usual course of business, directed to the insured at his postoffice address as appearing upon its books, made a *prima facie* case of compliance upon its part with the terms of the contract, leaving the insured to prove, in order to prevent a forfeiture of his membership, that the notice

was not in fact received by or for him, we need not determine."

The passage cited from *Bacon on Benefit Society and Life Insurance* is based on cases dealing with contracts which, by their terms, provided that notice might be given by mail.

In the case of *Hartford L. Ins. Co. v. Hyde*, *supra*, it is true the charge of the circuit judge contained the expression that the assured was not bound to pay "until such notice was mailed;" but no point was made upon that feature of the charge, and the mind of this court was not directed at all to the subject, and it was not dealt with in the opinion. That case is therefore not authority for defendant's contention.

Nor is the case of *Otis v. Payne* applicable. In that case the court had under examination a negotiation conducted by mail. Such a case stands on a rule different from the one we now have before us. 1 Page, Contr. § 52. And see *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 61 C. C. A. 254, 126 Fed. 352. Here we have not a negotiation, but a claim that a right already acquired was forfeited by miscarriage of the mail; that the mere posting of a letter properly stamped and addressed should be treated as notice and a valuable right thereby defeated, although such letter never reached its destination, no information was conveyed by it, and it in no sense performed the purpose it was designed to perform.

Before such a conclusion can be properly reached, it seems to us there should be direct statutory provisions requiring it, or the clear terms of a contract.

The purpose of a letter is to give information. If it never reaches its destination, it fails of its purpose. To say that nevertheless it must be held to have accomplished the purpose could only be justified, as we have said, by the terms of a statute or of an express contract authorizing such result. In the absence of these, it would not be reasonable to infer that a man would agree that his ignorance of a fact should fix him with all of the consequences of knowledge.

It is said in the present case that the custom had been to give notice by mail, and that, when a letter was properly posted, all of the requisites of the custom were complied with. This is not a sound view. All of the previous letters had reached their destination, and had conveyed the information they were designed to convey. The custom was not merely to mail, but to give notice by mail, to actually convey the information intended to be delivered by that means.

We see no hardship to the insurer in this view of the matter. It is surely not admissible to suppose that any insurance company is alert for occasions to declare forfeitures and thereby to keep moneys for which no

equivalent has been rendered. The company is entitled to prompt payment of premiums. It is only by such payments that its business can be carried on. The power to declare forfeitures for nonpayment is given to effectuate this purpose. But it is a perversion of the purpose when forfeitures are in themselves made an object or end to be attained. Therefore the courts have always seized upon every reasonable circumstance presented in a case to prevent the taking effect of a forfeiture. In the case of a miscarriage of the mail, the insured performs his duty if, upon subsequently receiving notice, he promptly complies by paying the premium due. *Grant v. Alabama Gold L. Ins. Co.* 76 Ga. 583. The complainants in the present case did so comply and thereby saved the forfeiture.

2. Aside from the question just considered, and passing without special remark the peculiarity of the policy, in that it places the provision for forfeiture for nonpayment of premiums under the misleading head of "nonforfeitures," we are of opinion that, under a proper construction of the policy considered in connection with the language of the notes and the correspondence at the time, it was intended that the rights of the parties should be measured by the provision embodied in the notes, the last sentence of which contained a summation of the agreement of the parties under the new phase it had assumed. A portion of the premium had been paid in cash, and notes executed for the residue, which were enforceable by the company. This clause reads: "This note is given said company upon this express understanding or agreement, that for any loss occurring by death after this note is due and remains unpaid, then said company shall not be liable." The effect of this was that, if the complainants permitted this note to go to maturity and remain thereafter unpaid, they took the risk of the death of the insured, Bowen, thereafter and pending such default. The rights of the parties were reciprocal. The defendant had the right to collect and thus restore the insurance, and the complainants the right to pay, with the same result. But in the meantime the advantage was with the company in one aspect, since, if Bowen had died while the note still remained unpaid, the insurance would have been lost.

The foregoing seems the most reasonable construction, since under no other can full effect be given to the words "and remains unpaid."

Even if we did not deem this construction the best, still, if a reasonable one, we should feel bound to adopt it, when considering whether a forfeiture should be allowed, since, when dealing purely with the question 7 L.R.A. (N.S.)

of forfeiture, "the rule is that, if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract." *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10. And see *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 233, 234, 86 S. W. 383; *Schmidt v. German Mut. Ins. Co.* 4 Ind. App. 340, 30 N. E. 939; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205.

For cases construing fairly similar clauses, substantially as herein construed, see *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 639, 40 S. W. 1092; *Williams v. Albany City Ins. Co.* 19 Mich. 451, 2 Am. Rep. 95; *Hooker v. Continental Ins. Co.* 69 Neb. 754, 96 N. W. 663; *Houston v. Farmers' & M. Ins. Co.* 64 Neb. 138, 89 N. W. 635; *Robinson v. Continental Ins. Co.* 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647; *Hummel's Appeal*, 78 Pa. 320; *Matthews v. American Ins. Co.* 40 Ohio St. 135; *McEvoy v. Michigan Mut. L. Ins. Co.* 3 Ohio C. C. 569; *East Texas F. Ins. Co. v. Perky*, 5 Tex. Civ. App. 698, 24 S. W. 1080. And see *American Ins. Co. v. Klink*, 65 Mo. 78.

Ressler v. Fidelity Mut. L. Ins. Co. 110 Tenn. 411, 75 S. W. 735, is not in conflict with what we have herein decided.

No loss occurred by the death of Bowen, while the note was in default. That event did not occur until a considerable time after complainants had made a full tender of the amount due upon the notes. Hence there was no forfeiture.

It results that the decree of the chancellor denying complainants relief was erroneous, and must be reversed, and judgment must be rendered here for the amount of the policy and interest. The points decided being decisive of the case, we need not consider the other points raised by the facts set forth in the statement and argued in the briefs of counsel.

We do not think this is a proper case for the imposition of the statutory penalty upon insurance companies for the interposition of frivolous defenses.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

RE PHILLIP LUEFT, JR., et al.

(— Wis. —, 109 N. W. 652.)

Trust—power to mortgage.

1. The executors have power to mort-

Case Note.—Power of trustee to mortgage trust estate for purpose of making im-

gage the trust estate under a will placing an estate in their hands in trust to use the income for the maintenance of testator's son, for the accomplishment of which purpose they are given power to manage the property, sell land, or convey the whole or any part thereof as the testator might himself do, where, without the mortgage, the income does not exceed the necessary expenses of maintaining the estate, while, by means of it, sufficient to maintain the son will be secured.

provements so as to render it productive:

In determining the question stated, the inquiry must be whether the granting of such power to the trustees was within the intention of the creator of the trust, as indicated by express provisions, or implied, as in the case in hand, from the purposes for which the trust was created. Its solution in any given case, therefore, will depend upon the peculiar circumstances.

(1) In *Starr v. Moulton*, 97 Ill. 525, it was held that, where it was clear that executors had power under the will to sell such portions of the real estate as they might deem proper for the purpose of paying debts, removing encumbrances, or improving the remainder with the view of making it productive; and throughout the will expressions occurred which tended to show that it was the intention and expectation of the testator that his executors would keep his estate intact so far as they were able, and generally to manage it in such a way as to make it as productive as possible,—the grant of power to sell included the power to mortgage when that mode of raising money would, in the judgment of the executors, be to the best interest of the estate,—especially where they were expressly clothed with discretionary power to sell unproductive property, or to convert it into productive property by making improvements thereon when justified by the condition of the estate.

In *Wetmore v. Holsman*, 23 How. Pr. 202, 14 Abb. Pr. 311, it was held that, where trustees under a marriage settlement are expressly authorized to repair, improve, and to borrow money, they are clearly authorized to borrow money by mortgage to improve the estate.

In *Baillie v. Carolina Interstate Bldg. & L. Asso.* 100 Ga. 20, 28 S. E. 274, it was held that, where a trustee under a settlement for the benefit of a married woman during her life, with remainder over to her children, was authorized to pledge, mortgage, sell, and convey a sufficiency of the trust property to make up any deficiency in the income, with power, for the purpose of managing said trust estate and changing the investments thereof, to pledge, mortgage, sell, exchange, or otherwise dispose of all or any portion of the estate, real and personal, as he might deem best, taking into consideration the powers conferred and the nature of the property in question, it was clearly necessary, in order to carry out the inten-

Mortgage—infant's interest.

2. The interests of an infant remainderman will be promoted by an execution of a mortgage to take up a valid prior one and pay overdue taxes, within the meaning of a statute permitting the mortgaging of estates in which infants are interested to promote their interests in the property.

Same—duty of life tenant—effect.

3. The duty of the life tenant to pay taxes on the estate does not prevent the court from authorizing the mortgage of the

tion of the grantor, that the power to borrow money for the improvement of the property should exist, and that such power might be exercised by subscribing to stock in, for the purpose of obtaining a loan from, a building and loan association.

In *Boon v. Hall*, 76 App. Div. 520, 78 N. Y. Supp. 557, it was held that, where property, chiefly unimproved, was devised in trust for the use, benefit, and maintenance of testator's son, who was in dependent circumstances, during his life, with remainder to his heirs, it being apparent that it was the testator's purpose to insure an income to his son, a trustee who was vested with discretionary authority to lease, mortgage, or sell any of the trust property might execute a mortgage to secure advances for the purpose of constructing stores upon the property.

In *Schulting v. Schulting*, 41 N. J. Eq. 130, 3 Atl. 526, it was held that, where testator manifestly did not contemplate the mortgaging of any part of the estate, but, on the contrary, there was evidence of an intention that the executors should avoid risks in the management of his property, a power of sale vested in them will be construed as authorizing a mortgage, where it is necessary for the preservation of the estate, but not where the object is improvement merely.

Where no specific authority is given to mortgage property, and the exercise of such a power cannot be reasonably implied, a mortgage of trust property for the purpose of obtaining money for the improvement of other real estate subject to the trust is invalid; but the mortgagee may assert an equitable claim against the property improved, to the extent of the benefits thereby conferred upon the *cestuis que trust*. *Tyson v. Latrobe*, 42 Md. 325.

An analogous question is presented in the case of *Miller v. Redwine*, 75 Ga. 130, in which it was held that, where a trustee was appointed by will to hold certain property, consisting of the lease on a hotel, the furniture contained therein, and all the live stock about said hotel, bequeathed to the trustee's wife and her children, the trustee being given the right to sell said property and reinvest the same for the benefit of the *cestuis que trust* at any time without an order of the court for that purpose, the trustee had power to mortgage the trust property to raise money to carry on the hotel business.

estate to pay overdue taxes, and thereby preserve it for infant remainder-men.

Same—unauthorized act of trustee.

4. Whether or not executors exceeded their power with reference to the income of a trust estate placed in their hands is immaterial in a proceeding to mortgage the interests of infant remainder-men to take up a valid mortgage placed by them on the estate and to pay overdue taxes.

(Cassoday, Ch. J., dissents.)

(November 7, 1906.)

A PPEAL by Flora Annie Lueft by guardian from an order of the Circuit Court for Milwaukee County granting leave to mortgage an estate in which she had an interest. Affirmed.

Statement by Siebecker, J.:

An appeal from an order of the circuit court authorizing a referee to mortgage lands in which a minor has an interest under a will. On February 17, 1895, Phillip Lueft, a resident of Milwaukee, died intestate. His will was admitted to probate April 5, 1895. The executors named in the will duly qualified, and letters testamentary issued to them, and they continued to act as executors and trustees during the continuance of the trust under the will. The will of Phillip Lueft, deceased, gave \$20,000 out of his personal estate to his son Phillip Lueft, Jr., and then provided as follows.

"All the rest and residue of my estate, real or personal, and wherever situate at the time of my death, I give, devise, and bequeath to my said executors, in trust, however, for the following purposes, to wit: to hold, manage, invest, and reinvest the same, collect the rents, profits and income arising therefrom; to make all necessary repairs, and pay the taxes, assessments and insurance thereon; to lease, sell, deliver, transfer, grant and convey the whole or any part thereof; to invest and reinvest the proceeds of sale, and generally, to have, manage and control my said estate as fully as I might, if living, do myself; all subject, however, to the provisions, conditions, limitations, and restrictions hereinafter contained.

"(A) I direct that during the continuance of this trust, my said executors and trustees shall use the net income arising from the estate hereby devised and bequeathed to them as aforesaid, or so much of said income as may be necessary therefor, for the purpose of properly caring for and maintaining my son William Lueft, and his family, if any; it being my intention that my said son shall, in so far as said net income shall suffice, be maintained in the manner we have here-

tofore lived, and receive all necessary care, assistance and comforts.

"(B) All personal property herein bequeathed to my said executors and trustees shall be invested, kept invested and reinvested by my said executors and trustees in good interest bearing securities, secured by first mortgage on real estate, situate in the city of Milwaukee, county of Milwaukee, and state of Wisconsin.

"(C) In case my said executors or trustees shall sell any of the real estate hereinbefore devised to them, I direct that the proceeds of such sale or sales shall be invested, kept invested and reinvested by my said executors and trustees in good interest bearing securities secured by first mortgage on real estate situate in the said city of Milwaukee; for the purposes of this will the proceeds of such sales shall be deemed real estate and shall be disposed of by my executors and trustees in the manner hereinafter provided for the disposal of my real estate.

"(D) This trust shall terminate on the death of my said son William Lueft. In the event that on the termination of this trust my said son William Lueft shall leave him surviving lawful issue I will and direct that my said trustees shall convey and pay over all the estate then in their hands to such lawful issue forever."

The will provided, further, that if this son, William Lueft, shall leave no lawful issue, then the executors were to convey and dispose of the estate in their hands as follows: (a) To transfer to his son Phillip Lueft, Jr., all personalty in hand absolutely, and to convey to him all real estate for life with remainder in fee to his lawful issue surviving him, and if he should die leaving no lawful issue then to testator's legal heirs; (b) if the son Phillip Lueft, Jr., should not then be living, to transfer the property to his lawful heirs; and (c) if he should leave no lawful issue, then they were to transfer the estate in their hands to testator's legal heirs. At the time of testator's death his son William was insane, and had been in an asylum for the insane for some seven or eight years. He died September 7, 1901, unmarried and leaving no issue. The son Phillip is married, and at the time of William's death had, and still has, one child, a daughter, Flora Annie, who is a minor. She appears by guardian and prosecutes this appeal.

Testator's estate at the time of his death consisted of personal property amounting to \$26,474, and two pieces of real estate,—one piece situated on Twelfth street, appraised at \$8,500, and another situated on Wells street, appraised at \$5,000. The Twelfth street property consisted of a lot and a half,

upon which was located an old brick structure. About five years after testator's death, the executors, by moving the old structure to the rear of the lot and by constructing a new flat building on it, made improvements on the Twelfth street property at a cost of about \$36,000, which was paid by applying the legacy to Phillip Lueft, Jr., amounting to \$20,000, by using \$1,000 of cash on hand belonging to the residue of the estate, and by applying \$15,000, raised by a loan on September 18, 1901, by the executors and trustees under the will, payment thereof being secured by a mortgage on the real estate so improved. They also expended \$1,500 in improvements on the Wells street property, putting it in proper condition for letting. This action of the executors is alleged to have been taken under the powers of the will, and for the purpose of increasing the income, which was insufficient to pay taxes, assessments, necessary repairs, expenses for the maintenance of the property, and the support, as directed by the will, of the son William. On March 30, 1903, Phillip Lueft, Jr., and his wife, under chapter 300, Laws 1899, petitioned the circuit court to authorize a mortgage of \$18,000 on this real estate, the avails of such mortgage to be applied in payment of the \$15,000 mortgage given by the executors and trustees and interest due thereon, and to pay the unpaid taxes on the real estate for the years 1900, 1901, and 1902. Notice of such application was given to appellant and her guardian *ad litem*.

The petition set forth substantially the foregoing facts, and further alleged that the executors, as directed by the will, had supported the son William in an asylum for the insane until the time of his death; that the income from the real estate as so improved was insufficient to so maintain him and pay the expense of administration, the debts, taxes, assessments, and improvements on the real estate; that there was no money of the estate on hand to pay the mortgage when due, and that there were taxes unpaid on the estate for the years of 1900, 1901, and 1902; that a mortgage loan of \$18,000 on the property would well promote the interest of the daughter, Flora Annie, prevent the probable foreclosure of the mortgage, pay the former loan of \$15,000 with interest, and by redemption of the outstanding tax certificates prevent the issuance of tax deeds on the premises. The court, after a hearing and a reference respecting the application, made an order, based on this petition, in which it found "that the interests of said Flora Annie Lueft, and of any after-born children of said Phillip Lueft, Jr., who will also own and become interested in said real estate under and by said last will and testament of said 7 L.R.A.(N.S.)

Phillip Lueft, deceased, require and will be substantially promoted by the mortgaging of the real estate mentioned in said petition and hereinafter described for the sum of eighteen thousand (\$18,000) dollars, for the reasons set forth in said petition," authorized the execution of a mortgage, and directed the application of the money so borrowed in discharge of the former mortgage and interest due on it and the payment of unpaid taxes. This is an appeal from such order.

Messrs. Ryan, Ogden, & Bottum, for appellant:

The power did not confer a power to mortgage.

First Nat. Bank v. National Broadway Bank, 160 N. Y. 459, 42 L.R.A. 139, 51 N. E. 398; Potter v. Hodgman, 81 App. Div. 233, 80 N. Y. Supp. 1056; Willis v. Smith, 66 Tex. 31, 17 S. W. 247; Patapasco Guano Co. v. Morrison, 2 Woods, 395, Fed. Cas. No. 10,792; Greene v. Greene, 19 R. I. 619, 35 L.R.A. 790, 35 Atl. 1042; Hannah v. Carnahan, 65 Mich. 601, 32 N. W. 835; Rutherford Land & Improv. Co. v. Sannrock (N. J. Ch.) 44 Atl. 938; Wilson v. Maryland L. Ins. Co. 60 Md. 150; Rountree v. Denson, 59 Wis. 522, 18 N. W. 518.

Messrs. Austin, Fehr, & Gehrz, with Mr. Emil Wallber, for respondents:

In view of the broad wording of the powers granted to the trustees, the power to mortgage existed.

Lardner v. Williams, 98 Wis. 519, 74 N. W. 346; Rutherford Land & Improv. Co. v. Sannrock (N. J. Ch.) 44 Atl. 941; Kent v. Morrison, 153 Mass. 137, 10 L.R.A. 756, 25 Am. St. Rep. 616, 26 N. E. 427; Zane v. Kennedy, 73 Pa. 182; Leggett v. Firth, 53 Hun, 156, 6 N. Y. Supp. 158; Steifel v. Clark, 9 Baxt. 471; 4 Kent, Com. 147; Mills v. Banks, 3 P. Wms. 9; Jackson v. Everett (Tenn.) 58 S. W. 340; Williams v. Woodard, 2 Wend. 492; 11 Am. & Eng. Enc. Law, 2d ed. pp. 1060, 1061; 22 Am. & Eng. Enc. Law, 2d ed. p. 1156; McCreary v. Bomberger, 151 Pa. 329, 31 Am. St. Rep. 760, 24 Atl. 1066; Starr v. Moulton, 97 Ill. 536; Adams v. Rome, 59 Ga. 768; Colesbury v. Dart, 61 Ga. 621; Loebenthal v. Raleigh, 36 N. J. Eq. 173.

To protect the estate against a maturing mortgage and tax liens was a sufficient ground to make the order not only proper, but necessary.

Phelan v. Boylan, 25 Wis. 686; Rev. Stat. chap. 136; Schafer v. Luke, 51 Wis. 678, 8 N. W. 857.

Siebeck, J., delivered the opinion of the court:

Under the provisions of the will, it is un-

questioned that the executors took the residue of the estate for the purpose of applying the net income thereof, if necessary, to the care and maintenance, during his life, of testator's son William, and of his family, if he had any. In their administration of the trust, for the purposes and in the manner set out in the statement of facts, they mortgaged the real estate for \$15,000, to pay in part for the improvements made on it. The inquiry is whether the executors had power so to mortgage the real estate under the powers conferred by the will. The chief difficulty arises in determining whether the power to make disposition of the real estate, given in the will, included the power to mortgage it for the purpose of administering the trust with respect to the care and maintenance of the son William. The decisions on the subject of the right of trustees to mortgage real estate under a simple power of sale are not harmonious. *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346. The weight of authority seems to be that a mere power to sell, such as that of a power of attorney to sell real estate, confers no power to mortgage. 1 Jones, *Mortg.* § 129, and cases cited; 2 Washb. *Real Prop.* § 1690, and note. But when such powers, coupled with charges upon the estate, are conferred by wills or other instruments, and the executors are intrusted with its management to carry out and discharge such obligations, no such limitation is implied. Under such circumstances, the extent of the power conferred by such words as "to sell," "convey" and their equivalents, is to be ascertained from the intention of the donor of the power in the light of the purposes and objects of the trust as expressed in the grant.

In the construction of powers conferred for such objects, we again find the decisions upon the subject irreconcilable. Some of the courts have adopted the strict construction, and hold that no power to mortgage is implied by the language granting power to sell, convey, and dispose of the real estate, for the reason that such terms negative an intent of the donor to authorize mortgaging the estate. Of this class are the following cases: *Bloomer v. Waldron*, 3 Hill, 361; *Potter v. Hodgman*, 81 App. Div. 233, 80 N. Y. Supp. 1056; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Parkhurst v. Trumbull*, 130 Mich. 408, 90 N. W. 25; *Greene v. Greene*, 19 R. I. 619, 35 L.R.A. 790, 35 Atl. 1042. Other courts adopt a liberal interpretation of such terms when employed in granting such powers, and have construed them as expressly including the authority to mortgage. This rule is followed in Pennsylvania and other jurisdictions. *Zane v. Kennedy*, 73 Pa. 182; *McCreary v. Bomberger*, 151 Pa. 323, 31 Am. St. Rep. 760, 24 7 L.R.A.(N.S.)

Atl. 1066; *Jackson v. Everett*, 3 Tenn. Cas. 811; *Steifel v. Clark*, 9 Baxt. 466; *Rutherford Land & Improv. Co. v. Santrock*, 60 N. J. Eq. 471, 46 Atl. 648; *Mills v. Banks*, 3 P. Wms. 1; *Ball v. Harris*, 4 Myl. & C. 264; 4 Kent, Com. 345. This court, in the case of *Lardner v. Williams*, supra, treating of the question here involved, adopted the rule followed in many jurisdictions of looking into the instrument creating the trust and of giving effect to the manifest intent of the donor as shown by the light of the surrounding circumstances. The principle of this rule is that, if the purpose of the trust can be answered and best accomplished by mortgaging the estate, and if this is not in violation of the intention of the donor, then this method of administration is proper and within the grant of the power. Such construction was followed in *Starr v. Moulton*, 97 Ill. 525; *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169; *Waterman v. Baldwin*, 68 Iowa, 255, 26 N. W. 435; *Kent v. Morrison*, 153 Mass. 137, 10 L.R.A. 756, 25 Am. St. Rep. 616, 26 N. E. 427. See also 4 Kent, Com. 345, and cases cited; *Perry, Tr.* § 768.

The will clearly declares the object of the trust conferred on the executors. They were to employ the residue of the estate transferred to them so that his son William should be cared for and maintained, in the manner in which he had theretofore received "all necessary care, assistance, and comforts;" and the costs thereof was to be defrayed out of the net income of the estate. To accomplish this purpose the executors were vested with the residue of the estate, after a bequest of \$20,000 out of the personal estate to his son Phillip, "to hold, manage, invest, and reinvest the same, collect the rents, profits and income arising therefrom; to make all necessary repairs, and pay the taxes, assessments and insurance thereon; to lease, sell, deliver, transfer, grant, and convey the whole or any part thereof; to invest and reinvest the proceeds of sale, and generally, to have, manage and control my said estate as fully as I might, if living, do myself." In its terms and phraseology this language is significant, showing that the testator intended to confer on the executors all necessary authority under the power to manage the property throughout William's life so as to provide for him as the testator had done in his lifetime. It is evident that he intended to invest them with broad and discretionary powers in the control and management of the property, and in the conduct of William's affairs for his benefit. The terminology necessarily implies that the executors were to handle the property in such ways as they found best under the

circumstances to meet the charge imposed by the will. The terms of the will and the directions it imposed negative the idea that the executors were to be limited to an absolute sale of the real estate and to reinvesting the proceeds in interest-bearing securities. Testator manifestly contemplated that they should secure the largest possible income from the estate. The accomplishment of such an object implies that they were vested with a discretion to adopt such management as they, in their judgment, found would best attain the desired result. No portion of the will indicates an intention to restrict this authority by limiting the management and the disposition of the property to any specific method.

We should look to all parts of the will to ascertain the testator's intention. Taking this view of the will, we think that the language, "generally, to have, manage and control my said estate as fully as I might, if living, do myself," an expression of testator's intention to confer broad and comprehensive powers for the purposes of this trust, and that it should be construed as intending to give the language of the will a significance inclusive of every meaning in which the words may be used, instead of a restricted one. It appears that the real estate held in trust yielded no income above the necessary expenses of repair, taxes, and insurance. After it was improved, as shown, it yielded a net income sufficient to furnish the son William the care and maintenance directed, and the executors were thus enabled to accomplish the purposes of the trust. In the light of these facts, it seems obvious that the provisions of the will were complied with by the executors in making the improvements, and that their administration was in harmony with the testator's intention that the powers granted them should be coextensive with the purposes of the trust, and included those required to carry out the improvements of the real estate, and for this purpose they had authority to execute the mortgage for \$15,000. This mortgage being valid, and there being no means of payment available, it seems obvious that the only way to protect the infant's interest, and to prevent a sale of the premises in satisfaction of this mortgage, is to authorize another loan to secure money to pay it. Such a course is promotive, within the contemplation of chapter 300, p. 525, Laws of 1899, of her interests in the property.

It is suggested that the court erred in directing that the delinquent taxes be paid out of the money so to be raised in this proceeding, because the law imposes the duty of paying them on the life tenant. Notwithstanding such duty of the life tenant, the court may very properly direct redemption 7 L.R.A.(N.S.)

from a sale for delinquent taxes to prevent the issuance of tax deeds, thereby protecting the infant's estate. A delay of redemption until payment could be enforced against the life tenant might seriously imperil the infant's interests.

It is urged that the executors exceeded their trust in applying more than the net income to William's support. Whether or not there is a basis for such a claim is immaterial in this proceeding. The executors had power under the will to make the \$15,000 mortgage, and it was proper for the court to order a new loan to provide for its payment to protect the infant's estate from loss as threatened if it were not paid.

We discover no error in the record, and find that the order of the circuit court was well founded.

The order appealed from is affirmed.

GEORGIA SUPREME COURT.

CHARLES BLOCKER, Plff. in Err.,

v.

JOHN W. CLARK, Sheriff.

(— Ga. —, 54 S. E. 1022.)

Arrest—two of same name—error.

1. Where a valid warrant is placed in the hands of an arresting officer, and there are two persons bearing the name appearing in the warrant, the officer must make diligent inquiry as to the person intended to be arrested, and if, after such inquiry, the officer in good faith arrests a person of that name whom he honestly believes to be the person named in the warrant, he will not be liable in an action for false imprisonment founded on the mere fact of arrest, even though the person arrested be innocent of the charge and not the person for whom the warrant issued. If, however, after such arrest, information reaches the officer that a mistake has been made, and the person arrested is not the person for whom the warrant issued, and the officer thereafter detain such person in custody, he will be liable in an action for false imprisonment for such detention.

Same—duty of officer.

2. When an officer arrests a person under a warrant, the law charges him with the duty of carrying, with reasonable dili-

Headnotes by COBB, P. J.

Case Note.—Liability of officer for arresting wrong person bearing name appearing in warrant: —In an exhaustive note in 51 L.R.A. 219, upon the general subject of the liability of an officer for making an arrest, it is said that the officer who arrests the wrong person is liable if he fails to take proper precautions to ascertain the right person, or if he refuses information

gence, the person arrested before a committing magistrate; but the officer will not be liable to the person arrested for a breach of this duty when the delay is occasioned by the conduct of the person arrested.

Same—good faith—negativizing.

3. In the trial of an action against an officer for false imprisonment upon the ground that the plaintiff, who bore the name stated in the warrant, was not the person for whom the warrant issued, it is not necessary to the maintenance of the action that it should appear that the officer made the arrest "out of spite" or "a reckless disregard for the rights and liberties of the citizen." In such case, if the officer act in good faith, he is protected; but good faith may be negativized in other ways than by proof of spite or recklessness. The mere want of ordinary care is, in some circumstances, inconsistent with good faith.

(August 13, 1906.)

ERROR to the City Court of Richmond County to review a judgment in defendant's favor in an action brought to recover damages for false imprisonment. Reversed.

Statement by Cobb, P. J.:

Charles Blocker brought his action against John W. Clark, alleging that the defendant was the sheriff of Richmond county; that H. C. Hall made an affidavit that Charles Blocker had committed the offense of simple larceny, and on this affidavit a warrant was issued for the arrest of Charles Blocker and placed in the hands of Clark, and by him turned over to his deputy for execution. On the warrant appeared the following memorandum: "Weight about 160 pounds; brown skin; five feet ten inches, farm hand; lives in Tutt's extension, on Woodlawn road." On this warrant the deputy arrested the plaintiff. At the time of the arrest the

offered that would have disclosed his mistake, or if he detains the person an undue length of time without taking proper steps to establish his identity. Although but two of the cases cited in the note to sustain this statement of the general rule involved the arrest of a wrong person bearing the name appearing in the warrant, it is apparent that the similarity of names is merely a circumstance of greater or less weight to be taken into consideration in applying the rule. In *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915, one of the cases referred to, the sheriff and his sureties on his bond were held liable for placing a warrant in the hands of a constable, and causing the arrest of and refusing to release the plaintiff, who bore the same name and answered the description of the accused; it appearing that an investigation would have disclosed the fact of the plaintiff's innocence. As was said by the court in 7 L.R.A. (N.S.)

plaintiff denied that he had committed the offense charged in the warrant, and protested that he was not the person for whom the warrant was issued. Notwithstanding this denial and protest, plaintiff was taken into custody, and the deputy refused to carry him before a judicial officer, but lodged him in jail, where he remained for four days. It is alleged that the plaintiff did not answer the description set forth in the memorandum, in that he was six feet three inches high, and was distinctly black, that he had not worked on a farm for ten years or more, but worked as a fireman for an oil company in the city of Augusta, and that he did not live and had never lived in Tutt's extension, but in the city of Augusta some distance from that place. Tutt's extension being outside the city, in the village of Harrisonville, about a half a mile distant from his place of residence. Upon being released from jail plaintiff reported to his employer, who told him that his place had been filled, as he thought he had gone to the chain gang. He had been unable to secure work as remunerative as that which he had at the time of his arrest. Damages were laid in the sum of \$500. The defendant filed an answer, in which he admitted that the arrest had been made by his deputy, but denied that the plaintiff protested his innocence, etc. The statement as to the remark of his former employer was also denied. The answer further alleged that it was the duty of the defendant to execute all legal warrants placed in his hands, and that the warrant was in all respects regular. He placed it in the hands of his deputy, and the plaintiff bore the same name as the person charged in the warrant, and the deputy making the arrest acted in good faith and with reasonable diligence and caution. The answer contained this allegation: "After arresting him it

that case, every circumstance except the similarity of name and description indicated that the plaintiff was not the person against whom the warrant issued.

In the other case, *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772, a recovery against a sheriff was upheld where he arrested the plaintiff on a capias from another county, upon a charge of murdering a negro, and delivered him to a deputy from the county from which the capias issued; it appearing that the sheriff was informed by the plaintiff, who gave reference to several reliable persons accessible for information, that he had never been in the county in which the crime was charged to have been committed, and that the sheriff declined to investigate, notwithstanding that the plaintiff bore the same name as the party against whom the warrant issued, and had frequently boasted that he had killed a negro.

was the duty of the arresting officer to imprison him, unless he requested to be carried before a judicial officer. He made no such request. In taking plaintiff to jail said deputy sheriff conformed to the usual practice in such cases, taking steps to prevent the escape of the prisoner, but treating him with humanity in all respects, consistent with the officer's duty to keep him safely. After plaintiff was safely lodged in jail, defendant or his said deputy had no other duty to perform in reference to him. It was then for the plaintiff, who knew the law, to take steps to be brought before a judicial officer and be released." A copy of the affidavit and warrant, with the entry of arrest, was attached to the answer as an exhibit. At the trial the jury returned a verdict for the defendant, and the plaintiff assigns error upon the overruling of his motion for a new trial.

Mr. William H. Fleming, for plaintiff in error:

The duty of the arresting officer is to exercise reasonable diligence in bringing his prisoner before some judicial officer authorized to examine, commit, or receive bail.

Code, §§ 885, 897, 899; *Lamb v. Dillard*, 94 Ga. 206, 21 S. E. 463; *Gordon v. Hogan*, 114 Ga. 354, 40 S. E. 229; *Wiggins v. Norton*, 83 Ga. 148, 9 S. E. 607.

A mistake in the identity of the person, no matter how honestly made, cannot wholly defeat the right of recovery, though it may mitigate the amount of damages.

Mitchell v. Malone, 77 Ga. 301; Code, § 2963; Code 1895, § 3826.

Messrs. Joseph B. Cumming, Bryan Cumming, and George M. Beasley, for defendant in error:

If the imprisonment is by virtue of a warrant, neither the party bona fide suing it out, nor the officer who in good faith executes the same, is guilty of false imprisonment.

Code, § 3852; *Page v. Citizens' Bkg. Co.* 111 Ga. 85, 51 L.R.A. 463, 78 Am. St. Rep. 144, 36 S. E. 418; *Joiner v. Ocean S. S. Co.* 86 Ga. 238, 12 S. E. 361; *Williams v. Sewell*, 121 Ga. 665, 49 S. E. 732.

Even if it is conceded that the officer arrested a person other than the one named in the warrant, if the person arrested stated to the officer that he was the person named, the officer would not be liable.

2 Am. & Eng. Enc. Law, p. 845; 12 Am. & Eng. Enc. Law, p. 768; *Dunston v. Patereson*, 2 C. B. N. S. 494; *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752; *O'Shaughnessy v. Baxter*, 121 Mass. 515; *Hallowell & A. Bank v. Howard*, 14 Mass. 181.

The person bearing the name mentioned in 7 L.R.A. (N.S.)

the warrant is prima facie not "the wrong man," but the right man.

Johnston v. Riley, 13 Ga. 97; *West v. Cabell*, supra.

Cobb, P. J., delivered the opinion of the court:

1. It is absolutely essential to the validity of a warrant that the person to be arrested should be identified by the terms of the warrant. The usual method of identifying the person to be arrested is by the insertion therein of his name. It is not, however, indispensable that the name of the person to be arrested should appear in the warrant, for a warrant may be valid although it may not contain the name of the person whose arrest is directed. But if the warrant does not contain the name it must contain sufficient data to identify the person to be arrested thereunder. This may be done by stating his occupation, his personal appearance, peculiarities, place of residence, or other means of identification. When, however, the warrant contains the name of the person, the officer executing the same must rely upon the name alone, and cannot justify the arrest of a party whose name is other than that appearing in the warrant, even though he is the person intended. *Voorhees, Arrest*, §§ 39, 40. A warrant issued against John Doe, "the person carrying off the cannon," was held not to justify the arrest of Levi Mead, although he was taken in the act of carrying off the cannon, and was the person intended. *Mead v. Haws*, 7 Cow. 332. A warrant issued for Robert J. Williams was executed by arresting Spencer Riley, and it was held that all concerned in the arrest were trespassers, although Robert J. Williams and Spencer Riley were one and the same person. In such cases it is incumbent upon the officer seeking to justify the arrest to show that the person was as well known by the one name as by the other. *Johnston v. Riley*, 13 Ga. 137. See also cases cited in note to *Eanes v. State*, 44 Am. Dec. 291. A warrant was issued against John Hoyer, and Richard Hoyer was arrested thereunder. The officer was held liable for plaintiff's imprisonment, notwithstanding it appeared that Richard Hoyer was the person against whom the warrant was intended to issue. *Hoyer v. Bush*, 1 Mann. & G. 775. See also *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752. If the person arrested represents to the officer that he is the individual named in the warrant, or otherwise misleads the officer as to his identity, the arrest is not illegal; and neither is his detention under the warrant illegal until the officer receives information indicating that the person so arrested was not the person named in the warrant. 5 Enc. Laws of

England, 313; *Dunston v. Paterson*, 2 C. B. N. S. 495. It will thus be seen that an officer arresting one not bearing the name set forth in the warrant acts at his peril, and will be held liable as a trespasser, even though the person actually arrested was the person intended to be charged, unless he makes it appear that such person was as well known by the name appearing in the warrant as by the other name which he bore. When the warrant is regular upon its face, and issues from a court of competent jurisdiction, it is the duty of the officer in whose hands it is placed to arrest the person named therein, and no other. If the person named therein is arrested, the officer is justified in making the arrest notwithstanding it may thereafter appear that the person arrested was not the person intended, and that a mistake was made in the name inserted in the warrant. The prosecutor who made a mistake as to the name might be liable to the person unlawfully arrested, but the officer would be blameless. The officer may take into consideration any information that he may receive outside of the terms of the warrant, in order to locate the person named therein, but his duty at last is to arrest the person named. The memorandum in the present case was not part of the warrant, and if the officer had arrested a person of the exact description contained in the memorandum, he would have been a trespasser, if that person did not bear the name of Charles Blocker, and was not well known by that name. If the memorandum had been a part of the warrant, the officer would have been a trespasser in following the memorandum in making the arrest, if the person arrested was not named Charles Blocker.

An officer in whose hands a warrant is placed is charged with the duty of examining the same to ascertain the person identified by the warrant. If the person is identified by description, and not by name, he must exercise due diligence in applying the description in the warrant to the person arrested. If he in good faith arrests a person answering the description in the warrant he is not a trespasser in making the arrest, but may become one if he holds the person arrested after he receives information that such person was not the person intended to be arrested. If the person is described by name only, he must likewise exercise due diligence in determining whether the person arrested bears the name specified in the warrant, and the arrest will be justified if the person bears the name, although a detention might be illegal when information comes to the officer that the person so arrested is not the person against whom the warrant was issued. If there are two or more persons, within the bailiwick of the

officer in whose hands the warrant is placed, bearing the same name, the officer is charged with the duty of ascertaining, before making an arrest, which of such persons the warrant was intended for. If he decides this question in good faith, he is not a trespasser in making the arrest, although he may make a mistake and arrest the wrong person. If an officer arrest a person bearing a name stated in the warrant, and such person is described as being in his bailiwick, and there be only one person bearing such name therein, the officer is protected in making the arrest, although the person may be innocent, and there may have been a mistake made as to the name stated in the warrant. If there be two or more persons of the same name within the bailiwick, the officer may make diligent inquiry as to the identity of the person named in the warrant; and if he makes such inquiry and arrests a person of that name in good faith, believing he is the person named in the warrant, the officer is also protected. If there has been a mistake made as to the name in the warrant, and the prosecutor is responsible for such mistake, the prosecutor might be liable, but the officer would be blameless. We are aware of the importance of the question involved as to the responsibility of an officer executing a warrant where there are two or more persons bearing the name stated in the warrant. If it should be held that the officer is protected when he acts in good faith, although the wrong person may be arrested, cases will arise where a person who is innocent will be deprived of his liberty, and will have no redress for the wrong. On the other hand, if it is held that the officer acts at his peril, the administration of the law through the execution of warrants is impeded, and criminals may escape on account of the timidity or caution of the officers. We are aware that the rule that the officer in such cases acts at his peril has been laid down by the courts of respectable standing; but we think that the rule of good faith is more consonant with our system as indicated by the provisions of the Code, which declares if the imprisonment is by virtue of a warrant, neither the party bona fide suing it out, nor the officer executing the same, is guilty of false imprisonment, though the warrant be defective in form, and void for want of jurisdiction. In such cases the good faith must be determined from all the circumstances. Civil Code, 1895, § 3852. If good faith will protect an officer who deprives a citizen of his liberty under a void warrant, it would seem for a stronger reason that it should protect an officer who is armed with a valid warrant, and who, after exercising due diligence, acting in perfect good faith,

makes a mistake as to the identity of the person named in the warrant.

2. When an officer makes an arrest under a warrant, it is his duty to "exercise reasonable diligence in bringing the person arrested before the person authorized to examine, commit, or receive bail." Penal Code 1895, § 899. What is reasonable diligence depends upon the peculiar facts of each case. If the officer fails to discharge the duty thus imposed upon him, he will be liable to the party injured thereby to the extent of any damages actually sustained as a direct result of the breach of duty, unless the delay was occasioned by the act of the party arrested.

3. Error is assigned upon the following extract from the charge: "So, gentlemen of the jury, you must find that the arresting officer either made this arrest out of spite, or that he did it under circumstances that showed a reckless disregard for the rights and liberties of the citizen." We think this charge erroneous and the error prejudicial to the plaintiff. Good faith will protect the officer. Personal spite or a reckless disregard of the rights of others would amount to bad faith. But the officer may not be animated by spite, his conduct be reckless, and still bad faith may exist. Good faith implies due diligence. Good faith may be negatived by evidence of negligence. The failure to exercise ordinary care in a transaction like the one under consideration is inconsistent with good faith.

Error was also assigned upon the following extract from the charge: "If, under the law I have given you in charge, you find that the preponderance of evidence sustains the plaintiff's claim that he was illegally arrested, and illegally imprisoned and deprived of his liberty, then it is your duty to return a verdict for the plaintiff for such an amount as the evidence shows he is entitled to. On the other hand, if the preponderance of evidence is not on the side of the contentions of the plaintiff, then your verdict should be for the defendant." The error assigned was that, under the instruction, there could be no recovery unless there was both an unlawful arrest and an unlawful imprisonment. This instruction is subject to this criticism: The jury might have believed that the arrest was in good faith, but the subsequent detention was not, and if so, the plaintiff would have been entitled to recover. Under the instruction, the jury were constrained to find for the defendant, unless they believed both the arrest and subsequent detention to be illegal.

What has been said disposes of all the assignments of error that require any discussion.

The evidence rejected was clearly hearsay, and properly repelled.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

GEORGIA SUPREME COURT.

MITTIE D. HOLLOWAY

v.

JOSEPH HOLLOWAY, Plff. in Err.

(— Ga. —, 55 S. E. 191.)

Manslaughter—turpitude.

1. The offense of voluntary manslaughter involves moral turpitude.

Divorce—conviction of crime—pardon.

2. The conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary for a term of two years or longer, gives to the other party to the marriage a right to a divorce; and this right is not affected by an executive pardon granted after the sentence has been imposed.

(August 13, 1906.)

Headnotes by COBB, P. J.

Case Note.—Effect of pardon or commutation of sentence of criminal on conjugal rights: — Although there appear to be no decisions involving the precise question presented in *HOLLOWAY v. HOLLOWAY*, as to whether a pardon is available as a defense to an action for divorce upon the ground of a conviction, perhaps because the statutes of many of the states make express provision that a pardon does not revive the marriage relation or restore conjugal rights, the fundamental principle that the effect of the conviction on the marriage relation is determined by the original sentence, and is unaffected by subsequent commutation or pardon, is fully supported by authority.

In *Re Deming*, 10 Johns. 232, a proceeding to recover from their mother the custody of his children, brought by one who had been sentenced to the state prison for life, which sentence, by virtue of statutory provision, rendered him "civilly dead to all intents and purposes in law," but who thereafter obtained a pardon, it was said that the effect of a pardon was to acquit the offender of all the penalties annexed to the conviction and give him a new credit and capacity, the limitation of the operation on his antecedent rights being such that it could not divest any person of any right or interest which the law had permitted to be acquired and vested in consequence of the judgment, and therefore such pardon could not annul or affect the validity of a second marriage of the wife.

In *Handy v. Handy*, 124 Mass. 394, it was held that a husband who had been sentenced

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action for divorce. Affirmed.

Statement by Cobb, P. J.

Mittie D. Holloway brought her libel for divorce against Joseph Holloway on May 13, 1905, and alleged that they were married on December 24, 1893. In 1899 the respondent was convicted of the offense of voluntary manslaughter, and sentenced to serve a term of twenty years in the penitentiary. They have not lived together since the conviction of the respondent. In 1904 the respondent was pardoned by the governor. A demurrer to the libel was overruled, and the respondent excepted.

Mr. O. M. Duke for plaintiff in error.

Mr. J. D. Kilpatrick for defendant in error.

Cobb, P. J., delivered the opinion of the court:

1. The Civil Code of 1895 declares among the grounds for divorce "the conviction of either party for an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the penitentiary for the term of two years or longer." § 2426, par. 8. The respondent was sentenced to the penitentiary for a term exceeding two years, and the right of the libellant to a divorce depends upon whether the offense of which he was convicted involved moral turpitude. Turpitude in its ordinary sense involves the idea of inherent baseness or vileness; shameful wickedness; depravity. Webster's International Dict. In its legal

to imprisonment at hard labor in the state prison for more than five years, which sentence was, by statute, classed with adultery as a ground for a divorce, could not, upon being pardoned out of prison for good behavior before the expiration of his sentence after having been imprisoned for about nine years, maintain an action for divorce against his wife upon the ground of her adultery committed after his sentence, he himself having been guilty of an offense of the same class and degree under the divorce act as adultery.

In *State v. Duket*, 90 Wis. 272, 31 L.R.A. 515, 48 Am. St. Rep. 928, 63 N. W. 83, it was held that the reversal of a sentence to imprisonment for life on account of error, but not for want of jurisdiction, did not operate to restore the marriage relation of the convict which had been dissolved by the sentence under a statute providing that a sentence to imprisonment for life should operate as an absolute dissolution of the marriage without any judgment of divorce or other legal process; and therefore that the person convicted could not be found

sense it includes everything done contrary to justice, honesty, modesty, or good morals. Black's Law Dict.; Bouvier's Law Dict. The word "moral," which so often precedes the word "turpitude," does not seem to add anything to the meaning of the term, other than that emphasis which often results from a tautological expression. All crimes embraced within the Roman's conception of the *crimen falsi* involve turpitude; but it is not safe to declare that such crimes only involve turpitude. Murder involves vileness and depravity; for it is the result of an abandoned and malignant heart. Voluntary manslaughter involves the intentional destruction of human life. It is true that there is no deliberation, no malice, in the act constituting the offense; but the manslayer intends to kill, and carries out the intention in an unlawful manner. It may be the result of passion or temper, and the law in its mercy visits a less penalty than that inflicted for wilful killing; but it necessarily involves the intention to unlawfully deprive another of life. Whenever one intentionally and wrongfully takes human life, he does an act which is base, vile, depraved, and contrary to good morals. That the offense of voluntary manslaughter involves moral turpitude cannot admit serious question. See, in this connection, 5 Words & Phrases Judicially Defined, 4580.

2. The right of the libellant to a divorce results from the conviction and sentence. There are three essential ingredients in the ground for divorce. The commission of the offense involving moral turpitude, the conviction for the same, and a sentence for a term of two years or longer in the penitentiary. When this state of affairs is shown

guilty of adultery in thereafter living with another woman.

The decision in *Young v. Young*, 61 Tex. 191, as to the noneffect of the commutation of a sentence to restore the person convicted to his conjugal rights, is sufficiently set forth in the opinion in the *HOLLOWAY CASE*.

In *Oliver v. Oliver*, 169 Mass. 592, 48 N. E. 843, and *Sargood v. Sargood*, 77 Vt. 498, 61 Atl. 472, it was held that, where a sentence for longer than a stated period is made a ground for divorce in favor of the husband or wife of the person so sentenced, and an indeterminate sentence has been imposed, the maximum term of imprisonment must be taken as the period governing the right to a divorce.

In this connection, reference may be made to the case of *Cone v. Cone*, 58 N. H. 152, in which it was held that, where a sentence to state prison for more than one year is made by statute a cause for divorce, the fact that an appeal is pending from the conviction constitutes no defense to proceedings for divorce.

to exist, the law declares the libellant is entitled to a divorce. Can this right, given by statute, be destroyed by an executive pardon? The pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction. He is no longer infamous. He may vote, hold office, and perform other public functions. Rights which have accrued to individuals as a result of the conviction are not affected by the pardon. Mr. Bishop, in his work on Marriage, Divorce, and Separation, §§ 444, 1807, says that, where conviction for a crime is declared to be a ground for a divorce, it is a defense to a divorce suit to show that the convict has been pardoned. He cites no authority for this statement. He does refer to the case of *Young v. Young*, 61 Tex. 191, where it was held that the commutation of the sentence of one convicted of a felony was not equivalent to a pardon. The statute of Texas provided that, if a party to a marriage was convicted of a felony and imprisoned in a state prison, this should be a ground for divorce, provided that no suit could be maintained for the conviction of either party until twelve months after final judgment of conviction, nor then if the governor should have pardoned the convict. In that case the governor had commuted the sentence of the convict within twelve months after final judgment; and this was held not to amount to a pardon within the meaning of the statute. Mr. Nelson, in his work on Divorce and Separation, says that it would seem that if, before the trial of the suit for divorce, the convict is pardoned, the divorce should not be granted. He cites no authority for this proposition. Reference is made to the case of *Young v. Young*, supra, and also to the case of *State v. Duket*, 90 Wis. 272, 31 L.R.A. 515, 48 Am. St. Rep. 928, 63 N. W. 83. In that case it was held that the reversal of a sentence of one convicted of a felony did not have the effect of restoring the conjugal rights taken away by virtue of a statute which declared that a sentence of imprisonment for life should dissolve the marriage of the person sentenced. Mr. Keezer, in his recent work on Marriage and Divorce, says that no pardon granted after the decree of divorce will restore such party to his or her conjugal rights. To sustain this proposition he cites the case of *Young v. Young*, supra, and *Handy v. Handy*, 124 Mass. 394. In the case last cited the facts were peculiar, and it is impossible to tell from the meager statement in the report exactly what was the extent of the ruling. We have been able to find no decision which is a direct ruling on the question now before us. We think the better view is that the pardon of the convict does not destroy

the right to a divorce, declared by statute to arise upon conviction and sentence.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent.

LOUISIANA SUPREME COURT.

ABRAHAM SCHULMAN

v.

EDWARD STANLEY WHITAKER, Appt.

(117 La. 703, 42 So. 227.)

Courts—jurisdiction—privacy.

1. The civil district court has jurisdiction of a complaint if it relates to a personal right,—the right to be left alone.

Action—character.

2. This is not an action instituted to punish an infraction of the criminal laws.

Photograph—suspect—injunction.

3. Unless it be evident that a picture should be taken to identify the person, or to detect crime, it cannot be taken; the purpose not being detection or identification. If a person is under arrest, or within the court's jurisdiction, generally there arises no necessity for the exercise of the photographer's art before his trial and conviction.

(October 29, 1906.)

Headnotes by BREAUX, Ch. J.

Case Note.—Right to take, or retain in "rogues'" gallery, picture of one accused of crime: — An interesting question is presented in the case reported above, as to the right to exhibit in the rogues' gallery the portrait of one merely accused of crime. That the portrait of a person actually convicted of crime may be kept in the rogues' gallery as a means of identification in the event of the escape of the prisoner or his commission of a subsequent offense is unquestionable. But to hold that such a course may be adopted toward one who has never been convicted of crime, and whose guilt or innocence of the crime of which he is accused or suspected is still to be determined, would seem to be carrying police supervision to an unwarranted extent. Tiedeman, in his work on State and Federal Control of Persons and Property, vol. 1, p. 157, says, on this subject: "Another phase of police supervision is that of photographing alleged criminals and sending copies of the photograph to all detective bureaus. If this be directed by the law as punishment for a crime of which the criminal stands convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act, for no right has been violated. But the practice is not confined to the convicted criminals. It is very often employed against

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans requiring defendant to destroy photographs which had been taken of the plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. Benjamin Rice Forman, for appellant:

The photograph was proper.

Molineux v. Collins, 177 N. Y. 395, 65 L.R.A. 104, 69 N. E. 727; Hottinger v. New Orleans, 42 La. Ann. 630, 8 So. 575; State ex rel. New Orleans v. Theard, 48 La. Ann. 1448, 21 So. 28; Lecourt v. Gaster, 49 La. Ann. 488, 21 So. 646.

Messrs. Solomon Wolff and Gustave Lemle, for appellee:

Constitutional provisions for the security of persons and property should be liberally construed.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Breaux, Ch. J., delivered the opinion of the court:

As a reason why defendant, who is inspector of police of the city of New Orleans, directed to have plaintiff's picture taken, and a copy placed in the rogues' gallery, and others sent to other galleries in other states, he (defendant) avers that plaintiff had been accused of having received stolen property, knowing it to have been stolen, twelve different times, as he (inspector of police) had found upon investigation; and furthermore, that an information was filed against plaintiff which has never been tried; that, when plaintiff was arrested under the charge which resulted in the information filed

persons who are only under suspicion. In such a case, if the suspicion is not well founded, and the suspected person is in fact innocent, such use of his photograph would be a libel, for which everyone could be held responsible who was concerned in its publication. And it would be an actionable trespass against the right of personal security, whether one is a criminal or not, to be compelled involuntarily to sit for a photograph to be used for such purposes, unless it was imposed by the statutes as a punishment for the crime of which he has been convicted."

Yet, in *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541, it is held that, since it is the duty of a sheriff to confine in jail and safely keep all persons in his custody awaiting trial on a charge of crime, until lawfully discharged, and, if they escape, to pursue and recapture them, he may lawfully take the portrait and measurements, weight, residence, place of birth, occupation, and personal characteristics of an accused person committed to his custody for safe-keeping, if, in his discretion, it is necessary to prevent his escape or facilitate his recapture in case he should do so. The complaint in this case did not charge that any physical force was used to induce the accused to have his picture taken, or to furnish the sheriff with such information as was not obtainable by observation. The action was brought on the sheriff's official bond, and charged the sheriff with libel by maliciously sending out the portrait of the accused and a description of his person, together with a statement of the accusations against him. The court refused to pass on the question whether or not the photographs and the words thereon were libelous, since it said that, even if they were, the sureties on his official bond would not be liable therefor, though the sheriff himself might be liable to an action.

Probably the first case in which the question of the right to place the portrait of one convicted or accused of crime in the rogues'

gallery arose, was *People ex rel. Joyce v. York*, 27 Misc. 658, 59 N. Y. Supp. 418, in which it was held that, where a person had been convicted of an assault, and sentenced to six months in the workhouse, and had frequently been arrested, and was an associate of criminals, these facts were sufficient to warrant the taking of his photograph and placing it in the rogues' gallery; and a mandamus to compel the police authorities to remove the picture was denied. The court said that it is well settled that a mandamus will issue only to compel a public officer to perform a duty imposed upon him by law; that there was no duty in respect to the matter now before the court, imposed upon the police commissioners; and that, if they had wronged the relator at all, the wrong was in the nature of a libel, for which he had an adequate remedy at law.

In a subsequent New York case,—*Owen v. Partridge*, 40 Misc. 415, 82 N. Y. Supp. 248,—which was an action for an injunction to restrain the commissioner of police of New York from publishing the photograph and certain memoranda concerning the appearance or measurements of the plaintiff, who had been arrested on suspicion, but subsequently discharged, and for a mandatory direction that the negative of such likeness, together with all copies and reproductions of it, and the memoranda, be destroyed or surrendered to the plaintiff, the court said that the taking of the photograph and measurements, and their retention, exhibition, or circulation, could obviously be justified only as an exercise of the police power; that the duty of the police to "preserve the public peace, prevent crime, detect and arrest offenders" (*Laws 1901*, chap. 466, § 315, p. 136), gives them necessarily a wide range of incidental powers to accomplish the mandates of the statute; that the existence of the so-called rogues' gallery, and the taking of the photographs, weights, and measurements, finds its authority, if anywhere, in this provision, or in the accepted pre-existing principles of which

against him, he denied having the goods; that they were subsequently found in his store.

Plaintiff states in his pleadings that he has kept a pawn shop in the city of New Orleans these eleven years past, and that he has always conducted himself properly since his residence in the city of New Orleans, which dates back to the time he opened a pawnbroker's business in this city. He alleged that after his picture had been taken he was arrested for having received stolen goods. He was tried and discharged. It remains that the plaintiff does not appear before us as one who has been convicted of crime. None the less his conduct has certainly given ground to a number of complaints. If there is any good cause for these complaints, the alleged guilty man should be tried. After his conviction, it will be time to determine whether or not his picture should be taken and placed in the rogues' gallery; not before, in this particular case, for while, from all appearances, plaintiff must have engaged in a pretty active business in his line, the proper place to inquire into the violations of the criminal law in connection with that business is before a tribunal having jurisdiction in the premises. Before that is done, his picture should not be taken.

It is true that the respondent is authorized by law to take such measures as are needful to prevent crimes, to detect and arrest offenders, and to protect the right of

persons and property. Act No. 32, p. 43, of 1904. None the less, the statute does not invest him with the right *in limine* to resort, as relates to picture taking, to the extreme measures adopted in the present case on the evidence offered and admitted. The necessity for taking the picture is not apparent, there being no evidence of any conviction of plaintiff either in the courts of this state or of any other state. Nor is there evidence before us that it is important for his identification that his picture be taken.

The taking of pictures, as proposed, and placing them in the rogues' gallery before conviction, may prove useful in some cases, but it may lead to abuses and injustice in others.

We have found no precedent directly pertinent to the issues here, and we do not think that one should be laid down in this case to authorize recourse to the Bertillon system.

There are cases remotely analogous to the case pending before us. In one of the cases the complainant, a pretty girl, took out an injunction to prevent a business firm from making use of her picture in advertising merchandise for sale in its stores and other public places. Sensitive, proud of her beauty, she did not, it seems, fancy the use made of the pictures. The court, although considering it in the nature of privacy or a private or personal right, the asserted violation of which was hardly as dis-

it is the expression; that, so far as habitual criminals are concerned,—their supervision and control,—no serious question could well be raised as to the propriety or legal character of the acts involved; but added that how far the exhibition in the rogues' gallery of the photographs of persons merely suspected of crime may be justified as a police measure may be a question not easy of solution. The court refers to Prof. Tiedeman's intimation that, where the suspicion is well founded, the right exists; but adds: "But what is a well-founded suspicion? Where the person photographed is not a habitual criminal, or has never been convicted of crime, so that preventive measures might be justified; or where the suspicion directed to a particular case has not sufficient legal basis in fact to warrant some criminal proceeding,—the definition of a 'suspicious person' becomes vague and shadowy, varying with the circumstances of each case, and measures like those under consideration may approach dangerously near an arbitrary interference with the personal rights." The court said, however, that, in the view it took of this application for an injunction, it did not deem it necessary to examine further the by-no-means-clear question of the right to take for police purposes the photograph of a person merely suspected of crime; that, conceding that

there is such a right, and conceding, also, that the defendant in this case had failed to bring himself within the facts permitting its exercise, the court was of the opinion that the plaintiff had mistaken his remedy. In other words, conceding that the plaintiff's rights had been invaded, he could not seek redress for the violation by means of an injunction action; that the plaintiff's sole injury, if any, had been to his character and reputation; and that, though he may have suffered wrong and the injury be irreparable, equity could give him no relief, but he must seek his remedy at law.

Where the photograph and measurements of a person convicted of murder were taken and filed in obedience to a statute requiring the superintendent of state prisons to cause the prisoners therein confined to be measured and described in accordance with the Bertillon method for identification of criminals, it was held that, notwithstanding the subsequent reversal of the conviction and the acquittal of the accused, mandamus would not issue to compel the superintendent of state prisons to surrender the photograph and measurements. *Molineux v. Collins*, 177 N. Y. 395, 65 L.R.A. 104, 69 N. E. 727. Affirming 41 Misc. 154, 83 N. Y. Supp. 943. The court said that the photograph, description, and measurements which the law required the superintendent to se-

agreeable as the complainer alleged, refused to make the injunction perpetual; it said that to grant the injunction would open a vast field of litigation. *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442.

It is a matter of public history, known to everyone, that the cartoonists apply their energy and exhaust their ingenuity in representing, with ridiculous exaggerations, the peculiarities of persons in journals and magazines. The photographer and the snapshot amateurs take the pictures of the willing and the unwilling. Generally, this is taken with as much good nature as the person caricatured can possibly command. We do not know that it has afforded any ground for litigation, when not exaggerated to the point of impeaching character. Here the purpose goes much further. The picture is to remain as evidence of a damning nature.

Whilst expressing the foregoing views, we desire to have it well understood that we are decidedly of opinion that cases may arise justifying the officer in charge of the police department in ordering a picture to be taken; but the necessity must be evident. Convicts and hardened criminals may forfeit all rights to consideration; to such an extent, at any rate, that their pictures may be taken if necessary to their identification, and that without much delay.

The gallery in question should not be broken up; the collection in other cases

should remain as it is, although there is no special statute on the subject. Law and right have the authority to protect themselves. But there is no necessity of going any further than actually necessary in that direction, save to say that the picture of the hardened criminal, when he is detected in the commission of a crime, can be taken; the pictures of fugitives from justice and others when necessary to their identification. We go no further than to decide that there was no necessity to take the picture for identification, nor to guard against the escape of the plaintiff. The following are our principal reasons: Plaintiff pays a high license. This is not a defense, and would not be so considered in any court of criminal jurisdiction. It might, however, be considered in the matter of identification or of escape. Again, plaintiff is compelled to report the character of his business each Monday morning to the inspector of police, in accordance with § 8651, council series, relating to pawn shops. This also is not a defense, but it is a very considerable check on wrongdoing and irregularity of the business.

Plaintiff's place of business seems to be well known; it is not charged that he has ever sought to conceal himself. There is evidently no hesitation felt in making affidavits against him. He has never sought, as far as we know, to evade meeting these affidavits. He is within the jurisdiction and under the authority of the district court. It

cure and preserve were a part of the public records, which the superintendent had no power to remove or destroy, even though the prisoner's sentence had been reversed and he had been acquitted of the charge against him, and that there was no relief for this apparent injustice to one acquitted of the charge against him, except through the legislature.

In *Shaffer v. United States*, 24 App. D. C. 417, it was held that the taking by the government of a photograph of one accused of homicide while he was in custody, and the use of the photograph on the trial to identify him, did not constitute a violation of any constitutional right where no excessive force or illegal duress was employed by the officer in taking the picture. The court in this case said: "We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that without such means many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself or to remove a mark in court to enable witnesses to identify him as the party ac- 7 L.R.A.(N.S.)

cused, as that he could rightfully refuse to allow an officer in whose custody he remained to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege."

A companion case to that of *SCHULMAN v. WHITAKER* was *Itzkovitch v. Whitaker*, 115 La. 479, 1 L.R.A.(N.S.) 1147, 39 So. 499, where it was held that the publication of an innocent man's photograph in the rogues' gallery gave rise to sufficient grounds to sustain an injunction. A temporary injunction was therefore granted to prevent the further exhibition of the plaintiff's photograph which had already been sent to the rogues' gallery; and, when the case was heard upon its merits, the injunction was made permanent, and the negative of the photographs ordered to be returned, and all entries of the photographs and of the measurements to be erased and canceled from the record. It was held that the picture of a person accused of crime should not be taken until after his conviction, unless it is evident that it should be taken before conviction for the purpose of identification or for the detection of the crime.

does not sufficiently appear that his picture is necessary to prove his guilt or for the identification of his person. For these reasons, the prosecutions before the court having jurisdiction in matter of crime and offenses will have to be exhausted in at least one case to justify in this case ordering the plaintiff's picture to be placed in the rogues' gallery.

The foregoing applies equally to the Itzkovitch Case, handed down this day.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

B. F. BRIGGS, Appt.

(— Kan. —, 86 Pac. 447.)

False pretenses—information.

1. An information, which charged that the defendant obtained a draft for money as a commission for a loan on a farm, on the false and fraudulent pretenses that he was an agent engaged in loaning money on

Headnotes by JOHNSTON, Ch. J.

Case Note.—Effect of coupling future promise with false pretenses:—It is generally held that the consequence attached to a false statement as to a past or existing fact is not overthrown by an accompanying promise to do some act in the future which operated as a part of the inducement under which the prosecutor parted with his property. Thus, upon the facts stated in each of the following cases, the defendants were held to be guilty of obtaining the property by false pretenses:

In *Pearce v. State*, 115 Ala. 116, 22 So. 502, defendant falsely represented that he was a pension agent, coupled with his promise that he would obtain a pension for the defrauded party.

In *Donohoe v. State*, 59 Ark. 377, 27 S. W. 226, defendant promised to pay for lumber which he used in the erection of a house upon land which he falsely pretended he had purchased. The seller of lumber in this state is entitled to a lien on land belonging to the purchaser upon which the house is erected, for the purchase price of the lumber.

In *Thomas v. State*, 90 Ga. 437, 16 S. E. 94, the false representation was that a sale had already been effected, coupled with a promise to complete it by making delivery.

In *Holton v. State*, 109 Ga. 127, 34 S. E. 358, the false pretense was that defendant had title to certain land, made for the purpose of inducing another to purchase it, 7 L.R.A. (N.S.)

farms, and that he had much property and was financially responsible, and had a large amount of money under his control, was not bad because it failed to state whether the application of the borrower for the loan was oral or written; and no error was committed in denying a motion to make the information more definite and certain in that respect.

Same—representation as to business.

2. A representation that a person is in a business or situation in which he is not, made for the purpose of defrauding another, and by which money or property is fraudulently obtained, is a false pretense.

Same—future promise.

3. The coupling of a future promise with a false pretense does not relieve the false pretense of its criminal character.

Same—evidence of other offenses.

4. Testimony that the defendant had made similar false representations and pretenses to others is admissible to show his knowledge of the falsity of the representations made in the present case and his guilty intent in making them.

(July 6, 1906.)

APPEAL by defendant from a judgment of the District Court for Crawford County convicting him of obtaining money by false pretenses. Affirmed.

The facts are stated in the opinion.

coupled with his promise that he would defend the title in the future.

In *Smith v. State*, 116 Ga. 537, 42 S. E. 766, the false pretense was that the prosecutor's son had sent the accused to the prosecutor with a request to let him have a small sum of money on the son's credit, coupled with accused's expressed intention of using the same in moving upon the son's land.

In *State v. Montgomery*, 56 Iowa, 195, 9 N. W. 120, the false pretense was that the defendant had goods in the possession of a railroad company and needed money to pay freight thereon, coupled with his promise to repay the same upon the arrival of the goods.

In *State v. Fooks*, 65 Iowa, 196, 21 N. W. 561, the false pretense was that defendant's brother was an English nobleman and was soon to arrive with money for him, coupled with his promise to use this money in repayment of the sum obtained from the defrauded party.

In *State v. Hollingsworth* (Iowa) 109 N. W. 1003, the false pretense was that defendant had arranged to go into business, coupled with his promise that he would use the money obtained in establishing the business, and would marry the prosecutrix.

In *State v. Cowdin*, 28 Kan. 269, the false pretenses were that defendant was procuring a loan from another with which to pay off certain notes secured by a mortgage held by the prosecutor, and that he had come for

Mr. E. C. Clark, for appellant:

Such of the representations as are not promises to do something in the future are in, and of themselves immaterial representations which will not sustain the action.

State v. Palmer, 50 Kan. 325, 32 Pac. 29; State v. Knott, 124 N. C. 814, 32 S. E. 798.

Messrs. C. C. Coleman, Attorney General, and John M. Wayde, for appellee:

False pretenses with reference to existing facts, coupled with a false promise to do something in the future, come within the statute.

1 McClain, *Crim. Law*, § 678; State v. Gordon, 56 Kan. 64, 42 Pac. 346; Hughes, *Crim. Law & Proc.* § 596, p. 163; Taylor v. Com. 94 Ky. 281, 22 S. W. 217; Thomas v. People, 34 N. Y. 351; Bobbitt v. State, 87 Ala. 91, 6 So. 378; Com. v. Stevenson, 127 Mass. 446; Cowan v. State, 41 Tex. *Crim. Rep.* 617, 56 S. W. 751.

Johnston, Ch. J., delivered the opinion of the court:

B. F. Briggs was convicted of obtaining money from Henry Mattox by means of false and fraudulent pretenses. In the information it was charged, in substance, that Briggs represented that he was a loan agent, engaged in loaning money on real estate; that he was financially responsible, and

the purpose of paying off such notes, coupled with his promise to pay off the notes upon prosecutor's executing a release of the mortgage upon the record book.

In State v. Gordon, 56 Kan. 64, 42 Pac. 346, the false pretense was that defendant and an Indian had in their possession a gold brick which they were about to take to the mint to be coined into money, coupled with defendant's promise to deliver the brick to the prosecutor to be taken by him to the mint, and to allow him to retain one third of the money coined therefrom.

In Com. v. Moore, 89 Ky. 542, 12 S. W. 1066, the false pretenses were that a mob was then threatening to take prosecutrix's son from jail, where he was confined, and kill him; that defendant had been employed as his counsel; and that to protect him it was necessary to remove him to the jail of another county before dark; coupled with his implied promise that he would secure the removal.

In State v. Jules, 85 Md. 305, 36 Atl. 1027, the false pretense was that defendant possessed extraordinary and supernatural power to cure, coupled with his promise to cure in the future.

In People v. Winslow, 39 Mich. 505, the false pretense was that defendants had a position to give out, or one in mind which the prosecutor could fill, coupled with a promise to procure the situation for the prosecutor.

In State v. Thaden, 43 Minn. 325, 45 N. W. 7 L.R.A. (N.S.)

worth from \$45,000 to \$60,000; that he had under his control \$500,000 to loan upon farms; and that he would make Mattox a loan of \$3,000 on his farm, at an interest rate of 5 per cent and a commission of \$120, one half of which was to be paid at once and the balance when the loan was completed; and that, relying on these representations, Mattox contracted for the loan and sent Briggs a draft for \$60, the value of which was realized by Briggs. It is alleged that the representations were false and fraudulent; that Briggs had no money to loan, and was not engaged in making loans on farms; that he had neither money nor credit, but was wholly insolvent; and that he never intended to effect a loan, but made the false and fraudulent representations with the intent to cheat and defraud Mattox out of the draft and the \$60 obtained upon it. By motions to make definite and certain and to quash appellant challenged the sufficiency of the information.

The motion to make an information definite and certain is an anomaly in criminal procedure. Ordinarily an indictment or information which fails to particularize, or lacks in fullness of statement, is open to attack by motion to quash. Courts sometimes require specification of particular things in what is known as a bill of particulars, but

614, the false pretense was that a worthless note, secured by mortgage on a lot, was worth its face value, and that the mortgaged lot was worth double the amount of the note, coupled with a promise to find a purchaser of the note and mortgage.

In State v. Vandenburg, 159 Mo. 230, 60 S. W. 79, the false pretense was that defendant was the authorized agent of a certain insurance company, coupled with his promise to deliver a policy to the defrauded party.

In State v. King, 67 N. H. 219, 34 Atl. 461, the false pretense was that defendant was a doctor of medicine, coupled with his promise to deliver medicine the next morning.

In Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397, Affirming 26 Hun, 76, the false representation was that a horse was sound, kind, and true, accompanied by written warranty. The court said: "It would not exempt the prisoner from the consequence of a false pretense made as to an existing material fact because it was combined with a promise for the future."

In People v. Jefferey, 82 Hun, 409, 31 N. Y. Supp. 267, the false pretense was that defendant was agent for a responsible chartered company dealing in seed oats, coupled with his promise that, if the defrauded party would buy oats, the company would sell for him twice the quantity of the same price per bushel, when the crop raised therefrom had matured.

In Com. v. Wallace, 114 Pa. 405, 60 Am. Rep. 353, 6 Atl. 685, the false pretense was

the making of such an order is largely within the discretion of the trial court. *Hughes*, *Crim. Law & Proc.* § 2879; 1 *Bishop*, *New Crim. Proc.* § 643. If the motion to make definite and certain were permissible, or should be treated as a motion for a bill of particulars, the court would not have been justified in allowing it. The supposed defect is that the information did not disclose whether the application of Mattox for a loan of money was in writing or only an oral one. The application was a mere incident in the transaction, and, so far as the offense is concerned, it is wholly immaterial whether it was written or oral. *State v. Baker*, 57 Kan. 544, 46 Pac. 947. It was not the basis of the false pretenses, and the money was not obtained by means of the application. The important features of the offense charged were the false representations made

with intent to defraud and the obtaining of money by reason of them, and these matters were fully stated in the information. It is the things said and done by Briggs, and not by Mattox, that were material, and which formed the basis of the offense charged in the information.

Upon the motion to quash, it is contended that the representations alleged are not material, and are mere promises to be performed in the future. It is true, as contended, that a mere promise to do something in the future, however false, is not an offense. "The false pretense relied upon to constitute an offense under the statute must relate to a past event, or to some present existing fact, and not to something to happen in the future." *Re Snyder*, 17 Kan. 546. Although some of the representations were mere promises, others were of existing facts and are

that the assets of a certain bank were largely in excess of its debts and liabilities, and that the bank was solvent and able to pay all its debts and liabilities, coupled with the promise that the money deposited would not be used to pay any previously contracted debts of the bank.

In *Com. ex rel. Gordon v. Keeper of County Prison*, 15 W. N. C. 282, the defendant falsely represented that he possessed the power to produce the spirits of the dead, accompanied by an executory promise to produce such spirits.

In *Brown v. State* (Tex. Crim. App.) 22 S. W. 22, the false pretense was that the defendant was the owner of certain live stock, coupled with his promise to give a mortgage thereon.

In *Boscow v. State*, 33 Tex. Crim. Rep. 390, 26 S. W. 625, the false pretense was that defendant was a practising physician, and was associated with other physicians in the practice of medicine, coupled with his promise to treat and cure the defrauded party's wife.

In *Rex v. Asterley*, 7 Car. & P. 191, the defendant falsely claimed that upon prior occasions, by going to certain parties, he had secured a reduction on certain fines imposed, and promised that he would secure a reduction of one half the fine imposed upon prosecutrix's father.

In *Reg. v. Bates*, 3 Cox, C. C. 201, the prisoner falsely represented that he was a provision dealer, and that he had the means of paying for certain property, and promised to pay for the same in the future.

In *Reg. v. Fry*, 7 Cox, C. C. 394, the prisoner falsely claimed that she kept a house at a particular place, and that, if the prosecutrix would lend the money, she could go to the shop and live with her until she secured a situation, and that she would repay the money when they got home.

In *Reg. v. West*, 8 Cox, C. C. 12, the prisoner obtained the money by falsely representing that he had bought certain skins,

and by promising that he would bring the skins and sell them to the prosecutrix.

In *Reg. v. Jennison*, 9 Cox, C. C. 158, the defendant falsely represented to an unmarried woman that he was a single man, coupled with his promise that he would lay out the money obtained from her in furnishing a house for them to live in, and that he would then marry her.

In *Reg. v. Speed*, 15 Cox, C. C. 24, defendant falsely represented that a new directory was about to be published for which he was collecting names and information, and for one shilling promised to insert the defrauded party's name in large type.

In *Reg. v. Lee*, 23 U. C. Q. B. 340, the prisoner obtained money by falsely stating that prosecutor's note was at a lawyer's office, and promised to go there and get it and deliver it to the prosecutor the next morning, when in fact the prisoner had sold the note to another party.

Although a promise to do something in the future is coupled with the false statement of an existing fact, yet, if the property is parted with by relying on the promise alone, the offense is not committed. *Jackson v. People*, 18 Ill. App. 508; *State v. Tripp*, 113 Iowa, 698, 84 N. W. 546; *People v. Hart*, 35 Misc. 182, 71 N. Y. Supp. 492.

In *Ranney v. People*, 22 N. Y. 413, the defendant represented that he had employment for the complainant, which does not appear to have been false, coupled with his promise to employ complainant at a future time, when he did not in fact intend to employ him. This was held insufficient to sustain the criminal prosecution. This case has been occasionally criticized, but, in the light of the meager facts, it seems to have been but an application of the accepted rule that, "unless there is a false representation, upon which the false promise is based, there can be no conviction, for the false promise alone involves no criminal consequences." See *State v. Haines*, 23 S. C. 170.

material. It was alleged that Briggs represented himself to be a responsible agent, engaged in making loans on real estate and to the farmers of southeastern Kansas, whereas he was not so engaged, and was not making loans on real estate to farmers. A misrepresentation as to the business in which a person is engaged for the purpose of defrauding another, and by which money or property is obtained, is a false pretense. It is a false pretense where a man falsely represents himself to be in a situation or business in which he is not. *Higler v. People*, 44 Mich. 299, 38 Am. Rep. 267, 6 N. W. 664; *Taylor v. Com.* 94 Ky. 281, 22 S. W. 217; *Com. v. Stevenson*, 127 Mass. 446; *Pearce v. State*, 115 Ala. 115, 22 So. 502; *People v. Dalton*, 2 Wheeler, Crim. Cas. 161; *Thomas v. People*, 34 N. Y. 351; *Hughes*, Crim. Law. & Proc. § 596; 19 Cyc. Law & Proc. p. 401. Then there were the representations that he had a large amount of property and was in good financial standing, whereas it is alleged that he was absolutely insolvent. Added to these was the representation, which was also negatived, that he had \$500,000 at his command and under his control. These representations were not mere promises, nor can they be regarded as immaterial. 19 Cyc. Law & Proc. p. 398. That there may have been connected with them future promises, or other matters of less consequence, does not relieve the false pretenses of their criminal character. It has already been determined that "the mere fact that a false pretense of an existing or past fact is accompanied by a future promise will not relieve the defendant or take the case out of the operation of the statute." *State v. Gordon*, 56 Kan. 67, 42 Pac. 346. It is not necessary to a conviction that the false pretenses should be the sole inducement to the obtaining of the money or property. It is enough if they have a controlling influence, although other minor considerations may concur. It was said in *Re Snyder*, supra, that "it is not necessary to constitute the offense of obtaining goods by false pretenses that the owner should have been induced to part with his property solely and entirely by pretenses which were false; nor need the pretenses be the paramount cause of the delivery [to the prisoner]. It is sufficient if they are a part of the moving cause, and without them the prosecutor would not have parted with the property."

There is a contention that the information is bad for duplicity, because it charges that the pretenses were made for the purpose of obtaining both draft and money. It is said, too, that the draft was obtained in Crawford county, where the prosecution was had, while the money was obtained upon it

in Labette county. Only one offense was charged, and it arose out of the single transaction of obtaining the draft for \$60 by false pretenses. The averment that he had collected the money on the draft did not state an additional offense, nor invalidate the information. *State v. Pryor*, 53 Kan. 657, 37 Pac. 169; *State v. McDonald*, 59 Kan. 241, 52 Pac. 453; *State v. Meade*, 56 Kan. 690, 44 Pac. 619. Nor can there be a valid objection to the jurisdiction of the court. The false representations and pretenses were made in Crawford county, and the draft was mailed by Mattox to Briggs in the same county. It was received in Labette county, it is true; but the general rule is that the venue is in the county where the property is obtained by the false pretense. The draft was obtained by the false pretense. The draft was obtained from Mattox when he surrendered possession of it by placing it in the post-office, addressed to the appellant. The Post-office Department is deemed to be the agent of the appellant in the same way that a common carrier would have been his agent if the draft had been given to it for delivery to the appellant. *Re Stephenson*, 67 Kan. 556, 73 Pac. 62; *Com. v. Wood*, 142 Mass. 459, 462, 8 N. E. 432; *Reg. v. Jones*, 1 Den. C. C. 551; *Reg. v. Leech*, Dears. C. C. 642; 1 McClain, Crim. Law, § 696.

Appellant complains of the admission of the testimony of three witnesses to the effect that he had made the same representations to them as he had to Mattox, and had conducted similar transactions in regard to loans on farms, but that he had not effected a loan. This testimony was doubtless admitted, and was admissible, for the purpose of showing knowledge of the falsity of the representations and guilty intent in making them. Briggs had held himself out as one who had made loans to farmers and who was able to make such loans. Evidence of the transaction with others tended to prove his fraudulent scheme, that he knew his representations to Mattox were false, and that he had made them with the intent to defraud. A fair statement of the rule is found in *Underhill on Criminal Evidence*, § 438, where he says: "Evidence of similar offenses, involving the making of other false representations, is admissible against the prisoner to show that he was aware of the falsity of the statements made by him in the present instance, and that, knowing them to be false, he made them with the intent to deceive. Evidence of similar false pretenses is particularly relevant when it appears that the fraudulent act for which the accused is on trial does not stand alone, but is a part of a scheme not merely to de-

fraud one individual, but to swindle the community at large." See also *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Jackson*, 112 Mo. 585, 20 S. W. 674; *DuBois v. People*, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658; *Com. v. Lubinsky*, 182 Mass. 142, 64 N. E. 966; *State v. Dexter*, 115 Iowa, 678, 87 N. W. 417; *State v. Southall*, 77 Minn. 296, 79 N. W. 1007; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Crum v. State*, 148 Ind. 401, 47 N. E. 833; *Carnell v. State*, 85 Md. 1, 36 Atl. 117; *Farmer v. State*, 100 Ga. 41, 28 S. E. 26; *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728; *Tarbox v. State*, 38 Ohio St. 581; *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *Wood v. United States*, 16 Pet. 342, 10 L. ed. 987; *Reg. v. Rhodes*, 68 L. J. Q. B. N. S. 83, 79 L. T. N. S. 360; *Queen v. Ollis* [1900] 2 Q. B. 758, 83 L. T. N. S. 251; *Hughes*, *Crim. Law & Proc.* § 647; 19 *Cyc. Law & Proc.* p. 443.

Other objections are made to rulings on the admission of testimony, but there is nothing substantial in them. The requested instructions which the court refused were manifestly incomplete and incorrect, and the charge given by the court fairly presented the issues in the case to the jury.

There appears to be sufficient testimony to support the verdict, and, no error being found, the judgment will be affirmed.

All the Justices concur.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Appt.,
v.

HARRY MARCUS, Respnt.

(185 N. Y. 257, 77 N. E. 1073.)

Master—interference with contract rights—constitutional law.

A statute forbidding an employer to exact an agreement from an employee not to join a labor union infringes his constitutional rights of liberty.

(Edward T. Bartlett, J., dissents.)

(May 25, 1906.)

Case Note.—Constitutionality of statutes forbidding employer to exact an agreement from employee not to join labor union:

—The right of an employer to stipulate in a contract of hiring that the employee shall not become a member of any labor union, or, if already a member of such a union, that he shall withdraw therefrom, would seem to be a fundamental part of the constitutional guaranty of liberty of contract. That the courts so regard it is shown 7 L.R.A. (N.S.)

APPEAL by the People from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of the Court of Special Sessions for the City of New York convicting defendant of violating the statute against contracts requiring employees not to join labor unions. Affirmed.

The facts are stated in the opinion.

Mr. Robert S. Johnstone, with Mr. William Travers Jerome, for appellant:

The test of constitutionality is always one of power,—nothing else.

Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047; Cooley, *Const. Lim.* 7th ed. 252.

The legislature has power to enact that the coercion of one person by another may be an offense.

Davis v. State, 30 Ohio L. J. 342; Curran v. Galen, 2 Misc. 553, 22 N. Y. Supp. 826, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369.

The right of contract is not an absolute right, and may be subjected to many restraints in the furtherance of the public interests.

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; Johnston v. Fargo, 184 N. Y. 379, post,—, 77 N. E. 388; People v. Ewer, 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4.

Messrs. Ernest F. Eidlitz and Frederick Hulse, with Mr. Elias B. Goodman, for respondent:

The right of contract is an attribute of property.

Farmers' Loan & T. Co. v. Chicago & A. R. Co. 27 Fed. 146; Shirk v. La Fayette, 52 Fed. 857; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

As the legislature may not take away property of an individual without due process of law, so may it not take away the right of contract.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; Wright v.

by the fact that, in every jurisdiction in which the question has been raised, statutes forbidding the making of such agreements have been held void as in violation of the constitutional provision that no one shall be deprived of life, liberty, or property without due process of law. Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Coffeyville Vitriified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848; State v. Julow, 129

Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83; 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

Chase, J., delivered the opinion of the court:

It is provided by § 1 of the 14th Amendment of the Constitution of the United States that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of

the laws." It is provided by § 1 of article 1 of the Constitution of the state of New York that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," and by § 6 of said article that no person shall "be deprived of life, liberty, or property without due process of law." The free and untrammelled right to contract is a part of the liberty guaranteed to every citizen by the Federal and state Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health, or moral and general welfare of the public; but, subject to such restraint, an employer and employee may make and enforce such contract relating to labor as they may agree upon. In 1887 the legislature added to the Penal Code § 171a,

Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Bateman, 7 Ohio N. P. 487; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 S. W. 1098; PEOPLE v. MARCUS.

It is held in some of these cases that such contracts are also void because in violation of the constitutional provision against special legislation. And that statutes of this kind cannot be upheld as a police regulation has been declared in every case in which that contention has been raised.

As stated in Gillespie v. People, supra, if an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law. And the right of property involves as one of its essential attributes the right not only to contract, but also to terminate contracts.

That the interest of employees as well as of employers is protected by decisions holding such statutes unconstitutional is well stated in the language of the court in State ex rel. Zillmer v. Kreutzberg as follows: "Free will in making private contracts and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. . . . We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employee. In answering the question now before us, we may not forget the possibility of being called on to answer whether the legislature may make a criminal of the employee who quits, for example, because his employer joins a blacklisting association; because nonunion men or members of some other union are employed, or nonunion or forbidden machines or materials are used; 7 L.R.A.(N.S.)

because of an obnoxious foreman; because excessive hours of work are required; because compelled to trade at employer's store or board at his boarding house; or because of any other fact or conduct now considered entirely adequate reason for refusing or leaving a particular service. It must not be forgotten if, as counsel for the state argues, the laborer is too weak to meet the employer on equal terms in the field of contract, that he will be far more subject to the latter's control and oppression in the field of politics, and that laws of the above character will surely come, if within the proper province of the legislature, unless, as we have faith to believe, the character and the individuality of the wage earners of the country are sufficient to maintain their independence—both contractual and political—in a field of equal rights under the law, and of full liberty to each to sell and buy labor to and from whom he will."

In only one case—that of Davis v. State, 30 Ohio L. J. 342,—has the constitutionality of such a statute been sustained. In this case it was held that an act making it unlawful for any employer to prevent employees from belonging to any labor organization, or to coerce or attempt to coerce employees by discharging or threatening to discharge them because of their connection with such organizations, was constitutional. But this decision was rendered by an inferior court before the rendition of any of the decisions of higher courts cited above, and was repudiated in the later Ohio case of State v. Bateman, supra.

In harmony with the cases denying the constitutionality of such a statute, is the decision in Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 578, denying the constitutionality of an analogous statute requiring an employer to give a discharged workman a certificate stating the reasons of the discharge, on the ground that the right of discharge may be exercised without any reason or explanation.

as follows: "Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations, on behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employee or employees, laborer or mechanic, to enter into an agreement, either written or verbal, from such person, persons, employee, laborer, or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor." The constitutional right of the legislature to enact that section of the Penal Code is challenged by the defendant, and the question is now presented for consideration, because of the arrest and conviction of the defendant for a violation thereof.

On December 1, 1904, the H. Marcus Skirt Company, a corporation, as the party of the first part, and H. Scheinbaum, as the party of the second part, entered into an agreement, the material parts of which are as follows: "Party of the first part agrees to employ party of the second part as a piece worker, and party of the first part agrees to pay for all finished work only on each and every Tuesday. Party of the second part hereby agrees not to belong to any labor union or to take part in any strike against the party of the first part, and to work as an individual in the open shop of party of the first part. Party of the second part further agrees that in the event of not complying with all the articles herein mentioned to forfeit to the party of the first part his money due for all work unpaid. Party of the second part also agrees to deposit \$1.00 each week, which will be deducted from his salary until the amount reaches \$10; same to be held as a forfeit in the event of his not complying with all the above stipulations. H. Marcus Skirt Company agrees to keep party of the second part employed as long as he proves satisfactory." Thereafter an information was filed in a court of special sessions in which it alleged that the defendant is a person of said corporation and an employer of labor, and that he "did on behalf of such corporation, and as such employer of labor, coerce and compel one Hyman Scheinbaum to enter into a written agreement on the part of and from him the said Hyman Scheinbaum not to join or become a member of any labor organization as a condition of the said Hyman Scheinbaum securing employment from and continuing in the employment of the said H. Marcus Skirt Co." On such information, a warrant was

issued and the defendant was arraigned and pleaded guilty. He thereupon made a motion in arrest of judgment upon the ground "that it appears upon the face of the information that the facts therein stated do not constitute a crime, . . . that the statute upon which said information is based contravenes the 14th Amendment of the Constitution of the United States, and is therefore null and void and that said statute contravenes the Constitution of the state of New York, in that it restrains the right to free contract for a purpose not calculated, intended, convenient, or appropriate to protect the public health or to serve the public comfort or safety." The motion in arrest of judgment was denied, and the defendant was fined \$5, which he paid under protest, and an appeal was taken to the appellate division, which reversed the judgment of conviction. *People v. Marcus*, 110 App. Div. 255, 97 N. Y. Supp. 322. From the order of reversal, this appeal is taken.

The legislative intent in the use of the words "coerce or compel" in said section of the Penal Code is apparent on reading the section. They were not intended to refer to physical violence or interference with the person of the employee. In *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, the court, in construing the words of § 110 of the labor law (chap. 415, p. 485, Laws of New York, 1897), as follows: "No employee shall be required or permitted to work in a biscuit, bread, or cake bakery . . . more than sixty hours in any one week or more than ten hours in any one day;" says: "The mandate of the statute . . . is the substantial equivalent of an enactment that 'no employee shall contract or agree to work' more than ten hours per day." In the case now before us the mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment, or the continuance of an employment, of a person conditional upon the employee not joining or becoming a member of a labor organization. There is nothing in the information upon which the warrant against the defendant was issued to show that there was any interference with the freedom of Scheinbaum in deciding whether he would enter into the contract with the corporation. The courts of this state recognize the right of employees and employers to organize and co-operate for any lawful purpose. Contracts for labor may be freely made with individuals or a combination of individuals, and, so long as they do not interfere with public safety, health, or morals, they are not illegal. The views of this court as to what constitutes freedom to contract in relation

to the purchase and sale of labor, and as to what contracts relating thereto are lawful and enforceable, were stated with much detail and ability by the members of the court when the cases of *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, and *Jacobs v. Cohen*, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 76 N. E. 5, were decided; and the decisions in those cases are substantially controlling in the determination of this appeal.

In *National Protective Asso. v. Cumming*, supra, it was said that a person may refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it; but, even if the reason is that the employee refuses to work with another who is not a member of his organization, it does not affect his right to stop work, or to refuse to enter upon employment. The converse of this statement must be true, and an employer of labor may refuse to employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. It is a well-known fact that combinations of employees, and also of employers, require their members to do or refrain from doing many things which they deem to their individual and combined advantage, while a person not a member of such an organization can act in accordance with the terms of such agreement as he may choose to make. A person employing labor may decide that it is to his advantage to employ only union labor, and be willing to enter into an agreement necessary to procure such labor; or he may decide that it is to his advantage to employ nonunion labor, in which case he may also decide that it is to his advantage to make the employment conditional upon an agreement that such employee will not join or become a member of a labor organization.

In *Jacobs v. Cohen*, supra, an employees' union sued certain manufacturing employers on a promissory note given by them as collateral security to be applied as liquidated damages for the violation of a certain agreement by which the manufacturing employers agreed not to employ any help whatsoever other than members of said labor union who should procure a pass card showing that they were in good standing in said union; and by which they further agreed to conform to the rules and regulations of said union, and cease to employ anyone not in good standing in said union, and by which they further agreed to many restrictive and other provisions relating to the conduct of their business, which are stated more fully in the prevailing and dissenting opinions in 7 L.R.A.(N.S.)

this court. The answer in the second separate defense alleged, in substance, that the contract was in restraint of trade, and that its purpose is to combine employers and employees whereby the freedom of the citizen in pursuing his lawful trade and calling is, through said contract, combination, and arrangement, hampered and restricted, and that it is also for the purpose of coercing workmen to become members of a particular employees' organization under penalty of loss of position and deprivation of employment and that it is against public policy and unlawful. Two questions were submitted to this court, viz.: "(1) Is a contract made by an employer of labor, by which he binds himself to employ and to retain in his employ only members in good standing of a single labor union, consonant with public policy and enforceable in the courts of justice in this state?" "(2) Is the 'second' separate defense, contained in the answer herein of the defendants Morris Cohen and Louis Cohen, insufficient upon the face thereof to constitute a defense?" Both of these questions were answered in the affirmative; and the court says: "Whatever else may be said of it, this is the case of an agreement voluntarily made by an employer with his workmen, which bound the latter to give their skilled services for a certain period of time, upon certain conditions, regulating the performance of the work to be done and restricting the class of workmen, who should be engaged upon it, to such persons as were in affiliation with an association organized by the employer's workmen with reference to the carrying on of the very work. It would seem as though an employer should be unquestionably free to enter into such a contract with his workmen for the conduct of the business without its being deemed obnoxious upon any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employees concerning the conduct of the business for a year, and securing to the latter an absolute right to limit the class of their fellow workmen to those persons who should be in affiliation with an organization, entered into with the design of protecting their interests in carrying on the work."

That freedom to contract which entitles an employer to make by agreement his place of business wholly within the control of a

labor union entitles him, if he so desires, to require of his employees that they be wholly independent of any labor union.

The order of the Appellate Division should be affirmed.

Edward T. Bartlett, J., dissenting:

I vote to reverse the order of the appellate division and to affirm the judgment of conviction. The freedom to contract should be untrammelled. A person desiring employment ought not to be required to abstain from joining any labor organization, nor should he be compelled to join a labor organization. The statute should have covered both cases. I regard this legislation as a step in the right direction, although it was evidently drawn in the interest of labor organizations and without regard to securing absolute freedom of contract. The employer is to be protected and the employed as well. I trust the day is not far distant when to every working man will be open all the avenues of employment, whether he belongs to labor unions or other organizations, or stands alone upon his individual right to work for such a wage as seems to him just. This statute is not, in my opinion, unconstitutional, but is to be regarded as a step in the direction dictated by every consideration of public policy.

Cullen, Ch. J., and Gray, Haight, Vann, and Willard Bartlett, JJ., concur.

MAINE SUPREME JUDICIAL COURT.

JAMES MAY

v.

WILLIAM M. PENNELL.

(101 Me. 516, 64 Atl. 885.)

Suicide—attempt—crime.

An attempt to commit suicide is not

a crime in the absence of statute making it such, or making suicide a crime.

(August 11, 1906.)

EXCEPTIONS by petitioner to rulings of the Supreme Judicial Court for Cumberland County denying a discharge of petitioner on a writ of habeas corpus from custody to which he had been committed under a sentence after conviction of attempt to commit suicide. Sustained.

The facts are stated in the opinion.

Mr. William A. Connellan for plaintiff.

Whitehouse, J., delivered the opinion of the court:

The petitioner was indicted in the superior court for Cumberland county for the alleged crime of attempting to commit suicide, and upon conviction was sentenced at the May term, 1906, to imprisonment at labor in the county jail for the term of eleven months. Thereupon he presented to a single justice his petition for a writ of habeas corpus to obtain a release from imprisonment, on the ground that the act charged in the indictment is not a crime in this state, and that the sentence inflicted upon him was not warranted by law. The justice overruled this contention *pro forma*, and refused to discharge the petitioner. The case comes to the law court on exceptions to this ruling.

By the early common law of England suicide was ranked among infamous crimes, and held to be a "species of felony." It was punished by a forfeiture to the King of the goods and chattels of *felo de se*, and an ignominious burial in the highway with a stake driven through his body. 4 Bl. Com. 189. But, aside from the mental suffering which might thus be inflicted upon innocent surviving relatives of the suicide by a dese-

Case Note.—Attempt to commit suicide as a crime:—The foregoing opinion, which otherwise embodies a complete review of the subject, overlooks the case of *State v. Carney*, 69 N. J. L. 478, 55 Atl. 44, holding that an attempt at suicide is an indictable offense in New Jersey. The court in the latter case distinguishes the Massachusetts cases cited in the opinion in *MAY v. PENNELL* upon the ground that the common-law offense had been repealed by implication by the Massachusetts statute. It is obvious that this ground of distinction also applies to *MAY v. PENNELL*. The New Jersey court pointed out that, while there is no independent enactment in New Jersey making an attempt at suicide a crime, its statute does declare that all offenses of an indictable nature at common law, and not otherwise provided for by the act of the legislature, shall be misdemeanors and punishable accordingly.
7 L.R.A. (N.S.)

Assuming that punishment by forfeiture of property and ignominious burial, prescribed by the common law for suicide, has been abolished in New Jersey as well as in Massachusetts, the New Jersey case is still distinguishable from the Massachusetts cases for the reason that the New Jersey statute with respect to attempts does not, like the Massachusetts statute, impliedly limit indictable attempts to cases in which the attempt, if unsuccessful, would have constituted, not merely a criminal offense, but a punishable offense. The mere fact that suicide may be regarded as a crime, or at least criminal, it not being a punishable offense, is obviously insufficient to bring an attempt to commit suicide within the Massachusetts statute, which in this respect is the same as the Maine statute defining indictable attempts.

eration of his body, it was not in the power of human tribunals to impose any other punishment than the forfeiture of his estate; and "since forfeitures for crime are not practised in our states," says Mr. Bishop, "suicide is not practically an offense with us." 1 Bishop, *Crim. Law*, § 512; 2 Bishop, *Crim. Law*, § 1187. No case has been brought to the attention of the court in which it has been held in any of the United States that suicide is a punishable offense. Although it may be deemed ethically reprehensible and inconsistent with the public welfare, it has never been declared by the legislature, or held by the court of this state, to be such a public wrong as will subject the doer to legal punishment. Section 1 of chapter 136 of the Revised Statutes declares that, "when no punishment is provided by statute, a person convicted of an offense shall be imprisoned for less than one year or fined not exceeding \$500. "But, even if suicide is deemed to be criminal as *malum in se*, neither of the penalties specified in this statute can be inflicted upon one whose life is ended.

Nor is there any statute in this state which constitutes an attempt to commit suicide a substantive offense, or makes it subject to legal punishment. Section 9, chap. 132, Rev. Stat., provides as follows: "Whoever attempts to commit an offense, and does anything towards it, but fails, or is interrupted, or is prevented, in its execution, where no punishment is expressly provided for such attempt, shall, if the offense thus attempted is punishable with imprisonment for life, be imprisoned for not less than one, nor more than ten, years; and in all other cases he shall receive the same kind of punishment that might have been inflicted if the offense attempted had been committed, but not exceeding one half thereof." But here, again, it is obvious that cases of suicide were not within the contemplation of the legislature in the enactment of this statute. As no penalty of any kind is attached to suicide if actually committed, there could be no punishment whatever by force of this statute for an attempt to commit it.

In the absence of any statute in this state expressly making an attempt to commit suicide a punishable offense, it is therefore difficult to discover any satisfactory ground upon which the sentence in this case can rest; for it would appear to be a palpable solecism in the law to declare that a mere attempt to commit an act which is not penal is itself punishable.

It is suggested, however, that, inasmuch as suicide was a "species of felony" by the common law of England, and an attempt to commit suicide was there held to be a misde-

meanor, it became incorporated in the common law of Massachusetts as a substantive offense, and in this state is subject to the provisions of § 1, chap. 136, Rev. Stat., above quoted, declaring that, "when no punishment is provided by statute, a person convicted of an offense shall be imprisoned for less than one year, or fined," etc.

The only English cases that have been cited in any of the text-books or cyclopædias as authority for the doctrine that an attempt to commit suicide was a misdemeanor by the common law of England, are *Reg. v. Doody*, 6 Cox, C. C. 463, and *Reg. v. Burgess*, 9 Cox, C. C. 247. The former case is simply the report of a *nisi prius* ruling at a trial in which the prisoner was not defended by counsel. In the latter case the defendant pleaded guilty, and the question reserved for the court of criminal appeals was primarily one of jurisdiction. It was contended in behalf of the defendant that an attempt to commit suicide was an attempt to commit murder within the meaning of chapter 100, Stat. 24 & 25 Vict., and hence was not within the jurisdiction of the county assizes; but the court held that, though suicide was deemed a felony in England, it was not murder within the meaning of the act named, and that the attempt to commit suicide was a misdemeanor and within the jurisdiction of that court; but sentence was respited.

"An attempt," says Mr. Bishop, "is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing [of it]" (1 Bishop, *New Crim. Law*, § 728); while "a substantive felony is one depending on itself alone, and not on another felony to be first established by the conviction of the direct doer" (1 Bishop, *New Crim. Law*, § 696). It is not claimed that the attempt to commit suicide was ever made a substantive offense by any act of the British Parliament, and there is no suggestion in the brief oral utterances of the judges in the English cases above cited that the misdemeanor of which the defendant was in each instance there convicted was other than the ordinary attempt to commit a punishable felony. It is not suggested that it was a substantive offense by the law of England. If the accomplished act of suicide had not there been a punishable crime, the attempt to commit the act could not have been held to be a punishable misdemeanor. For it has been seen that an attempt involves an "intent to do a particular thing which the law declares to be a crime," and the word "crime" or "offense," as ordinarily used in legislative enactments, by text writers on criminal law, and in the practical administra-

tion of it by the courts, uniformly signifies a public wrong which subjects the perpetrator to legal punishment. Standard Dict.; 1 Bishop, Crim. Law, 32. In accordance with this view is the statement of Mr. Bishop, as above shown, that suicide is "not practically an offense with us." But an attempt to commit an act which is not "practically a crime" is not itself "practically criminal," because not punishable. In Massachusetts forfeitures were abolished by the "Body of Liberties" of 1641, the statute providing for an ignominious burial of the suicide fell into disuse at the close of that century, and the colony act of 1660 was repealed in 1823. Thus the common law of England upon this subject was modified in Massachusetts, and suicide ceased to be a punishable offense. The ground work for the English doctrine that an attempt to commit it was a misdemeanor was thus removed. If it was a misdemeanor by the common law of England, it ceased to be such under the law of Massachusetts, and has never been recognized as a part of the common law of Maine. "Reason is the soul of the law," says Lord Coke, "and when the reason changes the law also changes." [Milborn's Case] 7 Coke, 7. Although there have been attempts to commit suicide in great numbers in the history of both Massachusetts and Maine, in no instance which this court has been able to discover has there been a conviction of such an attempt before any court prior to the case at bar.

In *Com. v. Dennis*, 105 Mass. 162, it was distinctly held that an attempt to commit suicide was not an indictable offense in that commonwealth; but the decision rests upon the construction of their statutes, which, however, are in substance and effect precisely like our own. In the opinion the court says: "In this commonwealth the whole matter of punishments for all attempts to commit an offense prohibited by law, when no express provision is otherwise made, has been subject to revision by statute." After stating the provision of the statute, in terms like § 9, chap. 132, of our Revised Statutes, above quoted, the court adds: "The attempt to commit suicide is thus left without punishment, because the act itself could never be punished by any of the modes stated. By a well-established rule of the construction of statutes, the common law is held to be repealed by implication, when the whole subject has been revised by the legislature. *Com. v. Cooley*, 10 Pick. 37; *Com. v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Lakin v. Lakin*, 2 Allen, 45. This rule requires us to look to the statute alone for the punishment, if any, affixed to the act here in-

dicted. If it is not there made punishable, it is enough, whatever the reason which induced its omission. The end of punishment is the prevention of crime, and it may have been thought at least impolitic to punish an attempt to do that which is itself dispunishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed."

It is true that in *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109, it was held that suicide must still be deemed criminal as *malum in se*, and, although an attempt to commit it is not punishable, yet a person who, in attempting to commit it, accidentally kills another, who is trying to prevent its accomplishment, is guilty of manslaughter. But Chief Justice Gray, who drew the opinion in the latter case, appears to have concurred in the former, and expressly states in his opinion that the conclusion reached in *Com. v. Mink* is not affected by the fact that "the legislature, having in the general revisions of the statutes measured the degree of punishment for attempts to commit offenses by the punishment prescribed for each offense if actually committed, has intentionally or inadvertently left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner,"—citing the former case of *Com. v. Dennis*, *supra*.

The question arose under the Penal Code of Hawaii in 1868, upon a demurrer to an indictment for an attempt to commit suicide, and the demurrer was sustained and the indictment quashed. In the opinion of the court published in *King v. Ahsee*, 2 Am. Law Rev. 794, Chief Justice Allen says, in conclusion: "The wisdom of legislative bodies has never deemed it wise to make a provision to apply to the act charged against the defendant, and we are of opinion that we should be slow to give an entirely new construction to the Code concerning murder, and to impose a punishment never contemplated, and of the wisdom of which the framers of the law have not as yet expressed a favorable opinion. . . . We find, however, no statute of any country, nor any provision of the common law, which will sustain this indictment."

By § 178 of the Penal Code of New York, however, enacted in 1881. "every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years or by a fine not exceeding \$1,000," although no forfeiture is imposed in the case of the "successful perpetrator." These sections of the New York Code are incorporated in the Codes of North and South Dakota. But

these provisions appear to have fallen into utter disuse; for we have been unable to find any reported convictions for this offense in either state since the adoption of this Code. And, although there have doubtless been innumerable attempts to commit suicide in the United States, no instance has been discovered in which there has ever been a conviction for this offense, on either statutory or common-law grounds, prior to that in the case at bar.

It is accordingly the opinion of the court that an attempt to commit suicide is not an indictable offense in this state, and that the entry should be—

Exceptions sustained.

Prisoner discharged.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ORLANDO MASON et al.,

v.

BAXTER D. WHITNEY, Appt.

(— Mass. —, 78 N. E. 881.)

Water—flow of stream—working hours.

1. The mere fact that for a long period of time it has been the custom of the owners of mills along a stream to run them only during the working hours of the day,

by reason of which the lower owners have gratuitously received the benefit of the pond of an upper mill owner which stored the water of the stream during the idle hours and let it all down during the working hours, does not give them a right to insist on his continuance of such practice, so as to prevent his running his wheels throughout the twenty-four hours.

Same—joint action.

2. The rights of lower mill owners on a stream are not enlarged by suing jointly to restrain the owner of an upper pond from running his wheels throughout the twenty-four hours, thereby depriving them of the benefit of his storage reservoir.

Same—reasonable use.

3. It is not unreasonable for a mill owner, if his own interest requires it, to use the water of the stream in his business, nights as well as days, so long as he leaves the natural flow of the water unobstructed and undiminished during the ordinary working hours of the day; and this is true, although those using the water above him send down most of it during the daytime.

Same—stored water.

4. The additional daily flow due to the storage of water during a wet season, to be let down during a dry one, is to be treated as part of the natural flow, in determining the right of a lower mill owner in reference to the use of other mill owners further down the stream.

(October 31, 1906.)

Case Note.—Right to use stream for power during the night as well as during the day:—The above decision is a material contribution to the law in holding that the rights of mill owners upon the stream are governed by its natural flow, and not by the artificial use which has been ordinarily made of the stream by the mill owners. As shown by 2 Farnham, Waters, 1612, the cases which have dealt with the rights of mill owners to the flow of the stream have usually been those in which the use complained of was an intermittent, and not a continuous, use. That author states that there is no ground of complaint on the part of the lower millowner merely because the flow is not regular, if the pond from which the flow comes does not so far exceed the capacity of the stream and the other ponds that they are rendered useless. But the intermittent flow must be based upon some reason, and be proportionate to the necessities of the mill for the use of which the pond is made. But it seems to be established that, since the interests of the riparian owners require the use of water chiefly in the daytime, the upper owner has no right to hold the water back in the daytime and let it down at night. Barrett v. Parsons, 10 Cush. 367; Beavers v. Trimmer, 25 N. J. L. 97. And in Hoyt v. Cline, 39 N. Y. S. R. 937, 15 N. Y. Supp. 337, it was held that an injunction would lie to restrain the upper owner from retaining the natural

flow of the water during working hours and discharging it in floods into the stream during nights and Sundays, at times when the lower mill owner could not use it, for the sole purpose of annoying and injuring him. So, the withholding of waters of an irrigation stream during the day, and discharging them during the night, when they cannot be utilized by lower owners, causing injury to crops and cattle, will sustain a right of action. Lone Tree Ditch Co. v. Rapid City Electric & Gaslight Co. 16 S. D. 451, 93 N. W. 650. And a malicious interference with the flow of the stream, by holding it up during the daytime and letting it down at night, for the purpose of injuring the lower proprietor, will sustain an action for damages. Twiss v. Baldwin, 9 Conn. 291. But the right to use it during the night instead of the day might be acquired by custom, if the rule would best secure the general rights of the parties in interest. Keeney & W. Mfg. Co. v. Union Mfg. Co. 39 Conn. 577. Conversely, water may be stored at night and used exclusively in the daytime if the mill is suited to the capacity of the stream, although the effect is to interrupt the flow of the stream while the reservoir is filling, and the owner of a mill below requires continuous flow of water night and day. Bullard v. Saratoga Victory Mfg. Co. 77 N. Y. 525, Affirming 13 Hun, 43. Since, by the construction of a pond proportionate to the size of the stream, the lower

A PPEAL by defendant from a decree of the Superior Court for Worcester County in complainants' favor in a suit to enjoin the alleged wrongful interference with the flow of water in a stream. Reversed.

The facts are stated in the opinion.

Messrs. Frank Bulkeley Smith, T. H. Gage, Jr., and Frank F. Dresser, for appellant:

The benefit of a storage reservoir, arising from the "fact that the natural flow of the stream is affected by the ordinary use of a reservoir above, cannot enlarge" the plaintiffs' rights against the defendant.

Brady v. Blackinton, 113 Mass. 245; Lake-side Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81; Drake v. Hamilton Woolen Co. 99 Mass. 574; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 7 L.R.A. 613, 24 N. E. 774; Whittier v. Cochecho Mfg. Co. 9 N. H. 454, 32 Am. Dec. 382.

The owner of the upper privilege may make a reasonable use of the water, and obstruct and accumulate it in a reasonable way for the benefit of his own mill, whatever may be the effect on the owner below.

Whitney v. Wheeler Cotton Mills, supra; Tourtellot v. Phelps, 4 Gray, 370; Gould v. Boston Duck Co. 13 Gray, 451; Wamesit Power Co. v. Sterling Mills, 158 Mass. 448, 33 N. E. 503; Hazard Powder Co. v. Somersville Mfg. Co. 78 Conn. 171, 61 Atl. 519; Drake v. Hamilton Woolen Co. and Whittier v. Cochecho Mfg. Co. supra; Weare v. Chase, 93 Me. 264, 44 Atl. 900; Brace v. Yale, 4 Allen, 393.

Evidence of custom and usage is admitted, not to control or in any way affect the natural flow of the stream, but solely and simply to show what is a reasonable use of the flow of the stream.

Hazard Powder Co. v. Somersville Mfg. Co. and Gould v. Boston Duck Co. supra.

A riparian owner is not entitled to an intermittent flow.

Hamor v. Bar Harbor Water Co. 92 Me. 364, 42 Atl. 790.

Messrs. Parker & Milton, Henry H. Fuller, and George A. Gaskill for appellees.

Knowlton, Ch. J., delivered the opinion of the court:

On Millers river in the town of Winchendon, within a distance of less than 2 miles, are six mill privileges, each occupied for manufacturing purposes. Altogether they

have a head and fall for the use of water power on their several wheels, which amounts to 98½ feet. The defendant owns the upper privilege, each of the parties plaintiff owns one of the others, and one is owned by persons who are not connected with this suit. The defendant's mills are near the head of the valley. They have a fall of 20 feet, with a mill pond covering 110 acres, containing 5,000,000 cubic feet of water for 1 foot in depth of the pond, this being something more than the entire flow of the stream for twenty-four hours. They have been used since 1846, in part for a machine shop, and in part as a cotton factory, and lately as a machine shop and a power house to furnish electricity to light the town of Winchendon. The mills of the several plaintiffs have been used still longer for different kinds of manufacturing. The valley is narrow, and descends rapidly from the defendant's mills to the westward. "The plaintiffs' mills have no substantial storage capacity in the respective mill ponds. It is only sufficient for from two to four hours' use when there is no inflow." The defendant maintains and uses, in connection with his mill, a large reservoir some miles up the stream on one of its branches, and the mill owner next above him maintains and uses two other reservoirs above his pond on the other branch of the stream. The master finds and the plaintiffs concede, what is clear upon the evidence, that no one of the parties has acquired any rights by prescription. The defendant's use of the water at his mills has always been such as he has found most convenient for his own purposes, and there is no foundation for a claim of use adverse to him.

For a long time prior to June, 1899, the usual hours for operating all of these establishments were from 7 A. M. to 6 P. M., with an hour's interval at noon. At an earlier period the mills ran eleven hours, and in all the years, from time to time when business was pressing, they were operated overtime during a part of the hours of the night. Since June, 1899, the defendant has used one of his two wheels ten hours per day for his machine shop, and the other, for a considerable part of each night, in producing electricity for lighting the town of Winchendon. From a lack of storage capacity in their ponds, much of the water used for this latter purpose has not

owner may regulate the flow to suit himself, and maintain it evenly throughout the twenty-four hours; and since each riparian owner has an equal right in the stream, and each may make a reasonable use of the water,—the test to be applied in every case is whether or not the use is reasonable in view of all the circumstances. Applying 7 L.R.A. (N.S.)

this test, it would seem that a use which was continuous and uniform throughout the twenty-four hours could not be held to be unreasonable, since, as suggested by the court in MASON v. WHITNEY, the lower proprietors, by the use of ponds, could utilize the water the same as though the upper mill did not exist.

been utilized by the plaintiffs, and they have not been able to have the entire flow of the stream for twenty-four hours come to their wheels during the ten hours which constitute their ordinary working day. This bill is brought to recover for their loss, and to obtain an injunction against a continuance by the defendant of this use.

The plaintiffs proceed upon the theory that, because of the custom and usage of mill owners on this stream, even though no prescriptive rights have been acquired, they are legally entitled to have the water come down from the defendant's mills in such a way that, without mill ponds of their own sufficient to retain any considerable amount of water, they can use the whole flow of the stream for a day of twenty-four hours, during the ten hours of the day in which they find it convenient to operate their machinery. The master has adopted this theory. The defendant made many requests for rulings in matters of law, touching this subject, which were refused or modified by the master. The defendant's request for a ruling that the natural flow of the stream may be used "in any reasonable manner required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size of the stream," the master gave with the qualification that, "in the case of ancient mills, dependent on a flow which has been established by custom and use and the wants of the community, the upper proprietor must exercise his right to the use of the water with a just regard to a like reasonable use of it by the proprietors of mills immediately below, as those rights have been established by custom and usage, and the wants of the community." The fifth request was that, "so long as the upper proprietor uses the water in a reasonable and lawful manner, and in the way best fitted to his needs and interests, he does not, by such mere user, lose any rights by prescription, and can, if a change in user becomes advantageous to him, alter and modify his user, so long as he does not impair thereby the natural flow of the stream." This the master modified by inserting after the word "interests," the words "in the absence of any acquired rights in the lower proprietors, arising out of long-established custom and usage and the wants of the community," and by adding, at the end, the words, "unless the flow has been established by long custom and usage." The thirteenth request was as follows: "If the plaintiffs have any rights in the defendant's user other than the rights common to all riparian proprietors, they must show that such rights have been gained by prescription." To this the master added the words, "or by custom or

usage extending over more than twenty years. The nature of the custom and usage established in this case appears in the body of the report." In reference to the eighteenth request, the master says, "I have based my findings on a custom and usage adopted and carried out for many years by both the plaintiffs and the defendant." In dealing with other requests, and in other parts of his report, the master refers to an established custom and usage of the plaintiffs and the defendant, in their use of this stream, which has changed the rights common to riparian proprietors upon similar streams and limited the rights which the defendant would otherwise have to a use of the water for power. This, too, when it is found and conceded that no rights have been acquired or lost by prescription. The application of the law by the master is such that the plaintiffs are now held entitled, as against the defendant, to have his mill and pond and reservoir so managed that the entire flow of the river for the twenty-four hours shall come to their mills during the ten hours of the day when they wish to run their wheels, while if it were not for the dams and reservoirs of the defendant and another proprietor further up the stream, the water would flow regularly night and day, so that during the fourteen hours of each day when their mills are not running, the plaintiffs would lose much of the flow from lack of storage capacity in their ponds. The result would be that, without having acquired any prescriptive rights, the plaintiffs could compel these upper proprietors to interrupt the natural flow of the stream every day, and retain the water until the time when the plaintiffs wished to use it.

This is a mistaken view of the law. In the absence of any prescriptive rights, the plaintiffs have no greater right against the defendant, in reference to his use of the stream, than they would have if his mills and dams and reservoir and their mills and dams had been built and used but a single month. In the latter case each would have a right to a reasonable use of the water. In determining what is reasonable for each of the parties, the nature of the stream and of the several mill privileges, its adaptability to different modes of use, the wants of the community, the custom and usage of people in the neighborhood and elsewhere in regard to the management of business, the hours of labor and the use of the water of such streams, would all be proper matters for consideration as evidence. *Tourellott v. Phelps*, 4 Gray, 370; *Gould v. Boston Duck Co.* 13 Gray, 443, 451, 453; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 390, 7 L.R.A. 613, 24 N. E. 774; *Hazard Powder*

Co. v. Somersville Mfg. Co. 78 Conn. 171, 61 Atl. 519. In the absence of rights by prescription, the only difference in the determination of such a question, between a case when the mills are all new and a case when the mills have all been running sixty years, is that, in dealing with old mills the evidence of custom and usage as to hours of labor or the methods of doing business, which in either case would include the practice of the whole community in such matters, would be enlarged by taking in, with the rest, the practice of the half dozen owners on this stream. So far as it concerns the issue in this case, there is nothing to indicate that, for the last fifty years, there has been anything different in the experience of these men from that of men and property owners generally, engaged in like pursuits. So, upon custom and usage, the material evidence would doubtless be substantially the same if the mills were new as it is now. If the plaintiffs have enjoyed gratuitously the benefit of the defendant's dam and reservoir for the storage of water for their wheels, that is not a circumstance which gives them a right to have it in like manner in the future, or which deprives him of the right to use the stream now as he could use it if his works on the stream were all new. Nor does it make it less reasonable for him to use the water now according to his interest.

So too, the rights of these plaintiffs are not enlarged by their suing jointly. The question as to each is whether the defendant is using the water unreasonably to his detriment. If the defendant were not using it at all,—if he and one or two proprietors further up should abandon their mills and take away their dams and open their reservoirs, so that the water would come down to the plaintiffs' mills in its natural flow, in the same quantity in all parts of each day of twenty-four hours,—it seems very plain that the plaintiffs would have no legal ground of complaint, although they would be able to use on their wheels, during each working day of ten hours, very much less water than they use now.

The question of chief difficulty in the case is: How far is it reasonable for a mill owner on such a stream to use the water in the nighttime, for a legitimate business which calls for power during that part of the day, although in most kinds of business power is used not more than ten hours in a day? It is a familiar fact that certain industries cannot be conducted profitably without a use of power in the nighttime. This is true of paper manufacturing, which is an important industry in Massachusetts, of producing electricity for light-

ing and for the use of street railways, of powder manufacturing, and of some other kinds of business. All kinds of legitimate business are alike entitled to the protection of the law. This is recognized in the cases which show a use of water power in the nighttime, to the detriment of proprietors who wish to use it only in the daytime. *Barrett v. Parsons*, 10 Cush. 367; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576; *Hazard Powder Co. v. Somersville Mfg. Co.* supra.

The primary right of every riparian proprietor is to have the natural and customary flow of the stream, without obstruction or change. This primary right is modified by the right of every proprietor to make a reasonable use of the water, which leaves the lower proprietor the natural flow, changed, so far as it may be, by such previous use on the stream above. If such use makes the flow more advantageous for the lower proprietor than the flow in its strictly natural state, he gets the benefit of it, as an incident of his ownership, which he may enjoy while it lasts, but not as permanent property that he can control for the future. The fact that a reasonable use by an upper proprietor leaves the flow more beneficial than the strictly natural flow to those on the stream below, may well be considered as a circumstance, so long as the condition remains, in determining what is a reasonable use for an intermediate proprietor, in reference to those further down. In this way a reservoir, reasonably constructed and used in connection with a stream, may so far affect the stream below as properly to be taken into account in passing upon the conduct of lower riparian proprietors.

We have been referred to no adjudication, and after searching we have found none, that determines how far a proprietor, under a claim of a reasonable use, may change the natural flow of a stream by appropriating its waters in the nighttime and holding them back in the daytime. In *Barrett v. Parsons*, 10 Cush. 367-372, the judge left to the jury the question whether the defendant had "used the water in a reasonable and proper manner for the regular prosecution of his business, . . . [or] had used it unreasonably, wantonly, and unnecessarily, by running his mill at unusual and unreasonable hours, and holding back the water and letting it down to the plaintiffs' works at improper times of the day and night, so that the plaintiffs were thereby deprived of the reasonable, ordinary, and proper use of their mills." The defendant had used his gristmill a great deal in the nighttime, and had let down to

the plaintiffs but little water in the daytime. A detention of water in the nighttime and an increased use of it in the daytime has often been held to be reasonable, even when it affected unfavorably a particular proprietor below. This is because it is in accordance with the usual and convenient method of transacting most kinds of manufacturing business. But reversing the method would be detrimental to the interests of most lower riparian proprietors. In all the five cases last above cited, the decision was adverse to the contention of mill owners that they could lawfully change the natural flow of a stream by using the water nights and holding it back days, to the damage of owners below. But we are of opinion that it is not unreasonable for a mill owner, if his interest requires it, to use the water of his stream in his business nights as well as days, so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. If an upper proprietor maintains, for his own purposes, a reservoir for the storage of water that falls in the wet season, to be let down into the stream in times of low water, and in such times increases the flow by letting down water, the additional quantity that so comes each day may be treated as a part of the natural flow for the twenty-four hours in determining the rights of a lower mill owner in reference to the use of other mill owners further down the stream. But the mill owner ought not to be under an obligation, against his own interest, to hold back water in the nighttime in order to enable his neighbor below to use it more profitably the next day. The lower proprietor is "entitled only to a natural flow, not to an intermittent flow." *Weare v. Chase*, 93 Me. 264-272, 44 Atl. 900, 902. We think this too plain for doubt where the stream comes to the upper proprietor with its strictly natural flow unchanged by any use above. If there is a use above which usually sends down to him most of the water in the daytime, the subject takes on difficulties. Does reasonable conduct require him to forego his own interest, in order to give the proprietor below something better than the natural flow of the stream, because it comes to him changed, in a way that would be beneficial to the lower proprietor? The general statement of the law in the decisions indicates that, in the absence of special rights acquired by grant or prescription, a riparian proprietor is entitled to nothing more or better than the natural flow of the stream. If he wishes to use all the water during a part of the day, he may provide for himself storage, or otherwise adapt his works to the conditions. We are 7 L.R.A.(N.S.)

of opinion that it is not unreasonable for a mill owner, even if the water above him is all used in the daytime, to use a part of it in his business in the nighttime, provided he leaves as much as the regular natural flow of the stream, unaffected by use, to pass by at all times during the ordinary business hours of the day. We do not say, as a matter of law, that there may not be conditions which would make it reasonable to increase or diminish such a use in the nighttime. But under the conditions that appear in this case, we think this a correct statement of what is reasonable between the parties.

Inasmuch as the use of the defendant's reservoir on the stream above is a part of his use of the stream at his mills for his own convenience, we think his entire use at the mills and at the reservoir should be considered together, in its effect upon the natural flow to the plaintiffs below, in determining the limits of the defendant's rights. That part of his use which is detrimental and that part which is beneficial to the plaintiffs, when taken together, will show how far he can go in the use of the water without invading their rights. *Elliot v. Fitchburg R. Co.* 10 Cush. 191-197, 57 Am. Dec. 85.

It is unnecessary to consider in detail the numerous exceptions that were taken. The principles above stated will enable the parties to determine their rights.

Decree reversed.

Case to stand for further hearing.

MISSOURI SUPREME COURT. (Division 1.)

SUSIE B. HARRISON, Resp't.,

v.

KANSAS CITY ELECTRIC LIGHT COMPANY, Appt.

(195 Mo. 606, 93 S. W. 951.)

Electricity—grounding current.

1. An electric light company is negligent in turning the current upon a circuit upon which it has known that the wire

Case Note.—Liability for negligence with respect to electric current as affected by concurring negligence of third person:

—The rule governing liability for negligence as affected by the concurring negligence of a third party is well stated by the court in its opinion in *HARRISON v. KANSAS CITY ELECTRIC LIGHT CO.* with reference to liability for injuries caused by an electric current, as follows: "If a defendant is negligent, and his negligence combines with that of another, or with any other independent intervening cause, he is

was grounded, without positively knowing that the trouble has been remedied, where the means to ascertain that fact are within its reach and at hand.

Master—imputed negligence of servant.

2. The negligence of the lineman of an electric light company in reporting that a circuit upon which a wire had been grounded, and which he had been sent to clear, was cleared, without having remedied the trouble, is imputable to the company.

Electricity—concurrent negligence—liability.

3. An electric light company which negligently turns a current on to a circuit having a grounded wire cannot escape liability for resulting injury to a person coming in contact with the grounded current by the fact that the injury would not have occurred except for the act of a stranger in making a second ground at another place.

Same—duty of company.

4. An electric light company cannot escape liability for the death of a person who innocently came in contact with its grounded current upon his own premises, upon the theory that it owed him no duty.

Same—proximate cause.

5. An electric light company which negligently permits its current to be grounded cannot escape liability for the death of one who innocently comes in contact with it at a point where a stranger has made another ground, on the theory that the particular injury could not have been anticipated by any reasonable man.

Instruction—assumption.

6. An instruction is not erroneous in

liable although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury."

The following cases illustrate the various applications of this doctrine:

A telephone company and an electric light company were both held liable in *Horning v. Hudson River Teleph. Co.* 111 App. Div. 122, 97 N. Y. Supp. 625, in which a fireman, in the performance of his duties, was required to remove from a lane, through which the fire engine must pass, an abandoned telephone wire which the telephone company had negligently failed to support, and was injured by an electric current transmitted into the telephone wire from an unguarded and uninsulated electric-light wire. The evidence showed that insulation and a guard wire over the electric-light wire, if kept in good condition, would have prevented the transmission of the current into the telephone wire.

And in *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L.R.A. 570, 54 Am. St. Rep. 262, 33 S. W. 426, the jury found the owners of both wires guilty of negligence,—the owner of the telephone wire in permitting that to fall and remain down, and the owner of the trolley wire in allowing the telephone wire to become charged with electricity by contact with the trolley wire. The court says: "The injury was the result 7 L.R.A.(N.S.)

assuming, in an action for injury by a grounded electric-light current, that two grounds existed, when it was conceded by both parties that to cause an accident two grounds must have existed, and the accident was established.

Same—permitting jury to determine proximate cause.

7. An instruction is not erroneous, in an action for negligent killing, as requiring the jury to determine the proximate cause of death, which informs them that, if the diversion of an electric current was the proximate cause of the death, then defendant is liable, where they have been told the facts necessary to create liability, so that a verdict for plaintiff would merely announce that such facts existed from which the law imposes the liability.

Evidence—erroneous admission—curing error.

8. Upon discovering an error in the admission of evidence, the court need not discharge the jury and award a new trial, but may cure the error by instructing the jury to disregard the testimony.

Same—improved appliances—nonprejudicial error.

9. The admission of evidence in an action against an electric light company for the death of a person because of grounded current, that there were means by which the grounded portion might have been cut out, is not prejudicial, where the company had, before turning the current into the circuit containing the ground, concluded that the ground was not located there, so that

of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable."

Similar decisions were rendered in the following cases, in which unprotected or negligently strung telephone wires came in contact with uninsulated or unguarded trolley or electric light wires, owned or controlled by a separate company, thereby causing injuries. *McKay v. Southern Bell Teleph. & Teleg. Co.* 111 Ala. 337, 31 L.R.A. 589, 56 Am. St. Rep. 59, 19 So. 695; *Jones v. Finch*, 128 Ala. 217, 29 So. 182; *Cumberland Teleph. & Teleg. Co. v. Ware*, 115 Ky. 581, 74 S. W. 289; *Economy Light & P. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *United Electric R. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; *Western U. Teleph. Co. v. State*, 82 Md. 293, 31 L.R.A. 572, 51 Am. St. Rep. 404, 33 Atl. 763.

The facts that a telephone company strung its wires above those of an electric light company, already in place, and took no steps to guard against the possibility of the wires coming into contact with each other at the crossing point; and that it strung its wires so loosely and negligently that one of them fell in a storm upon an uninsulated wire below, causing it to burn in two, one end falling into the street, so that a pedestrian came into contact with it

it would not have made use of such appliances had they been part of its equipment. Same—admissibility.

10. In an action against an electric light company for injuries caused by a grounded current evidence is not admissible that appliances existed which would enable it to cut out the grounded portion and turn the current into the remainder of the circuit, since it is not bound to adopt any particular appliance, but is required to have the appliances which it does adopt reasonably safe.

Imputed negligence.

11. The act of a boy in wrongfully grounding an electric-light current is not imputable to his father, so as to prevent a recovery against the electric company in case the father is killed by innocently coming in contact with the current, which the company negligently turns onto the circuit without employing means in its control to ascertain whether or not the ground which it has known to exist has been remedied.

(April 20, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in plaintiff's favor in an action brought to recover damages for the negligent killing of her husband. Affirmed.

The facts are stated in the opinion.

Messrs. Harkless, Cryslar, & Histed for appellant.

and was killed,—were held, in *Hebert v. Lake Charles Ice, Light, & Waterworks Co.* 111 La. 522, 64 L.R.A. 101, 100 Am. St. Rep. 505, 35 So. 731, to be no excuse to the electric light company for not keeping its wires well covered with insulation, since the falling of the telephone wire on the wire below would have been attended with no disaster but for the uninsulated condition of the latter.

The fact that a telephone company may have been negligent in leaving one of its wires suspended in a dangerous manner was held, in *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484, to constitute no defense to an electric railway company, in an action for damages for the death of a horse by a charge of electricity from the telephone wire, which had been broken through the negligence of a conductor of one of the company's cars in allowing a trolley pole to fly up against it.

Where two electric light companies by contract used the same poles, which were owned by one of them, and a lineman of the lessee company was killed by contact with a live wire of the other company which it had negligently failed to insulate, the latter company cannot escape liability on the ground of the negligence of the lessee company in failing to turn off the current, which it had the right and opportunity to do. *Standard Light & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931. 7 L.R.A. (N.S.)

Messrs. Morgan & Schibsbay and Boyle, Guthrie, & Smith, for respondent:

Persons who, for their own private gain or profit, send the dangerous agency, electricity, out into the streets and alleys of a city, are bound to use the utmost care in preventing the escape from the wires of the electrical current to the injury of others.

Geismann v. Missouri-Edison Electric Co. 173 Mo. 654, 73 S. W. 654; *Winkelman v. Kansas City Electric Light Co.* 110 Mo. App. 184, 85 S. W. 99; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Perham v. Portland Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; 1 *Thomp. Neg.* 2d ed. § 797; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L.R.A. 566, 41 Pac. 499; *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927; *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 1; *Larson v. Central R. Co.* 56 Ill. App. 263.

Such persons are bound to use the utmost care in inspecting the wires carrying the electrical current, and to remove or remedy any defects thereon, no matter how created, or by whose fault or act.

Geismann v. Missouri-Edison Electric Co.

And the failure of an electric light company to have its wires properly insulated was held, in *San Antonio Gas & Electric Co. v. Speegle* (Tex. Civ. App.) 60 S. W. 884, to be a concurring cause of an injury to a lineman of a telephone company, caused by the breaking of a wire of the latter company which he was taking down, and which fell across an uninsulated light wire, thereby rendering the electric light company liable, though, but for the defect in the wire which broke, the accident would not have happened.

A city owning an uninsulated patrol wire, fastened above electric-light wires to poles erected by an electric light company, which was not protected with guard wires, was liable to be brought into contact with the light wires by the swaying of the limbs of trees, had no supports except the insulators on the poles, and which had not been in use for about a year, was held liable, in *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, Affirmed in 165 N. Y. 619, 59 N. E. 1131, for the death of a boy who came in contact with a broken end of such wire, which was charged with a deadly current derived from the electric-light wires, although the injury would not have occurred but for the negligence of an employee of the electric light company in pulling the patrol wire down over the street.

and Winkelman v. Kansas City Electric Light Co. supra; Griffin v. United Electric Light Co. 164 Mass. 492, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675; Mitchell v. Charleston Light & P. Co. 45 S. C. 146, 31 L.R.A. 577, 32 S. E. 767; Cook v. Wilmington City Electric Co. 9 Houst. (Del.) 306, 32 Atl. 643; Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66; Leavenworth Coal Co. v. Ratchford, supra; Atlanta Consol. Street R. Co. v. Owings, 97 Ga. 663, 33 L.R.A. 798, 25 S. E. 377, 1 Thomp. Neg. 2d ed. § 802; Turton v. Powelton Electric Co. 185 Pa. 406, 39 Atl. 1053; Larson v. Central R. Co. and Haynes v. Raleigh Gas Co. supra; United Electric R. Co. v. Shelton, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778.

These duties it owes to all persons who are injured at places where they are entitled, as of right, to be for purposes of business or pleasure.

Geismann v. Missouri-Edison Electric Co. supra; Ennis v. Gray, 87 Hun, 355, 34 N. Y. Supp. 379; Griffin v. United Electric Light Co. supra; Perham v. Portland Electric Co.; McLaughlin v. Louisville Electric Light Co.; and Atlanta Consol. Street R. Co. v. Owings,—supra; Overall v. Louisville Electric Light Co. 20 Ky. L. Rep. 759, 47 S. W. 442; Giraudi v. Electric Improv. Co. supra.

A defendant who has failed to exercise ordinary care will not be excused by the fact that the injury in its manner of occurrence could not reasonably have been anticipated.

Hoepper v. Southern Hotel Co. 142 Mo. 378, 44 S. W. 257; Miller v. St. Louis, I. M. & S. R. Co. 90 Mo. 389, 2 S. W. 439; Graney v. St. Louis, I. M. & S. R. Co. 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246; Smith v. London & S. W. R. Co. L. R. 6 C. P. 20; Dixon v. Scott, 181 Ill. 116, 54 N. E. 897; 21 Am. & Eng. Enc. Law, 2d ed. p. 488.

A defendant whose negligent acts or omissions have directly contributed to plaintiff's injury will not be excused by the fact that other causes for which he was not responsible have also contributed proximately to the injury in such a manner that but for them the injury would not have happened.

Lore v. American Mfg. Co. 160 Mo. 608, 61 S. W. 678; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Musick v. Jacob Dold Packing Co. 58 Mo. App. 322; Brennan v. St. Louis, 92 Mo. 482, 2 S. W. 481; Hull v. Kansas City, 54 Mo. 598, 14 Am. Rep. 487; Waller v. Missouri, K. & T. R. Co. 59 Mo. App. 410; Meade v. Chicago, R. I. & P. R. Co. 68 Mo. App. 92; McDermott v. Hannibal 7 L.R.A. (N.S.)

& St. J. R. Co. 87 Mo. 285; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574.

Marshall, J., delivered the opinion of the court:

This is an action under the statute for \$5,000 damages for the death of plaintiff's husband, on the 24th of April, 1902, caused by an electric shock from the defendant's wire in Kansas City, Missouri. The action is by the widow. A prior action had been brought by the widow within six months after the death, in which the plaintiff suffered a nonsuit, and this action was brought within one year thereafter, as allowed by the statute. There was a judgment for the plaintiff for \$5,000, and the defendant appealed.

The issues:

The petition alleges the relation of the plaintiff to the deceased, and his death on the day stated, the fact of such prior suit, nonsuit, and the institution of this action within the statutory time, the incorporation of the defendant; that it owned a certain electric power house and electric-light circuits connected therewith in Kansas City, used by it for the purpose of lighting the streets of said city; that it was the duty of the defendant to maintain and operate the same, as far as ordinary and reasonable care would avail therefor so that the same should be in a reasonably safe condition and not liable to endanger lives and property of others. The negligence charged in the petition is as follows: "That on and for some time prior to about the 24th day of April, 1902, a certain of said arc-light circuits owned and operated by the defendant company, and known, as plaintiff is informed, as circuit No. 32, was in a dangerous and defective condition in that it was 'grounded;' that is to say, that, on account of defects in the insulation of said circuit, the wire or wires on said circuit had come into electrical contact with the earth at some place or places to plaintiff unknown, so that, upon said circuit becoming grounded at any other place or places, a heavy and dangerous volume and charge of electricity was liable to pass from said circuit to and through any person or persons who might be situated that said charge of electricity should pass through the body of such person or persons and through the earth in what is commonly known as a 'short circuit' and thereon back to said circuit through such other grounded connection or contact, to the serious or fatal injury of the person so affected, and who are liable to come into contact with the current so recklessly released and discharged from said circuit and its proper course, without knowledge or notice that said current was being so diverted and

discharged. That, by reason of said circuit being so grounded on or about and prior to April 24, 1902, at some place or places to plaintiff unknown, conditions so arose that the wire of said circuit at and near the place of residence of the plaintiff and her deceased husband came in contact with trees near and adjacent and contiguous to which the defendant had carelessly strung the wire of such circuit, so as to burn said trees, including a tree upon the premises of the plaintiff and her deceased husband; that the volume of electricity passed along the wire or wires of said circuit or circuits was such as when diverted and passed through an inferior conductor, such as the wood of trees, or the human body, would, in passing through the same, burn said wood, and injure or destroy the life of such human being or beings. That, on or about the 24th day of April, 1902, the said circuit being 'grounded' as aforesaid, at some place or places to the plaintiff unknown, and other than at the place immediately hereinafter described, upon the premises of the plaintiff and her deceased husband, Harold, the infant son of the deceased, who knew nothing of the danger of electricity, having discovered that one of the trees upon the premises of the plaintiff and her deceased husband had been burned by the contact of such tree with the wires of said circuit, which was defectively and insufficiently insulated through the carelessness and negligence of the defendant in locating same, so that same was liable to abrasion and destruction, in order to save said tree from further injury, at about the hour of 4:30 o'clock in the afternoon, connected to the wire of said circuit of the defendant, at a place where same was endangering and injuring said tree through such defective insulation, a small copper wire, and continued said copper wire into contact with the ground. That upon the said tree aforesaid there was suspended a swing for the pleasure of the plaintiff's children, constructed of a hanging loop of wire cable suspended from two points of support on a limb of said trees, and supporting a wooden seat in which said children, and others, were accustomed to swing. That said wire cable, so made into said swing, was longer than was necessary for such purpose, and the loose end thereof was wound around the limb of said tree, and down to and around the trunk of said tree, before reaching the ground. That said Harold, after so connecting said copper wire, as aforesaid, conducted the same from said tree down and around the trunk of said tree, so as to bring same in contact with the wire of said cable and bring said cable into electrical contact with the wire of said circuit. That said copper

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wire being so conducted to and into the ground, the charge of electricity discharged from said circuit passed harmlessly along and through said wire, down and into the ground and through the ground to some other place or places to the plaintiff unknown, to where the circuit was 'grounded,' back into said circuit and through the same returned to the power house of the defendant. That about the hour of 7:25 o'clock in the evening of said day, said Harold noticed that said copper wire or the wire of said circuit of the defendant was again burning said tree where same came into contact therewith, and, in an endeavor to prevent the further injury to said tree, cut off said copper wire between the ground and said tree, so as to leave said copper wire and the said wire of said cable of which said swing was constructed in electrical contact with the wire of said circuit, but without electrical connection with the ground other than through the insufficient and poor conductor which the trunk of said tree and the roots thereof made. That almost immediately thereafter the plaintiff's deceased husband came out into said yard for the proper purpose of speaking to or associating with the children playing about the same, and, in entire ignorance of the electrical connection of the cable to said swing, as aforesaid, with said circuit of the defendant, placed his hand in contact with said cable, whereupon said Harrison became part of an electrical connection between said cable and the earth, and the circuit of the defendant, at such other place or places where same had been negligently allowed to become and remain 'grounded,' so that a powerful charge of electricity passed from the wire of said circuit adjacent to said tree, through said copper wire, the said cable and the body of said Harrison, down and into the ground and through the same, through said 'grounded' current connection elsewhere, and back into the circuit of the defendant, causing the instant death of said Harrison. That the electricity of the character generated by the defendant in said power house and discharged along and over and through the said wires of said circuits will follow what is known in electrical science as the easiest or readiest conductor in preference to a non-conductor, or some other conductor over which it is compelled to pass, with greater resistance. That the wires used by said boy Harold are among the best known conductors of electricity, and that iron wire, such as said cable, is a first-class conductor of electricity, and while said cable and wire were directly connected with the ground the electricity passed directly and harmlessly through same and into the ground, but when

such copper wire was cut there was no connection except through the trunk of said tree until the person of said Harrison touched the wire of said cable, when said electricity immediately diverted itself in sufficient volume to kill said Harrison, and passed through the body of said Harrison through the ground and on as aforesaid. That the volume and character of electricity generated by defendant at said power house and discharged over and through said circuits is many times greater than the amount necessary to produce a fatal injury when discharged through the human body, all of which, as well as the tendency of said electricity to pass through the human body, if parts of the human body should come in contact with metal connected by contact with said currents, when such human body would afford the readiest conductor of said electricity to and through other conductors in a circuit through which such electricity could pass, was or should have been well known to defendant. That, long prior to the hour of 7:25 o'clock in the evening of said day, the defendant, through its officers, agents, and employees at said power house, had notice that said circuit "had been so 'grounded' that charges of electricity passing over the same were liable to be diverted and might be so diverted as to produce fatal or serious injuries to persons inadvertently coming into the course of and becoming part of the conductor in the transmission of said electricity. That, if defendant had had, as it should have had, such means and appliances as are well known to the science of electricity and to persons familiar with the operation of such power house and circuits in use at such power house, it could have promptly ascertained that said circuit had been 'grounded' and located the place or places where its said circuit was so 'grounded,' and remedied said defect and removed said dangerous condition, but, through lack of such appliances, and the carelessness of the defendant, its servants, agents, and employees, in failing to locate the places where said dangerous condition existed after it had, or should have had, notice that such dangerous conditions did exist at places on said current, such dangerous conditions were not located and remedied, but recklessly and negligently, the defendant, through its agents, servants, and employees, caused to be transmitted through and over the wires of said circuit a charge of electricity many times greater than sufficient to produce fatal injuries to a human being, whereby, and by reason of which, the plaintiff's husband met with such fatal injuries, without negligence or fault upon his part." The answer is a general denial.

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The case made is this:

The defendant is an electric light company, and is engaged in the business of lighting streets and residences of Kansas City, Missouri, and Kansas City, Kansas. It had a circuit called No. 32, which was 20 miles long. Its plant in Kansas City, Missouri, was located at what was called "Turkey Creek station." That station is 3 miles from the plaintiff's residence, which was located on Tenth street, near Woodland. Circuit No. 32 is designated as a "lamp loop" to distinguish it from the main or trunk line. Turkey Creek station runs day and night, but during the daytime the electricity for lighting arc lights on the streets is not turned on, and the plant runs for the purpose of furnishing electric lights to residences and places of business. Circuit No. 32 runs in front of the plaintiff's residence, and had been erected about a year prior to the accident. The wire was strung upon poles which stood between the curbing of the street and the sidewalk. The poles were about 25 feet high. An arm ran across the top; one wire hung on one side of the pole, and one on the other. The Harrison residence stood about 23 feet back from the street. There was a large tree standing in the yard in front of the house, and about 2 feet inside of the yard fence. The branches of the tree extended out over the sidewalk, so that the ends thereof, about the size of a lead pencil, came in contact with the arc wire of said circuit. The wires were located about 12 feet from the body of the tree. The branches of the tree that came in contact with the wire by reason of their movement by the wind had rubbed the insulation off of the wire for from 2 to 6 inches. For a month or two prior to the accident, persons living in the neighborhood had observed that at the point of contact between the branches of the tree and the electric wire in front of the Harrison residence, as also at other points where similar conditions existed, sparks or flashes of light would be thrown off from the wire when the limbs of the trees were moved by the wind, and the trees, themselves, had been injured by other branches coming in contact with the wires. The deceased had a son named Harold, who was fourteen years of age, a boy of considerable intelligence and aptness and with an inclination to experiment with electricity. Prior to the accident he had rigged up an alarm bell, worked by electricity, in the barn, back of the house, and his parents knew of that fact, and knew of his electrical proclivities. About a month prior to the accident the boy conceived the idea of tapping the defendant's wire at the point where the branches of the tree came in contact with it. On

the day of the accident he returned from school about 4:15 or 4:30 o'clock P. M. He took a copper wire, which was 35 feet long, that he had been using for the alarm bell, and made a hook about 1 foot long out of a piece of galvanized iron. He fastened the hook to the end of a stick; then he climbed the tree, went out on the limb, attached the hook to the defendant's electric wire at the point where the insulation was worn off, nailed a stick, to which the hook was attached, to the limb of the tree, attached the copper wire, which had no insulation on it, to the hook and wrapped the wire around the tree, ran it down into the ground, and thence along the edge of the sidewalk to a point near the front of the house. There was a sawing attached to one of the limbs of the tree, the ropes of which were made of steel cable about $\frac{3}{4}$ of an inch in diameter. This steel cable rope was longer than was necessary for the swing, and the loose end of it had been wrapped around the tree. The boy says that his purpose in so doing was to protect the tree from being injured by the electricity which escaped from the wire to the branch of the tree that rested against it. He says he knew the danger of undertaking to make a connection with the arc wire while the current was on, and also knew that the current was not on the wire during the daytime, nor was it on at the time he made the connection. He says he completed his scheme about 5 o'clock P. M.

During the day of the accident the defendant knew that there was trouble on this circuit No. 32, and about 2 to half-past 3, or perhaps a little later, the defendant sent out one of its linemen to find where the trouble was and to remedy it. The defendant knew that the trouble consisted in the fact that the wire was "grounded" somewhere on the line, exactly where it did not know, nor had it any means of knowing or ascertaining except by sending out a "trouble man" to locate it. The lineman took with him an instrument, called a "magneto box," for the purpose of locating where the "ground" or "grounds" existed, which caused the trouble. That instrument is attached to the wire, and is operated by a crank thereby producing a light current of electricity not sufficient to injure anyone, but enough to ring a bell. When so attached and operated, if there is a "ground," the bell will ring and indicate on which side of the box the ground exists, but will not indicate the point on the wire where the trouble is. In order to locate the exact point of trouble it is necessary for the lineman to make such experiments along the line until the point of trouble is located. The lineman left the down-town office some-
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time between 2 o'clock and 4:55 o'clock. He first said that it was between 2 and 3:30 o'clock, but afterwards said it was not until after the report was received that there was trouble on the circuit. He says it would take four or five, and not to exceed ten, minutes, to make each test; he further says that he made about 6 tests, covering about 2 miles and consuming about 40 minutes. He further says that he made the first test at Twelfth and Brooklyn streets, the second at Eleventh and Prospect, the next at Ninth and Prospect. These are all of the points at which he can definitely state that he made any tests. A record was kept and introduced in evidence showing at what time the report of trouble was received, and at what time the trouble was located and corrected. That report showed that the trouble was first reported at 4:55 P. M., and that the lineman reported circuit "No. 32 O. K. at 5:15 P. M." The lineman says that he never located the trouble, but that after making the tests aforesaid he concluded that the trouble was not on circuit No. 32, but was on the trunk line, and that in making his report at 5:15 that No. 32 was O. K., he meant that he had cleared the line so far as he was concerned,—that is, that the current of electricity could be turned on without injury to him, and that he did not thereby mean, necessarily, that he had located and remedied the trouble. The report further showed "All O. K. at 4:55 P. M., except No. 18-32 up town." Where No. 18 was or what was done with reference to it does not appear in the abstract of the record. The report further shows, as above indicated, "No. 32 O. K. at 5:15 P. M." After that report was received nothing further was done looking towards ascertaining whether the line was "clear" or whether the trouble had been remedied, but, without making any further tests, the current of electricity was turned on at 7:25 P. M. The testimony disclosed that the "voltage," meaning the force or pressure of the electricity, was 3,300 volts, and the "amperage," meaning the quantity of electricity sent over the wire under such pressure was $6\frac{1}{2}$ amperes, and that one fourth to one half of an ampere in quantity transmitted under a pressure of 1,000 volts or pressure is fatal to human life.

The deceased returned to his home only a few minutes before his death, say about 7 o'clock P. M. The boy, and some of his boy friends, were playing in the front yard. The deceased ordered his boy to go into the house and stay there, and told the other boys to go home. It had been raining that day and was quite damp. After going into the house his boy again went out in the front yard. About ten minutes before the

accident, the boy noticed that the electricity had been turned on, and that the light at Tenth and Woodland was burning, though not as brightly as usual. He further noticed that the tree aforesaid commenced to burn. The boys who had been ordered away called his attention to the fact that the tree was burning. He caught hold of the wire to pull it down, and it shocked him. He then went around the house and got an ax and chopped the wire in two about 4 feet from the ground, where it ran down on the side of the tree on the inside of the yard. He then noticed that one of the wires still continued to burn. He stood there watching it, and his father came out of the house a second time and ordered him to go in the house. The deceased then walked towards the swing and took hold of it, and was instantly killed. The boy says that from the time the current of electricity was first turned on until his father was killed there was an interval of only about fifteen minutes. The boy says he did not warn his father against taking hold of the steel rope of the swing, because he did not have time to do so, because of the excitement, and because he did not know there was any current of electricity in the steel rope. The evidence discloses, however, that copper wire is one of the best conductors of electricity that is known, and that while the wire was "grounded" the current of electricity would leave the electric wire of the defendant, pass through the copper wire into the earth at the point where it was "grounded," thence through the earth to the nearest point where there was another "ground," and thence back to the wire, and so on around the circuit. This is called "short circuiting." The evidence further discloses that a tree, a telephone, telegraph, district messenger, or other wire coming in contact with the arc wire will ground the circuit of electricity, and that a live tree, a human being, or any metallic substance is a conductor of electricity, varying somewhat in the character of the conductor; that electricity will always follow the best conductor, although some of it may be diverted from the arc wire even by a less efficient conductor. The evidence adduced by both parties further shows, and it is admitted by counsel, that where there is only one "ground" it is harmless, and that in order to produce injury there must be two "grounds," and that when there are two "grounds," if a person comes in contact with one of them, his body will form a part of the circuit through which the electricity will pass, and, if the electricity is of sufficient force and quantity, it will result in injury. Mr. Richardson, the general manager

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of the defendant, testified, on cross-examination, that, if there were two "grounds," and the wire had not been cut by the boy, as above described, but had been allowed to remain "grounded" or to lie on the ground, a current of electricity would have flowed over the copper wire, and if a man took hold of the copper wire the electricity would pass through his body.

This is a sufficient statement of the facts, and there is no substantial controversy about them. Upon this showing, the defendant claims: First, that, even conceding that there was another "ground," and that the defendant was negligent in not discovering and remedying it, nevertheless, that negligence of the defendant was not the proximate cause of the injury, but that the cutting of the copper wire by the boy was the proximate cause of the injury, and, that act having been done after the current of electricity was turned on, and when it was impossible to test the wire for "grounds," the defendant is not liable; second, that the defendant was only bound to exercise ordinary care and vigilance, that it owned no duty to the deceased, and that the injury was caused by the unexpected, unanticipated, and heretofore unheard-of extraordinary act of a trespasser, for which the defendant is not liable; third, that the court erred in giving erroneous instructions for the plaintiff; and fourth, that the court erred in admitting incompetent evidence offered by the plaintiff.

1. The first contention of the defendant is that, even conceding that there was another "ground," and that the defendant was negligent in not discovering or remedying it, nevertheless, that negligence of the defendant was not the proximate cause of the injury, but that the cutting of the copper wire by the boy was the proximate cause of the injury, and, that act having been done after the current of electricity was turned on, and when it was impossible to test the wire for "grounds," the defendant is not liable. The case has been remarkably well briefed and argued by counsel on both sides. A multiplicity of cases, both from this and other states, have been cited by counsel on both sides, and the question of proximate cause has been very thoroughly gone over. It would be impossible in a single opinion to review the cases and analyze fully the law as declared by many decisions and the text writers bearing upon this question. The proposition of law involved has been so often discussed and decided by this court that it is unnecessary to look elsewhere for authority. The law is well settled in this state that the doctrine of comparative negligence does not obtain in this state. The doctrine of concurrent neg-

ligence is firmly rooted in the jurisprudence of this state. The law is well settled in this state that "a defendant may be liable even if the accident was not caused by his sole negligence. He is liable if his negligence concurred with that of another, or with the act of God, or with an inanimate cause, and became a part of the direct and proximate cause, although not the sole cause." *Newcomb v. New York C. & H. R. R. Co.* 169 Mo., loc. cit. 422, 69 S. W. 348 et seq. and cases cited. In *Brash v. St. Louis*, 161 Mo., loc. cit. 437, 61 S. W. 808, the negligence of the city complained of combined with the act of God. *Brace, J.*, speaking for the court, quoted the rule laid down in 1 *Shearman & Redfield on Negligence*, 5th ed. § 39, as follows: "It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including 'the act of God,' or superhuman force intervening, the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that, if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the superior force which, concurring with his own negligence, produced the damage. But, if the superior force would have produced the same damage whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." And it was there said: "And this is the prevailing doctrine in this state;" citing cases. In *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653, the negligence of the city complained of consisted in permitting a small depression to remain in the street at the end of a bridge across a railroad track, which, under ordinary circumstances, would have been safe for public travel. Combined with this condition was the fact that an engine passing under the bridge suddenly emitted an unusual quantity of steam, thereby frightening the plaintiff's team and causing it to run away and injure the plaintiff. A recovery against the city was sustained on the ground that, although the act of the city in permitting the depression to remain in the street would not, ordinarily, have been productive of any injury, yet, when it combined with the other independent, intervening cause,—the emitting of steam from the engine,—it was one of the direct and proximate causes of

the injury. In *Bassett v. St. Joseph*, 53 Mo. 200, 14 Am. Rep. 446, the negligence of the city consisted in leaving an excavation adjacent to a market place. The street, exclusive of the excavation, was sufficient for ordinary passage. The plaintiff was passing along that portion of the street when a mule kicked at her. To avoid being kicked she dodged and fell into the ditch. The city was held liable notwithstanding its negligence would not ordinarily have produced the injury, but because when combined with the independent, intervening cause,—the kick of the mule,—it was one of the proximate causes of the injury. In *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481, the negligence of the city consisted in not repairing a ditch which had been washed across the street and sidewalk by the rain. The plaintiff, a three-year-old child, with her sister, thirteen years old, who was pushing a baby carriage with a baby in it, was passing along the sidewalk close to the ditch, when another little girl came up, stumbled against the plaintiff, and both fell in the ditch, and the plaintiff was injured. The city was held liable because its negligence concurred with the independent, intervening cause, and was one of the proximate causes of the injury. Many other cases in this state might be cited illustrative of the rule in reference to concurrent negligence constituting proximate cause, but the foregoing cases are sufficient to demonstrate that, if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury.

Applying these rules to the facts in judgment, the defendant must be held liable. It is conceded that, if there was only one "ground" no damage would result to a person coming in contact with the substance constituting the "grounding" of the current. Or, in this case, that, if there had been no other "ground" except that created by the son of the deceased making the connection with the arc wire, no injury would have resulted. It is conceded that there must be two "grounds" in order to produce injury. Hence it follows that there must have been some other "ground" at some other place than that made by the son of the deceased, as aforesaid. The testimony discloses that at some time after 2 P. M.—the defendant claims the fact to be that it was at 4:55 P. M.—the defendant discovered that there was a "ground" on circuit No. 32, and sent out a man to locate

it and remedy it. That man says he started at some time between 2 and half past 3 P. M. The record of the defendant, introduced in evidence, recites that: "All O. K. at 4:55 P. M., except 18-32 up town." The defendant claims that this was the time the boy made the connection with the wire aforesaid. Conceding this to be true, and conceding that the lineman started to discover the trouble at 4:55 P. M., the evidence discloses the fact to be that he made tests at only three points that he can designate, covering a space of 2 miles, and at a point other than in front of the Harrison residence. How far it was from the Harrison residence is not disclosed. The evidence shows, however, that circuit No. 32 was 20 miles long, and that the lineman only tested 2 miles thereof, and then sent in a report, "No. 32 O. K. at 5:15 P. M. The lineman says he did not discover where the trouble was, but was of opinion that it was not on circuit No. 32, but was somewhere on the trunk line. The evidence further discloses that when a test is made at the main office it will not disclose whether there is or is not more than one "ground," nor will it disclose the location of the "ground," and that those facts can only be ascertained, with the means employed by the defendant, by having tests made at different points along the line. The lineman says that in sending in that report at 5:15 P. M., he did not mean to say that, the line was "cleared;" that is, the trouble remedied, but simply meant to say that the electricity could be turned on without injury to him, as he had quit experimenting. The evidence further discloses that such tests cannot be made while the current of electricity is on the wire. After receiving the report at 5:15 P. M., the defendant, so far as this record discloses, made no further attempt to discover whether the line was "clear" before it turned on the current of electricity at 7:25 P. M.

The defendant contends that, if there was only one "ground," no damage would result to anyone, and this is conceded by the plaintiff. Upon this basis the defendant further claims that, even if it had not detected and remedied the "ground" made by the son of the deceased before it turned on the current of electricity, no damage would have ensued unless there had been some other "ground" also existing. Assuming this to be true, the question is whether the defendant was guilty of negligence in turning on the current of electricity at 7:25 P. M., without making any other tests to discover whether there was trouble on the line. It is conceded that it would only take four to five minutes to make such a test. Reduced to its last analysis, therefore, the fact is that at some time before the current of electrici-

ty was turned on, the defendant knew that there was trouble on the line,—that is, that there were one or more "grounds." It sent out one of its linemen to remedy it. That lineman did not do so. The trouble continued; the current of electricity was turned on, and the accident ensued. Whatever may have been understood by the servants and officers of the defendant as to the true meaning of the report sent in by the lineman at 5:15 P. M., the fact remains that the trouble had not been remedied, and the defendant had ample time in which to have done so, or else it should not have turned on the electricity until it knew that the trouble had been remedied. The negligence of the lineman was the negligence of the defendant, and, if he failed to report the fact that he had not discovered and remedied the trouble, his failure is imputable to the defendant. Under the circumstances, there is no escape from the conclusion that the defendant was negligent in turning on the current of electricity after it knew that there was trouble, without making a test at the main office to discover the true state of affairs, and without positively knowing that the trouble had been remedied. The fact that its negligence would not have resulted in the injury complained of except for the independent intervening negligence of the son of the deceased does not relieve the defendant from liability, for the act of the son of the deceased could not have produced the injury unless the defendant had turned on the current of electricity, nor unless there had also been a second ground somewhere else. The defendant's negligence was, therefore, a direct and proximate cause, or one of the direct and proximate causes, which concurred with the act of the son of the deceased to produce the injury, and, under the rule in this state, the defendant is liable.

2. The second contention of the defendant is that the defendant was only bound to exercise ordinary care and diligence; that it owed no duty to the deceased, and that the injury was caused by the unexpected, unanticipated, and heretofore unheard-of, extraordinary act of a trespasser, for which the defendant is not liable. The testimony discloses that never before had anyone so attempted to make a connection with an arc wire in Kansas City, Missouri, but that this defendant had had an experience of that sort with respect to the part of its system located in Kansas City, Kansas. As to this defendant, therefore, it cannot be said that the act of the son of the deceased in making the connection was an unheard-of, unprecedented act. The defendant contends that it owed no duty to the deceased. This contention is untenable. It employed one

of the most insidious and dangerous agencies known to man. Electricity is more powerful for good and for evil than any other agency known to mankind. It is the most dangerous form of peril, for it moves unseen, unheard, gives no warning, and may travel anywhere and everywhere. The defendant knew the character of the agency it employed, knew the means it employed for transmitting it for the good it would do, and knew the dangers to be apprehended from a "grounding" of its wires, and knew of the inevitable result to any person who might come in contact with that current where there were two "grounds." It knew that, unless its system was in good order, it was liable to injure some person at some time and place, or at any time or at any place, that such person came in contact with it. The point here made, that the defendant cannot be held liable because the particular injury complained of could not have been anticipated by any reasonable man, or that it would not have occurred, under common experience, was decided adversely to that contention by this court in *Hoepper v. Southern Hotel Co.* 142 Mo., loc. cit. 388, 44 S. W. 259. It was there said: "It is true, the negligent act must, in all cases, be the proximate cause of the injury in order to make the actor responsible therefor. But, if the injury follows as a direct consequence of the negligent act of omission, it cannot be said that the actor is not responsible therefor because the particular injury could not have been anticipated. A neglect to anticipate and guard against that which no reasonable man would expect to occur may not be negligence. 'If the wrong and the damage are not known by common experience to be usual in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and damage are not sufficiently conjoined or concatenated as cause and effect to support the action.' [Citing cases.] But, in case the negligence is shown, and the injurious consequences are immediate, and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual, and could not ordinarily have been foreseen." *Graney v. St. Louis, I. M. & S. R. Co.* 140 Mo. 98, 38 L.R.A. 633, 41 S. W. 246; 16 Am. & Eng. Enc. Law, p. 432, and cases cited. In *Smith v. London & S. W. R. Co.* L. R. 6 C. P. 20, it is said by Channell, B.: 'I quite agree that, where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence of negligence for the jury or not; but, when it has been determined that there is evidence of negli-

gence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.' . . . So the evidence tends to prove the negligence, and that the injury was the direct result thereof. It could make no difference whether or not defendant could have anticipated the particular injury." The same doctrine is laid down in *Graney v. St. Louis, I. M. & S. R. Co.* 140 Mo., loc. cit. 98, 38 L.R.A. 633, 41 S. W. 246; *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. 389, 2 S. W. 439; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 654, 73 S. W. 654; *Winkelman v. Kansas City Electric Light Co.* 110 Mo. App. 184, 85 S. W. 99; *Morrison v. Kansas City, St. J. & C. B. R. Co.* 27 Mo. App. 418; *Meade v. Chicago, R. I. & P. R. Co.* 68 Mo. App., loc. cit. 101. And also obtains in other jurisdictions. *Griffin v. United Electric Light Co.* 164 Mass., loc. cit. 493, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Ennis v. Gray*, 87 Hun, loc. cit. 357, 34 N. Y. Supp. 379; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63. See also 21 Am. & Eng. Enc. Law, 2d ed. pp. 487 et seq. The defendant relies upon *Fuchs v. St. Louis*, 167 Mo. 620, 57 L.R.A. 136, 67 S. W. 610; *Chandler v. Kansas City Missouri Gas Co.* 174 Mo. 321, 62 L.R.A. 474, 97 Am. St. Rep. 570, 73 S. W. 502; and *Paden v. Van Blarcom*, 181 Mo. 117, 79 S. W. 1195. Those cases, however, are easily distinguishable from the cases cited, and from the case at bar, in this, that in none of them was any act of negligence on the part of the defendant shown, or else the jury was required to find that the defendant had been negligent. Those cases are of such recent date that a close analysis thereof is not necessary to further demonstrate their inapplicability to the case at bar. In the *Fuchs Case* there was absolutely no evidence of negligence on the part of the city. In the *Chandler Case* the same was true, but the negligent act which caused the injury was solely attributable to a third person, and the defendant had no knowledge of it, and such an act had never before been experienced by it in the conduct of its business. A similar independent, intervening cause had been experienced by this defendant prior to this occasion. The *Paden Case* passed off entirely upon the theory that the court could not say, as a matter of law, whether or not the defendant was guilty of negligence under the circumstances, but that it was a question for the jury under the facts in judgment there. And the court in that case distinctly held that the decision in the *Fuchs Case* was not in conflict with anything said in that case.

3. The next contention of the defendant

is that the court erred in giving erroneous instructions for the plaintiff. The only instruction given for the plaintiff, which is set out in the abstract of the record, is as follows: "If the jury believe from the evidence that on the evening of the 24th day of April, 1902, the defendant caused to be transmitted over an electric arc-light circuit owned and operated by it, a current of electricity of such character that it was liable to be dangerous to human life, if diverted in whole or in part from the wire of such circuit; and if you further believe that the wire of such circuit at the time such current was so transmitted, if it was so transmitted, was in such condition that such circuit was liable to be diverted in whole or in part from the wire of such circuit; and if you further believe that such current was so liable to be diverted, if so liable, because the wire of such circuit was electrically connected with the ground at that time at two or more places so as to divert a sufficient volume of electricity to kill a man; and if you further believe from the evidence that, at the time the foregoing conditions existed, if they did exist, the defendant knew, or by the exercise of reasonable care and prudence could or should have known, that such condition existed, or that there was a probability of their existence; and if you further believe that it was a want of reasonable care and prudence on the part of the defendant to so transmit such current of electricity under the circumstances aforesaid as claimed by the plaintiff to have existed, and you find that each and every one of such circumstances did exist; and if you further find that, by reason of such a diversion of the whole or a part of such a current under such circumstances, if so diverted under such circumstances, the whole or a part of such diverted current passed through and into the body of Francis M. Harrison and killed him, without contributory negligence on his part, and that the diversion of such a current so transmitted was the proximate cause of the death of Francis M. Harrison, and that such death was due to the want of such ordinary care and prudence on the part of the defendant or its employees, under all the circumstances found by you to exist; and you further believe that the plaintiff on said day was the wife of said Harrison and suffered pecuniary loss from his death,—your verdict should be for the plaintiff." It is objected that this instruction is erroneous because it made the defendant responsible if the jury found that somebody was liable to divert the current, or if there was a probability that it would be diverted, or if "the current was transmitted under the circumstances claimed by the plaintiff, and thus referred the jury to the indefinite proposi-

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tion as to what the plaintiff might claim;" that it submitted to the jury the question of what was the proximate cause of the death, and that it assumed as a fact that two "grounds" existed. This criticism is not well taken. It was conceded by both parties that the current of electricity was not only liable to be dangerous to human life, but was certainly dangerous to human life if two "grounds" existed; and both sides admit that, unless two "grounds" had existed, no injury would have resulted in this case, and as an injury did result, under the concession on both sides, it follows that two "grounds" must have existed. The instruction, in speaking of the liability of the current being diverted, or of the probability of its being diverted, had reference entirely to the condition of the wire with respect to the abrasure of the insulation, which was shown to have existed for at least a month before the date of the accident, and simply required the jury to find whether or not the defendant had exercised reasonable care and prudence in ascertaining and remedying such condition if it existed, and was, therefore, unobjectionable in that respect.

The objection that it left the jury to hold the defendant liable if they found that the current was transmitted under the circumstances claimed by the plaintiff, and thus referred to the jury the indefinite proposition as to what the plaintiff might claim, arises entirely from overlooking the fact that the instruction used the word "aforesaid," and required the jury to find that the current was transmitted "under the circumstances aforesaid as claimed by the plaintiff to have existed (and you find that each and every one of such circumstances did exist). Thus the instruction referred to the prior predicates therein, and did not give the jury such a roving commission as counsel refer to. The last objection to the instruction is that it left the jury to determine the proximate cause of the death. The instruction specifies all the facts which the jury were required to find in order to make the defendant liable, and then told them that, if they found "that the diversion of such current so transmitted was the proximate cause of the death of Francis M. Harrison, and that such death was due to the want of ordinary care and prudence on the part of the defendant or its employees, under all the circumstances found by you to exist," etc. Used in this connection, after having first defined to the jury all the facts that it was necessary for them to find, in order to make the defendant liable, the use of the term "proximate cause" certainly could not have misled the jury under the facts in judgment here. The facts are practically undisputed. Under those facts the

defendant is liable. The verdict of the jury, therefore, simply announces a conclusion, as to the facts concerning which there is no dispute, and under which the law imposes a liability on the defendant. The instruction, therefore, could not have misled the jury to the defendant's prejudice, and could have had no effect upon the merits of the case, and therefore the use of the words "proximate cause" in that instruction does not constitute reversible error. But, on the contrary, the use of the term "proximate cause" in an instruction has been expressly sanctioned by this court. *Anderson v. Union Terminal R. Co.* 161 Mo., loc. cit. 428, 61 S. W. 874.

4. The last contention of the defendant is that the court erred in admitting incompetent evidence offered by the plaintiff. The testimony here claimed to have been incompetent is the testimony of the witness Newkirk, a consulting electrical and mechanical engineer, to the effect that there are well-known methods of preventing accidents like that here involved, which provide the line of wires with "loops," so that when trouble or a "grounding" is found to exist on any part of the system, that portion of the system where the trouble exists may be disconnected from the balance of the system and thereby enable the lighting company to turn on the current of electricity and furnish lights to all parts of the system except that where the difficulty or trouble exists. This witness further testified that the "magneto" employed by the defendant was not the most effective or delicate instrument for detecting trouble or "grounds" on its lines, and that it would not enable the servants of the defendant to ascertain the location of the trouble when applying the test at the main office, and that there was an instrument called a "galvanometer," which is a much more delicate instrument than the "magneto," and by which not only the question of whether there is a "ground," but also how many "grounds" exist, and the location of each, can be ascertained at the main office. At first the court, over the objection of the defendant, permitted the testimony as to the galvanometer to go in, but afterwards, on the defendant's objection, the court excluded that testimony and instructed the jury not to consider it in making up their verdict. As to the action of the trial court in first admitting and afterwards excluding the testimony as to the galvanometer, it was clearly not error. To hold otherwise would be to establish the rule of practice that when a court made a mistake and admitted incompetent testimony, and afterwards discovered that it had done so, it could not effectually correct the error by instructions to the jury, but that,

in order to remove the sting of the error, it would have to discharge the jury and award a new trial before a new venire. Such a rule could not reasonably be expected to be announced by any court. When a trial court becomes satisfied that it has erred in the admission of testimony, all that it can do is to instruct the jury to disregard it, and the presumption is that the jury did disregard it. It is not easy to perceive what injury the testimony of the witness as to the loops aforesaid did the defendant in this case. The testimony shows that the test disclosed the fact that there was trouble on circuit No. 32; that defendant sent out a lineman to locate it and correct it; that the lineman, instead of doing so, made a wholly insufficient test, and then, without fully investigating, concluded that the trouble was on the trunk line, and not on circuit No. 32. If the defendant, therefore, had had a system of such loops, the lineman would not have disconnected circuit No. 32 from the trunk line for the reason that he had concluded that the trouble did not exist on circuit No. 32. If the trouble existed on the trunk line, as the lineman concluded was the fact, it would not have been necessary to disconnect circuit No. 32, but would have been necessary to turn off the current of electricity on the trunk line. As hereinbefore pointed out, the negligence of the defendant in this case consists in its failure to ascertain, by means within its reach and at hand, whether the line was "clear" before it turned the current of electricity at 7:25 P. M., onto the trunk line, from which it was distributed to the various lamp loop lines, including No. 32.

Under the circumstances in this case, therefore, the question of whether it had or had not such loops as were described by the expert witness could have no possible bearing upon the defendant's liability, or upon the merits of this case. The law does not require the defendant, or anyone else, to adopt any particular appliances. All that the law requires is that the appliances adopted by the defendant shall be reasonably safe. If they are not, the defendant is liable. Not because it did not adopt better appliances, but because those it did adopt and use were not reasonably safe for the purposes for which they were used. The evidence of this witness as to the loops should not, therefore, have been admitted, but it is impossible that it could have had any effect whatever upon the verdict of the jury in this case. nor could it in any manner have affected the negligence of the defendant in turning on the current of electricity at 7:25 P. M. without using the tests it had to find out whether the line was "clear" or not. That was the negligence of

the defendant which produced, and would produce, the injury complained of, and which the defendant might have averted by employing the means it had. It is true that the negligence of the defendant, standing alone, would not have caused the injury without the act of the boy in making the connection with the defendant's wire. It is also true that the act of the boy in making that connection could not have caused the injury complained of without the negligence of the defendant in turning on the current of electricity without first ascertaining that the line was "clear." Thus, it required the concurrent negligence of the defendant and of the boy to produce the injury, and, as above shown, the defendant is liable, although its concurrent act was not the sole cause of the injury. And it makes no difference in this case that the boy was the son of the deceased. The legal consequence is the same as if it had been done by an entire stranger to the deceased.

For these reasons the judgment of the Circuit Court is affirmed.

All concur.

ARIZONA SUPREME COURT.

NEW YORK FOUNDLING HOSPITAL

JOHN C. GATTI.

(— Ariz. —, 79 Pac. 231.)

Habeas corpus—foreign corporation.

1. That a foreign corporation which has attempted to place children under its care

Case Note.—Recognition of right emanating from foreign power to the custody and control of a child:—The fundamental proposition on this subject is thus stated by the United States Supreme Court in *Lamar v. Micou*, 112 U. S. 470, 28 L. ed. 757, 5 Sup. Ct. Rep. 221, in its relation to the recognition of the authority of a foreign guardian,—and the principle is doubtless the same as applied to any other form of authority emanating from a foreign state or country:—"By the law of England and of this country, a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its courts."

But, while this fundamental principle is not to be lost sight of, it does not solve the difficulties of the subject. The practical question is whether, and under what circumstances, the courts of one state or country will, upon principles of comity, recognize such authority emanating from a foreign jurisdiction.
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in homes within the state has exceeded its charter authority, and that it has not complied with the provisions of the local law so as to be entitled to do business within the state, will not prevent its applying for a writ of habeas corpus to recover the custody of the children in case they are wrongfully seized by strangers.

Same—foundlings—interest of child.

2. The court will not grant the application of a foundling hospital which, through a mistake of its agents and representatives, has placed children which have come to its care in homes of filth and degradation in a distant state, to recover their custody from persons of some means and education, who, actuated by humanitarian motives, have rescued them from their unfortunate surroundings, administered to their needs, and become attached to them, so that they are willing to care for and educate them as their own, so that it appears that the change will not work for the best interests of the children.

(January 21, 1905.)

APPPLICATION for a writ of habeas corpus to secure possession of a child which was alleged to have been wrongfully seized and detained by respondent. Dismissed.

Statement by Kent, Ch. J.:

The New York Foundling Hospital, a corporation, filed its petition in this court, praying for a writ of habeas corpus to be directed to one John C. Gatti, commanding said Gatti to produce the body of William Norton, an infant, and to make return by what right he holds said infant in his possession and under his custody and control. In its application for the writ, petitioner

There was formerly a tendency to deny the foreign guardian any rights in respect to the person of the child, for the same reason that the authority of a foreign executor or administrator is denied. Thus, Judge Story (*Conflict of Laws*, § 499) said: "The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators." This statement has been frequently approved by the courts. See *Hoyt v. Sprague*, 103 U. S. 613, 36 L. ed. 585; *Re Nickals*, 21 Nev. 462, 34 Pac. 250; *Rogers v. McLean*, 31 Barb. 304; *Carr v. Wellborn*, *Dallam* (Tex.) 624.

So, in the celebrated case of *Johnstone v. Beattie*, 10 Clark & F. 42, the House of Lords, by a majority vote against a strong dissent by Lords Brougham and Campbell, refused to recognize the authority of a Scotch guardian over a ward who was personally in England.

alleged that it is a corporation organized and existing under the laws of the state of New York; that, under and by virtue of its charter, it is duly authorized and empowered to receive, and keep under its care, charge, custody, and management, children of the age of two years and under, found in the city of New York, abandoned or deserted, and left in the crib or other receptacle of petitioner for foundlings; that, by virtue of its charter, it found and received, and took under its care, charge, custody, and management, the child named in the petition; that, on or about the 1st day of October, 1904, in the exercise of its care, charge, custody, and management of said child, it placed said child in the home

of a certain person in the town of Clifton, Graham county, Arizona, to be held and cared for by said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; that, on or about the 2d day of October, 1904, the respondent unlawfully, and by means of force and violence, took possession of said child from the person to whom it was intrusted by the petitioner, and has ever since retained possession of the same, and the said child is now in the custody and under the control of the said respondent, without the consent or license of the petitioner, and against its desire, intention, and protest.

In response to the writ issued under said petition, the respondent, as directed, pro-

The statement above quoted from Story is sustained by the modern cases so far as it involves the proposition that the foreign appointment has no efficacy *ex proprio vigore*, but is not sustained by them so far as it implies that the authority of the foreign guardian will not be recognized as a matter of comity. Upon the contrary, the tendency is to recognize such authority upon principles of comity. Thus, the court, in *Lamar v. Micou*, supra, after laying down the fundamental proposition already quoted, added: "But the tendency of modern statutes and decisions is to defer to the law of the domicil, and to support the authority of the guardian appointed there." Practically, as stated in *1 Parmele's Wharton*, Confli. L. § 263a, the courts before which the question as to the care and custody of a child arises apply substantially the same principle whether the right of a foreign or domestic guardian is involved. *Prima facie* the guardian, whether domestic or foreign, is entitled to the custody of the ward; but in neither case is the right an absolute one. In either case the right of the guardian yields to the best interests of the child if they require that the latter shall be intrusted to the custody of another person. As suggested in the work just referred to, the fact that the guardian receives his appointment from a foreign state or country, and, if awarded the custody of the ward, will probably remove the latter from the jurisdiction, may, perhaps, make the court more cautious in awarding him the custody of the ward than if he were the domestic guardian, and would, with the child, remain subject to the control of the court. But, with this exception, a foreign guardian appointed at the domicil of the ward seems, for practical purposes, to stand as well before the court, so far as the custody of the ward's person is concerned, as though he had received his appointment and authority from a local tribunal. The foregoing statement of the principles governing the subject is exemplified by the following cases:

Thus, the guardian of the person of the minor, appointed on the application of the 7 L.R.A. (N.S.)

father in another state at his technical domicil, has not an absolute right to the custody of the child as against the guardian appointed at the child's actual residence; but the custody will be awarded with reference to the welfare of the child. *Kelsey v. Green*, 69 Conn. 291, 38 L.R.A. 471, 37 Atl. 679.

As a matter of comity, a guardian appointed in another state may maintain habeas corpus in New Hampshire to obtain the custody of a minor ward who is residing in the latter state with a relative. *Hanrahan v. Sears*, 72 N. H. 71, 54 Atl. 702. The court, said, in effect, that the decision of the point turns upon the question whether the child's welfare will be best promoted by taking her from her relatives, with whom she had lived for many years, and for whom she may have feelings of filial regard, and placing her in the custody of the relator, an officer appointed under the laws of Vermont; that, while the official character of the relator may have a legitimate bearing upon the question of custody, other considerations may be of controlling significance.

In *Grimes v. Butsch*, 142 Ind. 113, 41 N. E. 328, a guardian of the person of a ward, appointed in Missouri where the ward was domiciled, was held entitled to the custody of the child as against the latter's sister. The opinion shows that the foreign guardian's right was not regarded as an absolute one, and that the decision was put upon the ground that it was for the best interests of the child that his custody be awarded to the foreign guardian rather than to the sister.

A guardian appointed at the domicil of the minor has no absolute right to the custody of the latter in another state, but can never be held guilty of false imprisonment simply from the fact that he takes charge of the ward's person and removes him to the domicil. *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534, Gil. 315.

A grant to the father, of letters of guardianship over the person and property of a minor, by a court of competent jurisdiction where they are domiciled, strengthens the

duced the said child in court, and made return to the writ as follows: A motion to quash the writ was made upon the ground that the petition failed to disclose that the petitioner has any legal right to maintain the action, for the reason that the charter under which it was organized gives it no right of guardianship over the children committed to its care and custody; that its authority is limited to the reception in its institution of infants of the age of two years or under, found in the city of New York, who have been abandoned or deserted, and such as are surrendered to it under the provisions of its charter, and to keep within said institution said infants during their minority; and that said charter does not confer upon said institution the right to

make any such disposition of said children as was made by the petitioner, as set forth in its petition; and that, by making such disposition, the said petitioner has lost such power, right, and authority as may have been conferred upon it by the charter of the state of New York to retain the custody and control of said infant. The respondent, by way of plea in abatement, set up that the petitioner had no right to maintain the action, for the reason that it appears upon the face of the petition that the petitioner is a foreign corporation, and has not filed a copy of its articles of incorporation or charter, or the appointment of an agent resident within the territory, upon whom process may be served, as provided in chapter 10 of the Revised Statutes and the amend-

claim of the latter when contested beyond that jurisdiction. *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202. It was further said in this case that, where the father has been approved as a fit and proper custodian by a court of his domicile the court of another state, to which the child has been taken by a stranger, will not overthrow the father's authority, except upon a distinct issue, and upon most direct and overwhelming evidence of his unfitness.

In *Wells v. Andrews*, 60 Miss. 373, it appeared that it was the last wish of both the father and the mother of minor children domiciled in Tennessee that a certain person should take charge of them and manage their estates, and, after the death of both parents, such person received an appointment as guardian by a Tennessee court. The day he made the application the children were removed to Mississippi by their grandparents. It was held by the Mississippi supreme court that, under the circumstances, the children should be committed to the custody of the Tennessee guardian. Here, too, it is plain that the court did not regard the Tennessee guardian's right as absolute, and that the welfare of the minors was the chief consideration.

In *Nugent v. Vetzera*, L. R. 2 Eq. 704, the vice chancellor refused to interfere, upon the ground of any supposed benefit to the children, with the discretion of a guardian appointed by a foreign court of competent jurisdiction, who desired to remove his wards from England, where they had been sent for the purpose of education, in order to complete their education in their own country. The vice chancellor, however, refused to discharge an order by which the guardians had been appointed over the children in England, and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the court of his own country.

Though the power of a guardian, like that of an administrator, is local to the state in which he receives his appointment, yet he is competent to receive the property or the custody of the ward, when placed in his

hands by the courts of another state, to be taken to the state where either or both belong and in which he receives his appointment. The court must exercise its discretion in making an order to deliver over the custody of the ward to a foreign guardian, and the latter must make proof of his guardianship. *Warren v. Hofer*, 13 Ind. 167.

In *Com. ex rel. Sage v. Sage*, 160 Pa. 399, 28 Atl. 863, a habeas corpus proceeding by a father in Pennsylvania to obtain the custody of a child from the mother, it was held that the facts that the father was domiciled in New Jersey, and that, by the law of that state, he was the child's natural guardian, did not justify the awarding of the custody of the child to him without inquiring as to his fitness to have such custody.

In *Wilkins's Guardian*, 146 Pa. 585, 23 Atl. 325, the guardian of the persons of minor children, appointed in the state where they were then domiciled, without obtaining the consent of the domiciliary court, brought them to Pennsylvania, where most of their property was located; and one of their relatives was there appointed guardian of their persons. The appointment, under the circumstances being a judicious one, was upheld against the objection of the foreign guardian, the court taking the view that the domicile of the children had been changed by their removal to and residence in Pennsylvania with the consent of their foreign guardian.

A guardian appointed for an infant by a court in one state will not, on the ground of comity, be given custody of the child against its best interests by the courts of another state into which the child was taken, although the child was removed from the state where the guardian was appointed contemporaneously with, and possibly for the purpose of escaping the effect of, proceedings for the guardian's appointment. *Jones v. Bowman*, 13 Wyo. 79, 67 L.R.A. 860, 77 Pac. 439.

In the following cases, where the court in which the child was found refused to yield the custody to the foreign guardian, the decisions were controlled by the court's

ments thereto. By way of further return, respondent alleged that letters of guardianship of the person of the child named in the petition were granted to the respondent by the probate court of Graham county, Arizona, and that said respondent, under and by virtue of said letters of guardianship, has duly qualified as such guardian by taking the oath and giving the bond required by law and the order of said court, and that thereupon respondent became, was, and now is, the legally appointed and acting guardian of said child; that, upon the hearing of the application for said letters of guardianship, the petitioner appeared, and from the order of said court appointing respondent guardian as aforesaid it has taken an appeal to the district court of the second ju-

dicial district of the territory of Arizona. The respondent further made return that the child charged in the petition to be unlawfully in the custody and control of respondent is a white, Caucasian child, of the Anglo-Saxon race; that the petitioner, on or about the 1st day of October, 1904, brought the said child to the territory of Arizona, and abandoned him to the keeping of a Mexican Indian, whose name is unknown to the respondent, and who was and is financially unable properly to feed, clothe, shelter, maintain, and educate said child, and is otherwise, by reason of his race, mode of living, habits, and education, entirely unfit to have such care, control, and education of said child; that the said person to whom petitioner abandoned said child vol-

view of the best interests of the child; and it was assumed that the fact that the foreign guardian received his appointment and authority from another jurisdiction would not have prevented the court from awarding the custody of the ward to him if, under the circumstances of the case, it had been for the latter's best interests to do so. *Re Rice*, 42 Mich. 528, 4 N. W. 284; *Re Stockman*, 71 Mich. 180, 38 N. W. 876; *Foster v. Alston*, 6 How. (Miss.) 406.

In the cases thus far cited it was assumed that the court by which the foreign guardian was appointed had jurisdiction to make the appointment by reason of the child's domicile within the jurisdiction. Of course, if the court which made the appointment had no jurisdiction, the foreign guardian's authority will not be recognized, even as a matter of comity. *Grimmett v. Witherington*, 16 Ark. 377, 63 Am. Dec. 66; *Shorter v. Williams*, 74 Ga. 539; *Vennard's Succession*, 44 La. Ann. 1076, 11 So. 705.

The recognition by a court of one state or country of a provision in a decree of divorce rendered in another, awarding the custody of a child to one of the parents, is governed by a principle closely analogous to that already discussed in connection with the recognition of the authority of a foreign guardian over the person of a child.

Thus, in *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143, the court dismissed an appeal from an order in habeas corpus proceedings awarding the custody of infant children to their mother, to whose care and custody they had been intrusted by a decree of divorce rendered in another state, upon the ground that the New York court awarding the custody to the mother gave to the foreign decree, not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it.

In *Hammond v. Hammond*, 90 Ga. 527, 18 S. E. 265, it was held that a decree of divorce rendered in Alabama, by a court having jurisdiction, confiding the custody of a child to the mother, had the effect to consti-

tute her the lawful custodian in place of the father; and that the father, in order to obtain the custody of the child, must show that the mother is not a fit and proper person to rear it.

In *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946, it was held that a decree of divorce awarding the custody of the child of the marriage to the father, rendered by a court of another state or a territory having jurisdiction of the subject matter and of the parties, including the child, was *res judicata* and conclusive upon a Texas court, that the father was the proper person to have the custody of the child at the time the decree was rendered; but that such decree was not a bar to a subsequent proceeding in a court of Texas to modify it, upon proof that the situation and character of the respective parties had so changed as to render it to the interest of the child that it be committed to the care of the mother. The court further held that, while testimony of the conduct of the parties prior to the foreign decree was not admissible as substantive evidence upon the question as to which parent was entitled to the custody of the children, yet it might be admissible for the purpose of corroborating evidence of misconduct since that decree was rendered.

That a court of one state awards the custody of a child to one of the parents is not an estoppel of all future inquiry in the courts of another state, wherein the child has acquired a domicile. *People ex rel. Hickey v. Hickey*, 86 Ill. App. 20.

In *Vetterlein's Petition*, 14 R. I. 378, the court queried whether a decree of divorce rendered in another state, even if it were effective to dissolve the marriage, could have any force outside of the jurisdiction in which it was rendered so far as it affected the custody of the child. In this case, however, it was held that the court which rendered the decree did not have jurisdiction even to dissolve the marriage.

As is apparent from the case last cited, the question as to the recognition by a court of one state or country of a provision of a decree of divorce rendered in another, award-

untarily surrendered said child to certain persons, who thereupon placed said child in the care, custody, and control of respondent; that respondent is a fit person to have the care, custody, and control of said child, and that it will be to the best interest of said child that he be permitted to remain within the care, custody, and control of respondent, whose purpose and intention it is to rear, maintain, educate, and provide for said child, in all things, as though he were his own.

The motion to quash the writ was denied, and the plea in abatement was overruled. The petitioner's motion to strike was denied, and its demurrer to the return overruled.

Application for writs in sixteen other cases, involving the custody of sixteen other children, were brought by the petitioner. The petitions in those cases were similar to that filed in the case against John C. Gatti. The return in each of those cases was likewise similar to the return made in the Gatti Case. In response to the writs, the children were all produced in court. By stipulation entered into between the counsel for the petitioner and the counsel for the sev-

eral respondents, it was agreed that the proof adduced in the trial of the application for the writ of habeas corpus in the case of John C. Gatti, the pleadings, and the testimony taken, should be taken, applied to, and considered by the court as filed, taken, and applied in each of the other cases for writs of habeas corpus brought by the petitioner, and that each of said cases should abide the result of the determination of the case of John C. Gatti. The case was thereupon tried upon the issues of fact raised by the petition, the return, and an amended traverse to the return filed by the petitioner.

The testimony was heard in open court, before the full bench, and, in accordance with the stipulation, was permitted to embrace all the facts deemed relevant and material to all the cases before the court. The testimony and evidence show the following facts:

The New York Foundling Hospital is a corporation organized and existing under the laws of the state of New York, for the purpose of caring for abandoned and deserted infants found in the city of New York, and such as may be voluntarily surrendered to

ing the custody of a child to one of the parties, is very frequently complicated by the question as to the jurisdiction of the court which rendered the decree. As a general rule, at least, anything which shows that the court which rendered the decree was without jurisdiction to dissolve the marriage will negative jurisdiction to award the custody of a child of the marriage, and will therefore deprive the provision awarding the custody of the child of any effect in another state or country. It is thus apparent that the recognition by a court of one state or country of a provision awarding the custody of a child in a decree of divorce rendered in another will frequently involve the vexed question as to the jurisdiction to render a divorce upon constructive service against a nonresident. That general question is treated in a note in 59 L.R.A. 165, and it is, of course, impossible to consider it here. It may be noted in this connection, however, that, even conceding the jurisdiction of a court under such circumstances to render a decree of divorce dissolving the marriage, it does not necessarily follow that the court will have jurisdiction to award the custody of a child of the marriage if the child, at the time of the decree, was outside of the state in which the same was rendered.

In *Wakefield v. Ives*, 35 Iowa, 238, a decree of divorce rendered in another state, though upon constructive service against a nonresident, was held conclusive upon the parties, unless reversed, modified, or set aside for cause shown to the jurisdiction, in a habeas corpus proceeding in Iowa for the custody of the child, which was awarded to the mother by the decree; 7 L.R.A. (N.S.)

it appearing that the child was born in the state where the decree was rendered, and was living there at the time the decree was rendered. In *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, however, it was held that, while a decree of divorce rendered in another state upon constructive service against the defendant was valid and entitled to recognition in Iowa, so far as the status of the husband and wife were concerned, yet it was without jurisdiction and not entitled to recognition so far as it attempted to fix the custody of the minor children who at the time of the divorce were living with the wife in Iowa. *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779, is to the same effect as the last case. So the court, in *De la Montanya v. De la Montanya*, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345, held that, even upon the assumption that jurisdiction to dissolve the marriage relation might be obtained upon constructive service against the husband, was domiciled within the state but was absent therefrom, jurisdiction could not be thus acquired for the purpose of awarding to the mother the custody of the children who were with the father.

The conclusion reached in the last three cases, that the decree of divorce rendered in the other state was not entitled to recognition so far as it affected the custody of the child, would, of course, have been true *a fortiori* if it had been assumed, as many courts do assume, that the foreign court did not have jurisdiction even to dissolve the marriage. Other cases in point on the subject of this note are sufficiently discussed in the opinion in the reported case.

it, of the age of two years or under; the act amending its charter providing that it should be under the care, management, and control of the religious order known as the "Sisters of Charity." While the act amending the charter of the hospital does not, in terms, authorize the institution so to do, it is shown that it has been, from the organization of the hospital, the practice of its managers to place infants of suitable age in homes within and without the state of New York, to be cared for, reared, supported, and educated in such homes by the persons to whom they are given, and that it so places some 450 children each year, and that the hospital authorities retain the right to visit such homes and to maintain a supervision over said children until they become of age. The evidence does not disclose the nature or extent of this supervision, nor the method by which it is exercised.

During the summer of 1904 the hospital authorities received a letter from a priest temporarily in charge of the parish of Clifton and Morenci, requesting that a certain number of children be sent from the institution to Clifton and Morenci, to be placed within the homes of certain of his parishioners, who were represented by said priest to be of the Spanish race, but to be persons who spoke the English language; that it was the desire of these people that only children of fair complexion be sent. In response to the application, and upon the representations made by the priest, 40 children were sent by the petitioner, under the charge of Sister Anna Michella and two other Sisters of Charity, and an agent by the name of Swayne, consigned to the persons whose names had been previously supplied by the priest. These children were of the Caucasian race, and, as requested by the said priest, chosen from among those in the institution who were fairest and lightest in complexion. They were all children of unusual beauty and attractiveness. Their ages were from eighteen months to five years. To the clothing of each child was attached a tag, giving the band number of each child, the name of the person to whom consigned, and the name and date of birth of the child. To each person to whom a child was assigned was sent a letter, signed by the sister superior, requesting that the consignee, within a week after the reception of the child, fill out a blank which was inclosed, containing the name of the child, the name of the foster parents in full, the business occupation and the postoffice address of such foster parents, and forward the same to the hospital authorities. The letter also requested that the person to whom each child was assigned should write yearly, about the 1st of May, how the child was progressing,

and giving other items of interest. On the evening of October 1, 1904, the children, in charge of said sisters and agent, arrived in Clifton in a special car. It having become a matter of notoriety in Clifton that a number of children were to arrive, to be distributed to Mexican families, a crowd of Mexicans gathered at the station on the arrival of the train, together with a few American women of good families; the latter being attracted by curiosity and a desire to see the children, who, they supposed, were Mexicans. The children consigned to the persons in Clifton were taken from the car by those in charge of them, the Americans present assisting in taking them out. The latter were told by the agent that no disposition of the children to the Mexican families would be made that night, and, on being asked by one of the American women, he said that in the morning an opportunity would be given her to make an application for one of the children. Upon the arrival of the train, the priest came into the car, and Sister Anna Michella then asked him what sort of people they were, to whom the children were to be allotted. He thereupon said that they were all good American citizens, moral, and had no children of their own, and that the homes were all that could be wished for. Having noticed that some of the people were not as fair in color as she had hoped for and expected, the sister asked him if there would be any half-breeds among them, and he said, "No." She asked him how the people lived, and he replied that they lived in frame houses. She then stated to him that it was the rule of the home that the children were only placed out on trial until such time as the homes could be visited by the sisters, and that, if it were found that any of the homes were not as expected, the children would be removed. The children to be left at Clifton were taken to the priest's house, and 15 of them, under the supervision of the priest, were turned over that night to the persons to whom they were consigned. No visit to or examination of the homes of these people was made at any time, either by the agent, Swayne, the sisters in charge, or anyone, on behalf of the petitioner. They relied entirely upon the statement of the priest.

The evidence establishes, without contradiction, that the persons to whom the children were given, as assigned, both in Clifton and Morenci, were wholly unfit to be intrusted with them; that they were, with possibly one or two exceptions, of the lowest class of half-breed Mexican Indians; that they were impecunious, illiterate, unacquainted with the English language, vicious, and, in several instances, prostitutes and persons of notoriously bad character; that

their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs; that many of them had children of their own, whom they were unable properly to support. Sister Anna Michella, who was intrusted with the matter of carrying out the instructions of the hospital authorities, was so struck by the unfitness of these people that in three instances she refused to allow the children to be delivered, and in other instances, as testified to by a witness, gave them up "with tears streaming from her eyes;" and from her own testimony it appears that she was not satisfied with the people to whom they were to be delivered, but that she felt she could not override the authority of the priest.

On the morning of the 2d of October, it became generally known to the American residents of Clifton that the children had been distributed the night before to these people. Much indignation was immediately aroused, and an informal conference of citizens was held to discuss the matter of the distribution of the children which had been made. A committee was appointed to go to Morenci and ascertain from the priest and the agent, Swayne, their purposes, and to inform them as to the feeling excited among the Americans over the distribution of these white children to these half-breed Indian families. This committee was composed of one Jeff Dunagan, a deputy sheriff, and one Thomas Simpson. The committee left Clifton about 1 o'clock in the afternoon, and arrived in Morenci shortly after 2 o'clock in the afternoon. They immediately went to see Mr. Mills, the superintendent of the copper company operating at that place,—one of the leading citizens of the town,—and, in company with him, went in search of the agent, Swayne, whom they found at the hotel. Dunagan then stated to the agent the feeling which had been aroused in Clifton, their purpose in visiting Morenci, and asked him what he would do in the matter. Both Dunagan and Simpson testified that in response to their inquiries the agent, Swayne, said that he knew his business, and did not propose to be dictated to by the people; that the children "had been placed, and would stay placed." The testimony of Swayne qualifies the statements of Dunagan and Simpson as to what was said by him on that occasion. But, whatever may have been the precise reply made by Swayne, it is not disputed that Dunagan and Simpson telephoned the information to the people in Clifton that they had seen Swayne, and that his reply was that he would not do anything; that the children had been placed, and would stay placed. Upon the receipt in Clifton of this information so telephoned, a

meeting of the citizens was held, and a committee of 25 persons was named to collect the children from the people to whom they had been consigned, and to bring them to the principal hotel of the place. The members of the committee then visited the various homes of the persons having possession of the children, and stated to the latter that they had been sent by the American residents to take the children from their possession. In each instance the children, without protest, were voluntarily surrendered, and were thereupon taken to the hotel.

Upon the arrival of the train in Clifton, all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from these people, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of coarse Mexican beans, chilis, watermelons, and other improper food which had been fed them, and in some instances from the effect of beer and whisky that had been given them to drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them, and secured medical care and attention for them. On the next day the children were given to the several respondents in these cases, who have since had them in their care, custody, and control.

The agent, Swayne, and the priest, on the night of October 2d returned with Dunagan and Simpson to Clifton, arriving there in the early morning. Citizens to the number of 200 or 300 had assembled, and were waiting for their return. At this meeting much excitement was manifested, but no act of violence was done at that or any other time. Some threats, however, of a general character, were made by certain persons against the agent, Swayne. Both Swayne and the priest made a statement of their position at this meeting. Swayne at that time was apprehensive that he might receive bodily harm. In his statement at the meeting he said that the children were placed temporarily in charge of the people to whom they had been consigned, but the understanding was that the sisters were to remain for a matter of two or three weeks, and, if it were found by them that any of the children were placed in improper homes, they would be taken from such homes and replaced. He protested against the taking of the children by the American residents, and neither by his consent, nor that of the sisters, were the children either taken from the homes in which they had been placed or given to the respondents. On the next day other meetings were held, at which both the priest and Swayne were present. The

Morenci children were not given up to the sisters or the agent by the people who had taken them in charge, for the reason that they feared, if so returned, the children might be again placed in equally unfit homes of Mexican Indians elsewhere. In Morenci, after the distribution of the children, and after the facts had become known, the same indignation was aroused among the American citizens, and much the same course was pursued as in Clifton. Mr. Mills, in company with others, called upon the sisters and upon Agent Swayne, and remonstrated with them against permitting the children to remain with the people to whom they had been distributed. As a result of these remonstrances, and a statement by Mr. Mills that the American residents of Morenci would not suffer the children so to remain, the priest and the agent, Swayne, visited the homes of the Mexicans having the children, and obtained a surrender of them, and brought them to the hotel; and these children, with the exception of three, who were turned over, at the request of Dunagan, to be distributed among American residents, were subsequently taken back by the sisters and the agent to the East, and there placed in homes. It is shown by the testimony of Sister Anna and the agent, Swayne, that they would not have given the three Morenci children to Dunagan, except that they then believed that the people of Morenci would not permit any of the children to be taken away by them.

It is clearly established by the proof in the case, and it is not disputed, that each of the respondents is a fit and proper person to have the care, custody, and control of the children; that they are people of sufficient means properly to care for and educate the children, and that they are fit persons, by reason of their character, standing, and age, to have and maintain such care, custody, and control; that, without exception, they have become attached to the children, and the children have become attached to them; and that each desires to retain the particular child which he has, in order that he may rear the same as one of his own household.

On the 16th of October, applications were made by the respondents to the probate court of Graham county, Arizona, for letters of guardianship of the person of the child which each possessed. Hearings were had, at which this petitioner was represented by counsel, and in each instance letters of guardianship were granted in accordance with said application, and each of said respondents duly qualified as such guardian. Thereupon this petitioner took an appeal from the order granting said letters of guardianship in each case to the district 7 L.R.A. (N.S.)

court of Graham county. Pending said appeals these petitions were filed, and in response to the writs the children were brought before this court.

Messrs. Eugene S. Ives and Bennett & Williams for petitioner.

Messrs. W. C. McFarland and Bennett & Bennett for respondent.

Mr. Frederick S. Nave, *amicus curiæ*.

Kent, Ch. J., delivered the opinion of the court:

This proceeding, though not presenting questions difficult of determination, or points of law that are novel, is unusual in many of its features, and is important as determinative of the disposition and welfare of a number of little children, ignorant of the contest that is being carried on in regard to them. Our decision will determine the question of their environment, the circumstances under which they shall be brought up, the foster parents and homes they are to have, and will affect their future probably to a greater degree than any one circumstance that can now come into their lives. The importance to them of a proper determination of this proceeding has caused us to adopt the unusual procedure of hearing the evidence orally before the full bench, and we deem it proper, although the case has only in the past few days been closed, to determine the matter now, while all the parties concerned are before the court, and to state the facts as we find them and our conclusions somewhat at length, although opportunity has not been given to formulate them other than hastily.

The question presented for our determination primarily is, What disposition of these children will be for their best interests? They are brought before us by the petitioner, claiming its legal right to their custody. The respondents appear and claim their custody, alleging also a legal right. Whether a legal right exists, either on the one side or the other, such right is not conclusive upon us; and, while it is properly a factor to be taken into consideration in determining the welfare of the children, such welfare is the controlling, vital, determinative fact.

The supreme court of Massachusetts, with that clearness of diction so frequently characteristic of its opinions, has, in the case of Woodworth v. Spring, 4 Allen, 321,—the parent case, often cited and followed,—so fully covered the law upon this subject that we deem it desirable to quote here the greater portion of that opinion. Speaking through Mr. Chief Justice Bigelow, the court in that case said: "The child whose custody is in controversy in this case is legally

domiciled in the state of Illinois. That was his domicil of origin, and, as he has had hitherto no legal capacity to acquire a new one, and as the guardian appointed in the place of his origin has never intended to change the domicil of his ward, that of his birth still continues. Story, Conf. L. § 46. In determining the question of his legal custody in this commonwealth, he is therefore to be regarded as a foreign child who is lawfully within the jurisdiction of this state, having been brought within its limits not forcibly or clandestinely, but with his own consent and with that of the petitioner, his duly appointed guardian under the laws of Illinois, who had the lawful custody of his person in that state. So much seems to be clear, and, if the right to the possession and control of the person of the child depended on his domicil, the right of the petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another state, and that he has never, by an act or election of his own or of his guardian, obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens while they are residing on the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other states and countries, but *ex proprio rigore* they cannot have any extraterritorial force or operation. The question whether a person within the jurisdiction of a state can be removed therefrom depends not on the laws of the place whence he came or in which he may have his legal domicil, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found . . . The comity of a state will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction. Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* 7 L.R.A. (N.S.)

of a foreign parent over his child is not that which is vested in him by the laws of the place of his domicil, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority. These well-settled principles are founded on the necessity of securing and preserving to every state the exclusive sovereignty and jurisdiction within its own territory, and avoiding the confusion and conflict of rights and remedies which would ensue from attempting to give extraterritorial effect to the varying laws of different countries. *Statuta suo cluduntur territorio, nec ultra territorium disponunt*. Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded. It results from these principles that persons exercising offices and trusts with which they are clothed by virtue of the laws of a particular state or country cannot undertake to transfer their power or capacity to act, so as to control persons or property situated beyond the limits of the jurisdiction of the government or sovereignty from which their authority is derived. An administrator appointed under the laws of a foreign state cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another state exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with the office. Story, Conf. L. § 499. . . . So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth by virtue of his appointment as guardian in the state of Illinois, it is not supported either on principle or authority. He cannot assert his tutorial power *de jure* in our courts or within our territory. But it by no means follows that his claim to the care of the child and the control of his person, and to the privilege of removing him from this commonwealth, is to be absolutely denied. On the contrary, it is the duty of the courts of this state, in the exercise of that comity which recognizes the laws of other states when they are consistent with and in harmony with our own, to consider the status of guardian which the petitioner holds under the laws of another state as an important element in determining with whom the custody of the child is to continue. It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If

such were the rule, a child domiciled out of the state, who was sent hither for purposes of education, or came within the state by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicil, and thus escape or be taken out of all legitimate care and custody. But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another state as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly states having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. And, if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person. . . . Nor can we see that the appointment of a guardian over the minor by the probate court in this commonwealth operates to bar any decree by this court in favor of the foreign guardian, awarding to him the custody of his ward. Such an appointment might be expedient and proper for the purpose of clothing someone in this commonwealth with authority over the person of an infant for his protection and security against any unauthorized interference or control. But it certainly would not conclusively settle his permanent status or condition, so long as he remained an infant, or prevent his being removed from the commonwealth by the guardian appointed in the place of his domicil, if the interests and welfare of the ward rendered such removal expedient or necessary. No doubt, so long as the child continues within this jurisdiction, the guardian appointed in the courts of this state would have the exclusive right to the custody of his person. But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicil of the infant. The jurisdiction of this court to decide, on habeas corpus or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. . . . The result is that neither of the

parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child, as a predominant consideration, to whose custody he shall be committed."

It will be noted that the case from which we have quoted differs from the proceeding before us, in that in the Massachusetts case the child was in that jurisdiction without the intent of its guardian to change its domicil to that state, while here the still stronger reason exists for following the doctrine enunciated, in that the petitioner, in the exercise of its custody and control over the children, voluntarily brought them to this jurisdiction, with the conceded intention of changing their domicil by placing them in the homes in this territory it then believed to be suitable ones. Following the law as we find it,—and with it we are in full accord,—we do not deem it important to the main issue to be decided to pass upon the contention of the respondents that the charter of the petitioner gives it no right either to place these children in homes, or to reclaim them for any cause after they have been so placed; that the petitioner has no rights of guardianship; that whatever rights the petitioner has have no extraterritorial force, and can avail such institution nothing outside the state of New York; that, if the petitioner has a right to place such children in homes, then admittedly it is a part of its business, and, in placing these children in the homes here, it has been carrying on such business in this territory, and, having done so without complying with the territorial laws respecting the filing of its articles and the appointment of an agent, it cannot now, under our law, maintain this proceeding, founded on such business so done here. If the subject-matter of this proceeding were other than that of the custody of children, the legal propositions advanced by the respondents would merit careful attention; but in this proceeding it is sufficient to say that we do not recognize any of them as a bar to the proceeding brought by the petitioner, and that we recognize its right to present this application, and the power of the court under this application to award the petitioner the relief it seeks, if it be for the best interests of the children so to do. Similarly, it is not necessary for us to determine whether the petitioner is correct in its position that the letters of guardianship issued to the respondents by the probate court of Graham county give the respondents no legal right to the custody of the children, for the rea-

son that, an appeal having been taken to the district court, where a trial *de novo* must be had, such appeal vacates the order of appointment and the letters issued thereunder, for, if the letters be valid, and the respondents the appointed guardian thereunder, such fact is in no way controlling upon us, and is but one of the surrounding circumstances at which we should look in the interests of the children.

We hold, therefore, that, under the facts as we find them, neither the petitioner nor the respondents have any such legal claim as authorizes us for that reason to award to either of the parties the care and custody of these children. We have, then, to decide what disposition must be made of the children, to subserve best their welfare. The petitioner has frankly conceded that a great blunder was committed in the consignment and delivery of the children to these degraded half-breed Indians. The evidence satisfies us that it was an unintentional blunder on the part of the institution, and was caused by the misleading and inaccurate report of the local priest, who was not connected with the institution, and was a foreigner and unacquainted with existing conditions; that such blunder was not remedied at the time because of the tactless stubbornness of the agent, and the feeling of the sister in charge that she must bow to the authority of the priest, who insisted upon such disposition. We recognize the desire of the institution to right now, and to right itself, the wrong done these children, and to secure for them now suitable homes to be chosen by it, and, with the record of its great service to humanity in the past, we have no doubt of its purpose and ability to do so; but as, in the full light of the history of this transaction, shown by the evidence adduced at the trial, of which the institution so far away can hitherto have had but partial knowledge, it appears that the mistake, as originally made, was made by one not connected with the petitioner, and that the ultimate purpose of the institution—that of finding suitable homes for their children—has in this instance already been accomplished, we do not believe that the best interests of these children will be promoted by allowing the petitioner to adopt the course which it desires.

The counsel for petitioner has eloquently argued to us that the interests of these children will best be subserved by allowing this institution to take them to the East, and there place them in homes far removed from the knowledge of their antecedents, which by reason of the recent events has become so general where the respondents live. This argument would have great weight if we could be led to believe that a mere change

of foster parentage would insure a condition of ignorance of the circumstances of their birth and desertion, either in the children when they come to years of discretion, or in the friends and families of their adoption. There can be, at most, but a chance that such would be the result. As it is, these present foster parents—persons of some means and education—from the day when, with humanitarian impulse, and actuated by motives of sympathy for their pitiful condition, they assisted in the rescue of these little children from the evil into which they had fallen, down to the time of their attendance at this trial, at cost of much time and money, in their loving care and attention, have shown that more than ordinary ties of affection bind them to these children, and that in no other homes that can be found for them are they so likely to fare as well. We feel that it is for their best interests that no change be made in their custody, and that, if anywhere, here in the changing West, the land of opportunity and hope, these children, as they grow to manhood and womanhood, will have the fullest opportunity that it is possible for them to have to be judged, not upon the unfortunate condition of birth, but upon the record they themselves shall make, and the character they shall develop.

The writ will be dismissed in this and the other cases.

Sloan, Doan, and Davis, JJ., concur.

Appeal dismissed by Supreme Court of United States December 3, 1906.

NEBRASKA SUPREME COURT.

WILLIAM KINKEAD, Plff. in Err.,
v.

C. W. TURGEON et al.

(— Neb. —, 109 N. W. 744.)

Common law—adoption.

1. By statute so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States or the Constitution and statutes of this state is in force in this state.

Headnotes by LETTON, J.

Note.—As shown in the note to the above case upon the first hearing, which is reported in 1 L.R.A.(N.S.) 762, the opinion now adopted by the court is based on sound principle, and, in view of the statutory adoption of the common law, it seems to be the only conclusion that could have been reached by the court.

Waters—title to bed.

2. Under the common law, a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation; and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law.

Same.

3. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States.

Same—leaving bed.

4. Where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters as far as the thread of the stream, and may maintain ejectment to oust squatters within such limits.

(November 10, 1906.)

AN APPLICATION for a rehearing of a writ of error to the District Court for Dakota County to review a judgment in favor of defendants in an action brought to recover possession of certain real estate in which the judgment of the lower court had been affirmed. Judgment reversed.

The statement of facts and argument of counsel appear in the report of the case on former hearing, 1 L.R.A.(N.S.) 762.

Letton, J., delivered the opinion of the court:

The facts in this case are set forth in a former opinion by Oldham, C., reported in 1 L.R.A.(N.S.) 762, 104 N. W. 1062. On account of the fact that at the former hearing the commissioner was not favored with an oral argument of the case; and, further, for the reason that the question involved is of great public importance, a rehearing was allowed, and the case is again presented for consideration. As was pointed out in the former opinion, the question presented is here for the first time, though cases involving the rights of riparian owners to lands formed by accretion as alluvium have heretofore been considered by the court, and in deciding some of these cases certain expressions of opinion have been incidentally made by the writers of the several opinions upon the question here presented. In none of them, however, was the determination of this question necessary to the disposition of the case, nor was any argument made or authorities presented upon the point. In *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 802, 64 S. W. 239, the writer 7 L.R.A.(N.S.)

of the opinion indicates his personal views upon this question, but, since the case expressly holds that the Republican river is not a navigable stream, the expression was purely *obiter*. In *Crawford Co. v. Hathaway* (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781, opinion by Holcomb, J., the writer of the opinion says: "Whether the common-law rule fixing the rights of riparian proprietors applies to the larger streams of the state such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case where the subject is fairly presented and considered after opportunity for thorough investigation aided by the researches and arguments of counsel." It will be seen, therefore, that we approach the question unhampered by any previous adjudication.

There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question. From a somewhat extended examination of the various opinions, the writer believes that much of the confusion has resulted partly from a mistaken idea as to what the Supreme Court of the United States has decided upon the question, partly from an idea that meander lines in maps of original surveys limited and bounded the estate of the riparian owner by the bank of the stream, and partly from a mistaken idea of the necessities of the case, based upon the differences in length, volume, and navigability of the great rivers of America above tide water as compared with the inconsiderable extent of those English rivers which are navigable both above and below the flow of the tide. See *Mobile v. Eslava*, 9 Port. (Ala.) 578, 33 Am. Dec. 325; *McManus v. Carmichael*, 3 Iowa, 56; *Cooley v. Golden*, 117 Mo. 33, 21 L.R.A. 300, 23 S. W. 100. The statute of this state provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted and declared to be the law within said territory." *Cobbey's Anno. Stat.* 1903. § 6950. In this connection we have said: "The power of the courts to declare established doctrines of the common law inapplicable to this state should be used somewhat sparingly, and its exercise is not to be justified unless the inapplicability of the rule is general, extending to the whole or

the greater part of the state, or at least to an area capable of a definite judicial ascertainment. . . . The common-law rules as to the rights and duties of riparian owners are in force in every part of the state except as altered or modified by statutes." *Meng v. Coffee*, 67 Neb. 500, 60 L.R.A. 910, 108 Am. St. Rep. 697, 93 N. W. 713; *Slatery v. Harley*, 58 Neb. 575, 79 N. W. 151. The statutory provision above set forth has been in force in the territory and state of Nebraska for over fifty years, and during that period of more than half a century the courts have declared the common law inapplicable in but few instances, and in several of the instances that portion of the common law held inapplicable to our changed conditions has been that part thereof consisting of statutes enacted long before the American Revolution. *Meng v. Coffee*, supra. The cases in which the applicability of the common law as to the rights of riparian owners has been challenged heretofore in this state have all been concerned with the subject of the rights of the riparian owner to the unimpaired use of the water in the stream in resistance to a right claimed by appropriators to take it for purposes of irrigation or power, and the language used in *Meng v. Coffee*, supra, and other cases dealing with the same subject, while declaring as a general rule the supremacy of the common-law doctrine, is hardly applicable upon the question here presented. For, when deciding that the right of the riparian owner to the use of the running water in a stream was superior to the right of a person seeking to divert the water from the stream for irrigation purposes, it can hardly be said that the court had in mind the question here presented as to the right of a riparian owner to an abandoned river bed of a navigable stream. We think the question, therefore, must be considered open and not settled by the prior decisions. They are worthy of consideration, however, and must be given weight as determining the question of the rejection of the common-law rule.

The questions, then, necessary for determination in this case, are: First, What is the common law of England as to the rights of riparian proprietors in such a case as this? and, second, Are the provisions of the common law applicable, and, if applicable, are they in any way inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed by the legislature of this state? These being the questions presented, it is obvious that the weight to be attached to the opinions of the courts of other states upon the question of the rights of riparian propri-

etors in an abandoned river bed depends upon how far the Constitution and statutes of such state correspond with those of this state, as well as upon the persuasiveness of the reasoning set forth in the opinions.

Under the common law of England the title to the bed of the sea below high-water mark, and to the bed of all rivers as far as the flow of the tide extended, was in the Crown, but the riparian owners of all freshwater rivers above the ebb and flow of the tide, whether navigable or non-navigable, where the river formed the boundary between adjoining proprietors, was in the riparian owner to the thread of the stream. Lord Hale, *De Jure Maris*, Hargrave's Law Tracts, 5; *King v. Wharton*, 12 Mod. 510; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Farnham, Waters*, § 48; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 549. Chancellor Kent says: "The right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; they are *juris publici*, except that the proprietors adjoining such rivers own the soil, *ad filum aquæ*. But grants of land, bounded on rivers, or upon the margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway. The proprietors of the adjoining banks have a right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement." 3 Kent, Com. p. 427. This also is the rule of the civil law. *Ware, Roman Water Law*, §§ 22, 94. There appears, then, to be no controversy as to what constitutes the common law of England in regard to fresh waters or navigable rivers above the flow of the tide. Some of the cases in this country fail to draw a distinction between the rule of the common law with reference to rivers which are navigable in fact above the flow of the tide, and those navigable only where the tide flows, and adopted the idea that by the common law no rivers were navigable, or considered navigable, in law, except those in which the tide rose and fell. Comparing, then, the diminutive size and length and volume of the rivers of England with the magnificent waterways of this country, it was held that the common law as to navigable rivers was inapplicable to the situation in this country, and that our great rivers, which are navigable in fact for hundreds or perhaps thousands of miles,

are to be treated in law as were navigable rivers of England, meaning thereby the rivers in which the flow of the tide was perceptible. Much reasoning has been indulged in, based upon the apparent disproportion of the rivers of England and America, to show the necessity of abrogating the common-law rule on account of the actual navigability of our rivers above tide water. However, the rule of the common law has been adopted in Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, partly in New York, and in Ohio, South Carolina, and Wisconsin. It is rejected in Pennsylvania, Virginia, North Carolina, Alabama, Florida, Texas, Tennessee, Iowa, Kansas, Minnesota, Missouri, Oregon, Nevada, and California. In some of the states which reject the rule the defection is based upon the system of land surveys of the United States, it being held that where, in the original survey, the boundary next the stream is meandered, the government has parted with its title only to the extent of the meander line, and has reserved to itself, or to the state which afterwards was created, the title to the bed of the stream. Later decisions of the United States Supreme Court, however, have settled that the meander line along the bank of a navigable river is not a monument of title or boundary line, but merely marks the place where the water flowed at the time of the survey (*Hardin v. Jordan*, supra; *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518); and the doctrine of that court now is that, by the admission of the several states, whatever right or title the United States had to the bed of such navigable streams passed to the state government, and that the local law of each state determines the question whether the bed of such streams belongs to the state or to the riparian owner (*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Hardin v. Jordan*, supra; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157). These decisions of the Supreme Court of the United States conclusively establish the fact, therefore, that the common law with reference to riparian ownership in navigable streams is not inconsistent with the Constitution of the United States nor with the organic law of this state, and, since no law upon this subject has been passed by the legislature of the territory of Nebraska or of the state of Nebraska, the common law is not inconsistent with the statutory law of the state.

The only remaining question, then, is whether or not the common-law rule is applicable to the conditions in this state with

reference to the rights of riparian owners upon the Missouri river. As to a portion of such riparian rights this court has already spoken. We have held that the rights of riparian owners upon the Missouri river to land formed by accretion are the same as if the river were not navigable, and that the common law applies in full force. *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104. The same doctrine has been declared by the Supreme Court of the United States in the case of *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518, citing *Jones v. Souldard*, 24 How. 41, 16 L. ed. 604, and other cases. In passing upon the applicability of the common law to our conditions in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of Nebraska have been in occupancy of the west bank of the Missouri river. The first settlement of the territory was along the Missouri river, and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge, of which the court will take judicial notice, that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike, or impinge upon its banks at such an angle and with such effect as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream and be disintegrated, and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed, and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa, or Missouri. See *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Missouri v. Nebraska*, 196 U. S. 23, 49 L. ed. 372, 25 Sup. Ct. Rep. 155. These processes have been going on for fifty years. During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed, but has left the riparian owner in full possession and control of the same to the thread

of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto, and, as fast as it became subject to useful purposes, reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri river, and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. No evil consequences have been pointed out to us in the brief of defendants in error which are liable to occur to the public welfare by the continuance of this policy, nor are we able to discern wherein there is any such change in conditions from those which have so long prevailed along this boundary which would warrant the court in giving a new construction to the rights of riparian proprietors than that which has been, at least tacitly, given by the public authorities for so long a time. Further, we see nothing in this doctrine which in any wise impairs or interferes with the public right of navigation over these waters. It is true that, while the Missouri river has been declared by Congress to be a navigable stream, and while for many years during the early history of the great Northwest its waters furnished almost the only channel of communication between the settled portions of the United States and the vast territory lying along its course and around its headwaters, still, in later years, while intermittent attempts have been made to re-establish the river as a highway of commerce, the difficulties and disadvantages caused by its rapid current, its variable, erratic, and inconstant course, and the crumbling nature of the soil upon its banks have been so great that commerce has abandoned its waters and betaken itself to the more reliable, though perhaps more expensive, method of transportation by rail. Theoretically, therefore, the Missouri river is a navigable stream along the Nebraska boundary. Practically at the present time its usefulness as a public waterway has departed. However, in the consideration of this case we have treated it as if it were practically navigable, because, while improbable, it is not impossible that at some time in the future, under changed conditions, these waters may again become a channel of communication and intercourse.

We have seen that the common-law rights of riparian owners as to accretions along the bank of this river are in force in this state, and it is a fact within the personal observation of the writer of this opinion that

at some points on the boundary of this state, by virtue of the rapid accretions which sometimes take place along this stream, the present channel of the river is removed to a distance of more than a mile from where it was thirty years ago. If no injury is done to the public right by reason of the rapid and numerous changes of the channel of the Missouri river by the action of accretion, by the growth of sandbars and islands, and the gradual filling up of the intervening space between them and the bank, by which changes the bed where the river actually flowed is even more fully and effectually abandoned than where, by a sudden change, the river has left its bed and sought a new one, how can the public be in any wise injured by the latter form of abandonment? The effect is the same in both cases. Along the Missouri river the change of the bed to dry land in the case of accretion is sometimes even more rapidly performed than the changes of the abandoned bed to dry land in the case of avulsion, for in such case the abandoned bed is usually full of water, which gradually evaporates and which in many instances forms lakes which stand for years, occasionally filled again by the river in flood periods, a number of these "cut-off lakes," as they are locally termed, extending from 3 to 8 or 10 miles long, and occupying practically the whole of the abandoned bed for many years.

The fact that the rights of riparian owners are preserved *ad filum aquæ* is not inconsistent with, and does not interfere with, the right of navigation. The public retains its easement of the right of passage along and over the waters of the river as a public highway. This is the interest of the public in connection with such rivers which is paramount, and which is, and should be, protected by the courts. If, however, the river ceases to be navigable at any particular point, whether by gradual filling up of its old bed or a part of it by the process of accretion, or by a sudden change of its bed by the carving out of a new channel, the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public then has lost nothing by the change of channel. All its rights have been retained. As was said long ago by Ulpian: "In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, nevertheless, to be public, because it

is impossible that the channel of a public river should not be public. (D. 43, 12, 1, 7.)" Ware, *Roman Water Law*, § 22, p. 34. To hold otherwise in case of a stream of the characteristics of the Missouri river might well lead, by way of repeated changes of the river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel nearby by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class. When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road; and its right and privilege to pass over the old reverts to the abutting owners; and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed.

For these reasons we are satisfied that the common law as to the rights of riparian
7 L.R.A. (N.S.)

owners to the abandoned channel of a navigable fresh-water stream is applicable in Nebraska, and not inconsistent with our laws or Constitution, and that, therefore, the plaintiff is the owner of the property in controversy in this action.

We have not deemed it necessary to cite or particularize more than a few of the large number of cases bearing upon the proposition hereinbefore discussed. They may be found collated and distinguished in *Farnham on Waters*; *Gould on Waters*; in note to *English Ruling Cases*, vol. 23, p. 158; in *American & English Enc. Law*, 2d ed., as well as in other standard works of reference. In several instances the courts of a state lying upon the one side of one of our great rivers hold and enforce the rule of the common law, and on the other side of the same river the courts of a sister state declare that the riparian owner only takes to high-water or low-water mark, as the case may be. On the whole matter, we deem it best to let well enough alone and adhere to the custom and policy of this state since its earliest settlement.

The former opinion in this case is set aside, the judgment of the District Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

NORTH CAROLINA SUPREME COURT.

CITY OF DURHAM et al.

v.

ENO COTTON MILLS, Appt.

(141 N. C. 615, 54 S. E. 453.)

Water—pollution—injunction.

1. An inconsiderable pollution of a river at a point 17 miles above the intake of a city water supply will not be enjoined as a nuisance in the absence of any analy-

Case Note.—Power of legislature to forbid pollution of stream from which municipal water supply is taken:—As appears from the note to *State v. Griffin*, 41 L.R.A. 177, and 1 *Farnham, Waters*, 618, the legislatures have assumed the right to prevent the casting of polluting material into streams from which municipal water supplies are taken, and the courts have upheld them in so doing. Even the position of the court in *DURHAM v. ENO COTTON MILLS*, that the legislature may forbid such pollution without infringing the constitutional rights of the riparian owners, although no injury to the public health or comfort is actually shown, is supported by *State v. Streeper*, 5 N. J. L. J. 115, and *State ex rel. Board of Health v. Diamond Mills Paper Co.* 63 N. J. Eq. 111, 51 Atl. 1019, which hold that the fact that the stream purifies itself before reaching the intake of the waterworks of the municipality is no defense to a prosecution for violation of the statute. The constitutional

sis of the water at the point of intake merely upon opinion evidence that the pollution affects the water at that point.

Same—statutory prohibition—construction.

2. A statutory provision forbidding the discharge of sewage into a river from which a public drinking-water supply is taken is not limited by other provisions of the same statute establishing for inspection purposes a watershed extending 15 miles above the point of intake of such supply.

Same—health law.

3. The legislature may, under its police power, forbid the discharge of unpurified sewage into a river from which a public drinking-water supply is taken, without infringing the constitutional rights of the riparian owner, although no injury to the public health or comfort is actually shown.

Same—other source of supply.

4. The availability of another water supply will not prevent the operation of a statute forbidding the casting of sewage into a river from which a public drinking-water supply is taken.

(May 28, 1906.)

A PPEAL by defendant from a decree of the Superior Court for Durham County enjoining the pollution of a river. Affirmed.

Statement by Walker, J.:

Civil action, heard at chambers upon a

motion for an injunction. The action was brought for the purpose of enjoining the defendant from emptying its sewage into the waters of the Eno river, from which stream the plaintiffs allege the water supply of the city of Durham is obtained partly in the summer months. The material parts of the complaint are as follows: That the defendant owns and operates a cotton factory located about 300 feet from the Eno river, at the town of Hillsboro, in Orange county, North Carolina, and employs in and about its factory about 300 operatives; that said defendant maintains water-closets in its said factory for the use of its said operatives, and the deposits of human excrement therefrom are flowed and discharged through an 8-inch terra cotta sewer pipe directly into the Eno river, at a point about 300 feet from said factory; that at times said sewer pipe becomes choked and stopped up, and then said deposits of excrement and sewage are run through an open ditch and small drain into said Eno river at about the point of discharge of said sewer pipe above mentioned; that it also maintains, in connection with its said closets and system of sewage, a manhole or brick chamber, which is just outside of said factory, which said manhole or brick chamber frequently overflows on

soundness of the latter decisions, however, may be subject to some question. One of the rights of a riparian owner by reason of his location upon the banks of a stream is to make use of the water to such extent as he can without creating a nuisance to his neighbors or to the public. This right includes the casting of a certain amount of pollution into the stream. 1 Farnham, Waters, 288. This principle is well illustrated by the case of *Missouri v. Illinois*, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268, in which the Supreme Court of the United States, proceeding on common-law grounds, refused to enjoin the state of Illinois from casting polluting material into the stream because Missouri had not shown that it created a nuisance of which it could complain. This being the common-law right of the riparian owner, it is a property right the same as any other of the rights which grow out of use or enjoyment of his land. The Constitution provides that his property rights shall not be taken from him without compensation or due process of law. It would seem that the arbitrary declaration by the legislature that he should no longer enjoy this property right, without anything to show that it was necessary for the public health, was surely a deprivation of property, and that it was without compensation and without due process of law. The private property right gives way when it becomes an injury to the rights of other private owners or to the public; in other words, when it becomes a nuisance. And, unless the fact

of the nuisance is established, the statutory deprivation of the right would seem to conflict with the constitutional rights. The reasoning in *DURHAM v. ENO COTTON MILLS* to the contrary is not entirely satisfactory. The court cites *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172. It is needless to suggest that, there being no constitutional protection against the arbitrary exercise of power by Parliament, English decisions are of no value in this country, upon constitutional questions. And the suggestion quoted from *State v. Wheeler*, 44 N. J. L. 88, that to limit the legislation to cases where actual injury has occurred would be to deprive it of its most effective force, while true so far as it goes, does not meet the situation under discussion. If the nuisance was established there could be no claim that no relief could be had until injury had occurred. But the contention might be advanced with great force that the act of the riparian owner could not be stopped until the fact of nuisance, if not established, was made exceedingly probable. And where, as in the New Jersey cases cited above, it appeared or was admitted that the stream had purified itself before the intake of the municipal water supply was reached, it would seem that the necessity for public regulation under the police power ceased, and that therefore the action of the legislature was arbitrary and unconstitutional. The fact of public necessity being the basis of the police power, that fact should be apparent to justify an exercise of the power.

account of the choked condition of the said discharge pipe, and the overflow therefrom is deposited on the ground at and around said manhole, and is washed into said Eno river; that said defendant also discharges large quantities of dye waste on the ground just outside of its said factory, which flows and empties into said river near the point where defendant's said sewer pipe empties; that said defendant owns about sixty dwelling houses, located on both sides of said Eno river, and on its watershed, which are occupied by the operatives in defendant's said factory, and maintains in connection with said dwelling houses a large number of open privies without a tub system, some of which said privies are within 100 feet of said Eno river, and that the fecal matter from said privies is washed by the rains into the said Eno river; that the said city of Durham and its inhabitants are now and have been for the past seventeen or eighteen years supplied with drinking water from a plant which is located on Eno river at a point a few miles below defendant's said factory, and that the public drinking-water supply of the city of Durham and its inhabitants is taken from said Eno river at said plant; that the city of Durham has demanded of the said defendant that it provide some other method of disposing of its sewage and dye waste, and other dangerous and foul matter, and that it discontinue to empty and discharge the same into the said Eno river, all of which said defendant has refused and still refuses to do, but, on the contrary, wilfully, negligently, unlawfully, and in disregard of the comfort, safety, and health of the inhabitants of the city of Durham and of the plaintiff, T. A. Mann, is flowing and discharging its raw sewage into said Eno river, from which the public drinking-water supply of the city of Durham is taken, without having said sewage passed through some well-known system of sewage purification approved by the state board of health, or any other system of purification, and has avowed its purpose to continue to do so; that, as plaintiffs are informed and believe, the waters of the said Eno river have become and are now being polluted and made unfit for drinking purposes, and that the health of the inhabitants of the city of Durham and of the plaintiff, T. A. Mann, are seriously menaced because of the acts of said defendant complained of above. The prayer is for a perpetual injunction. His Honor granted a restraining order, with an order to show cause why an injunction to the hearing should not be issued.

The plaintiff, in support of the allegations of its complaint, filed several affidavits of physicians to the effect that the sewage, dye waste, and other deleterious matter which

are discharged into the river from the defendant's premises at Hillsboro, not only pollute the stream at that place, but will, in the opinion of the witnesses, pollute it at the place of intake near Durham where the plant of the waterworks company is located. Affidavits were also filed which tended to show that large quantities of feculent matter and dye waste are daily discharged into the river from the defendant's premises. It is not necessary to set forth the statements of these affidavits more fully, as they are quite sufficient to show that the water of the Eno river at Hillsboro is polluted by the acts of the defendant, and that one of the principal sources of such pollution is the daily deposit into the river of the contents of the defendant's sewer, and this is not only not denied by the defendant, but expressly admitted. One physician, whose affidavit was read by the plaintiff, expressed the opinion that the conditions at defendant's mill had much to do with the presence of typhoid fever in Durham and with the impurities found in the water supply of the said city, and that, if there should be typhoid fever among the defendant's mill operatives, it is more than probable that it would be communicated to the inhabitants of Durham through the water, and cause a serious epidemic, if present conditions are allowed to be continued. No evidence was offered by plaintiff tending to show that an analysis of any kind had been made of the water at the point of the intake near Durham to ascertain if there had been, in fact, any pollution of the stream at that place. The defendant, while admitting the pollution of the river at its mill site near Hillsboro, denies that it extends to the waters at the intake of the water company, near Durham. In support of this denial it offers proof of the following facts: The volume of sewage conveyed into the river is very small compared with the volume of water into which it flows. The sewage pipe is only 8 inches in diameter and empties 18 miles above the water company's intake. The excreta are carried through the pipe by the flushing of the closets with fresh water, to the river 200 yards distant, and by the time of arrival at the outlet of the sewer the solid matter is practically dissolved. The sewage then passes immediately into the "upper reaches of a pond," which extends $1\frac{1}{2}$ miles below the mill, and there are two other ponds below, and four backwaters of former ponds, with their dams now broken. There is necessarily sedimentation, which is a means of precipitation recognized by all the authorities upon the subject. In the stretch below the defendant's discharge pipe and the intake of the water company are numerous spring branches, creeks, and brooks

of fresh and pure water flowing into the Eno river millions of gallons every twenty-four hours. Thus dilution takes place, another recognized means of precipitation. That the flow of sewage is not only small, as already alleged, but is never constant. The dyestuffs are discharged into an open drain at said mills after their coloring matter has been as much as possible removed, and little of the dye makes its way to the river, and not enough to discolor the water, and that none of it, as defendant is informed, would be injurious to health. That a flowing stream constantly renewed from its sources and the accessions from other water courses, and the interruptions of the current of this river by ponds and backwaters as described would give the water polluted at the mouth of the sewer and drain ample time, considering the distance to be traversed, to become chemically and bacteriologically pure before it reaches the intake. The defendant also alleges that while the water company's plant was located on the Eno river before its mill was built near Hillsboro yet that water was not taken from the stream for the purpose of supplying the city of Durham until three or four years after the defendant began to discharge sewage into the river and otherwise to use its premises as stated in the complaint. It further avers that the plaintiff could have an abundant supply of pure water from Nancy Rhodes's branch, if the water company had not carelessly and negligently permitted its pond, which is supplied by that branch, to fill so that the volume of water it could have held was greatly diminished, and that the water company of the city of Durham can easily obtain a sufficient supply of pure water from two or more creeks conveniently located. That a plant for purifying sewage could be erected at defendant's mill only at great expense, and would add nothing to the purity of the water at the intake of the water company, while the water company could at little expense rid the water of any impurities which it might gather as it flows and carry along with it to the intake. It is further averred that the water company has not a sufficient settling reservoir at its plant. There are other matters stated in the affidavits of the respective parties, but it is not necessary that they should be set forth.

The presiding judge made the following finding of facts and the following order thereon: "This cause coming on to be heard by consent in the city of Durham, on the 10th day of February, 1905, and being heard upon the affidavits filed, after argument of counsel, it appears to me from said affidavits filed in the cause: That the Durham Water Company, a corporation, supplies water to the city of Durham for the use of its citi-

zens for drinking and other purposes. That the water with which said city of Durham is supplied, for a considerable portion of the year, is taken from the Nancy Rhodes branch, a tributary of Eno river, but that when the waters become low, during the summer and other seasons, when there is not much rain, the Nancy Rhodes branch does not afford a sufficient supply for the needs of the city of Durham and its inhabitants, and on such occasions and for such times the water has been taken from Eno river and conveyed through pipes to the city and used by the inhabitants for drinking and other purposes. Eno river is a stream some 7 miles from the city of Durham; has its source in Orange county, and flows by the town of Hillsboro and the mill settlement of the defendant, the Eno Cotton Mills, which are situated near the town of Hillsboro and close to, some 300 yards from, the river, and about 17 miles above the intake of water for the plaintiff, and the city of Durham. The defendant, the Eno Cotton Mills, is a corporation, and has a large plant near the Eno river, as above set out, in which it employs 300 or more operatives, and has dwellings on or near the bank of said Eno river for the occupancy of its operatives and their families. That in said mill are water-closets, for the use of its operatives. That the discharge from said closets is conveyed, in its raw state, through terra cotta pipes and open drains, into Eno river, and the refuse of dyestuffs from the said mill is emptied out on the ground and flows and is washed into the river. That the operatives at their dwellings use privies, from which once a week the excrement is hauled off and buried. That the discharge from said mills and the dwellings of said operatives flow into Eno river and pollute and render unwholesome the water of the river at the place of discharge of said sewage and for some distance below said mill. It further appears, from the said affidavits filed, that the pollution of the water of said river, by reason of the discharge from said mills, continues to such an extent down to the intake of the water supply for the city of Durham as to render the water less wholesome, and in case of an epidemic at said mill, such as typhoid fever, would be dangerous to the health of the citizens of Durham using water from said river for drinking purposes. The defendant has used no precautions to prevent polluting the water of Eno river, and does not propose to do so. The Durham Water Company established its plant on Eno river, 7 miles from the city, before the defendant constructed its mills or built its plant, but did not use the water of the river for its supply of water to the citizens of Durham until after the defendant built its plant and

had its mill in operation with the same system of sewage and same method for the disposition of its dyestuff and the human excrement as now used,—with like pollution of the stream. It further appears from said affidavits that the water now being used by the citizens of Durham is supplied from Nancy Rhodes's branch and that the flow of said branch in all probability will be sufficient to supply the inhabitants of the city of Durham until the summer months, and that said water is pure, but that when the dry weather comes, and the streams become low, the flow of Nancy Rhodes's branch will not be sufficient to supply the city with water, and then the water for such supply will necessarily in part have to be taken from the Eno river. It is therefore considered, ordered, and adjudged that the restraining order heretofore issued be suspended in its operation until the 20th day of April, 1906, in order that the defendant, in the meantime, may provide some well-known system of sewage purification, to be approved by the state board of health; that from and after the 20th day of April, 1906, the defendant, its agents, servants, and employees, under its control, is and shall be restrained from flowing or discharging any sewage into said Eno river until the same shall have passed through some well-known system of sewage purification approved by the state board of health; and from depositing human excrement and dyestuff on the watershed of the Eno river at Hillsboro, so near to said river that the same shall flow or be washed into said river until the final hearing of this action." From this order the defendant appealed.

Messrs. S. M. Gattis, John W. Graham, and Frank Nash, for appellant:

The legislature cannot compel the defendant, after the location and use of the Eno river for the natural purposes of drainage for many years, now to put in "a well-known system of sewerage, approved by the state board of health," without any compensation, at the suit of one who is not a lower riparian owner, and is located several miles from the stream.

Cooley, Const. Lim. 4th ed. p. 696; Johnston v. Rankin, 70 N. C. 550; State v. Newsum, 27 N. C. (5 Ired. L.) 250; Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) 451; State v. Glen, 52 N. C. (7 Jones, L.) 321; Cornelius v. Glen, 52 N. C. (7 Jones, L.) 512.

The apprehended mischief is not a nuisance *per se*.

Vickers v. Durham, 132 N. C. 880, 44 S. E. 685; Evans v. Wilmington & W. R. Co. 96 N. C. 46, 1 S. E. 529; Wood, Nuisances, § 569.
7 L.R.A.(N.S.)

If the discharge of sewage into a stream does not create a nuisance, injunction will be refused.

1 Farnham, Waters, p. 647; Gould, Waters, 3d ed. § 220; Morgan v. Binghamton, 102 N. Y. 500, 7 N. E. 424; Redd v. Edna Cotton Mills, 136 N. C. 342, 67 L.R.A. 983, 48 S. E. 761; Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704; Simpson v. Justice, 43 N. C. (8 Ired. Eq.) 115; Duffy v. Meadows, 131 N. C. 31, 42 S. E. 460; Northern P. R. Co. v. Whale, 149 U. S. 157, 37 L. ed. 686, 13 Sup. Ct. Rep. 822; 3 Bl. Com. 216; Robinson v. Kilvert, L. R. 41 Ch. Div. 88; Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012.

The city of Durham has none of the rights of a lower riparian owner.

Bates v. Illinois C. R. Co. 1 Black, 204, 17 L. ed. 158; World's Columbian Exposition v. United States, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; Atty. Gen. v. Blount, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; Muncie Pulp Co. v. Koonitz, 33 Ind. App. 532, 70 N. E. 999; Baltimore v. Warren Mfg. Co. 59 Md. 96; Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106; Conrad v. Arrowhead Hot Springs Hotel Co. 103 Cal. 399, 37 Pac. 386, 388.

The finding that the water may be polluted at the intake did not show a nuisance.

Brookline v. Mackintosh, 133 Mass. 215; Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. 108; Edwards v. Allouez Min. Co. 38 Mich. 46, 31 Am. Rep. 301; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Barnes v. Calhoun, 37 N. C. (2 Ired. Eq.) 199; Ellison v. Washington, 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430; Reyburn v. Sawyer, 128 N. C. 8, 37 S. E. 954; Topeka Water Supply Co. v. Potwin, 43 Kan. 408, 23 Pac. 578; Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co. L. R. 7 H. L. 697; Haupt's Appeal, 125 Pa. 211, 3 L.R.A. 536, 17 Atl. 436; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105.

Messrs. R. B. Boone and Fuller & Fuller, for appellees:

Injunctive relief will be granted in advance of any actual injury sustained by the threatened action of defendant, where there is danger, or a probability, that such action will be productive of any serious or irreparable injury, and particularly to prevent a nuisance which endangers the health and comfort of a whole community.

Atty. Gen. ex rel. Raleigh v. Hunter, 16 N. C. (1 Dev. Eq.) 12; Lockwood v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Vickers v. Durham, 132 N. C. 880, 44 S. E. 685; Atty. Gen. v. Blount, 11 N. C. (4 Hawks) 385, 15 Am. Dec. 526; Clark v. Lawrence, 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec.

241; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161, Affirmed in L. R. 1 Ch. 349; Atty. Gen. ex rel. *Thames River Conservators v. Kingston-on-Thames*, 13 Week. Rep. 888; *Farnham, Waters*, § 451, p. 1541.

There is no public policy in favor of industrial progress and improvement which will justify the operation of defendant's factory so as to pollute the waters of Eno river to the detriment of the people obtaining their water supply from said river, although the factory is conducted with skill and prudence and with the most improved machinery.

Farnham, Waters, § 64a, note 4; *Indianapolis Water Co. v. American Strawboard Co.* 57 Fed. 1000.

Defendant could not acquire by prescription the right to pollute the water.

Farnham, Waters, § 64, p. 288; *State v. Holman*, 104 N. C. 861, 10 S. E. 758.

It is no defense to defendant that pure water can be obtained from another source than that from which it is now being obtained to supply the city of Durham.

Farnham, Waters, § 515, p. 1691; *Stevenson v. Ebervale Coal Co.* 203 Pa. 316, 52 Atl. 201.

Defendant cannot require plaintiff to take active measures to stop the injury, although it could do so at no great expense.

Farnham, Waters, § 524, p. 1714.

The right to protect a water supply is within the police power of the legislature, and for injuries resulting to the individual from its exercise no damages are recoverable and no compensation allowed.

Farnham, Waters, § 137a, pp. 618 et seq.; *State v. Griffin*, 41 L.R.A. 177, and note, 69 N. H. 1, 76 Am. St. Rep. 139, 39 Atl. 260; *Barnard v. Shirley*, 41 L.R.A. 751, and note, 161 Ind. 160, 47 N. E. 671; *State v. Wheeler*, 44 N. J. L. 88; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, 9 Rose's Notes, 594.

Walker, J., delivered the opinion of the court:

This is an application for an injunction to restrain the defendant from polluting the Eno river, which, it appears, is in part the source of supply to the city of Durham of water for drinking and other purposes, requiring it to be kept free from impurities. The plaintiffs, although they have stated but one cause of action, base their right to relief upon two grounds: (1) That, as the water supply of Durham is obtained partly from the Eno river at a place on that stream where the water company's plant is located, 7 L.R.A. (N.S.)

it has the rights in the water of the river of a riparian proprietor. (2) That, if this is not so, it has the right to have the defendant enjoined from polluting the waters of the river under the recent act of the general assembly (Revisal 1905, § 3051), which reads as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the state board of health; and the continual flow and discharge of such sewage may be enjoined upon application of any person." This enactment, in connection with the fact alleged, that the city of Durham actually draws its water supply at a certain season of the year from the Eno river, is claimed to confer upon it the right to enjoin any act of the defendant in violation of the statute which tends to contaminate the water of the river at the outlet of its sewer near Hillsboro, where its cotton factory is situated. We will consider these questions in their order.

It is well settled by the authorities that at common law the riparian owner has the right to have the natural stream of water flow by or through his land in its ordinary, natural state, both as to its quantity and quality, as incident to the ownership of the land by or through which the water course runs, and that right continues, unless it has been lost or in some degree abridged by adverse user or by grant. This, it must be understood, is not an absolute and unlimited right, but the principle, as thus stated, should be qualified so as not to interfere with the equal rights of other upper and lower proprietors on the same stream. The riparian right, therefore, expressed with greater accuracy, is to have the stream to flow by or through the land in its ordinary purity and quantity without any unnecessary or unreasonable diminution or pollution of the stream by the owners above. The several proprietors along the course of the stream have no property in the flowing water itself, which is indivisible, and not the subject of riparian ownership, but each one may use it as it comes to his land for any purpose to which it can be applied without material injury to the just rights of others. This right to the use of water in its natural flow is not an easement, nor is it merely an appurtenance, but it is something inseparably annexed to the soil itself, and exists *jure naturæ* as parcel of the land. We think these principles will be found to be sustained by the authorities upon the subject. *Gould, Waters*, §§ 204-224; *Mason v. Hill*, 5 Barn. & Ad. 1; *Wood v. Waud*, 3 Exch. 748; *Stockport Waterworks Co. v.*

Potter, 7 Hurlst. & N. 160; Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co. L. R. 9 Ch. 451, L. R. 7 H. L. 697; 1 Farnham, Waters, §§ 62-65; Baltimore v. Warren Mfg. Co. 59 Md. 96. In Prentice v. Geiger, 74 N. Y. 345, the doctrine is thus stated: "The use of the water, as it passes, is the only right which, in the nature of things, he [the riparian proprietor] can have in it, and he acquires no exclusive right beyond its actual appropriation. But, as all proprietors on the stream have an equal right to the use of the water and to share in the benefits from its use, the right of the several owners is not an absolute, but a qualified, one, and the use of each must be such as is consistent with the substantial preservation of the equal rights of others. There are some uses which by common consent a riparian owner may have of the water, as it flows upon his premises, although such use may to some extent interfere with the use of the stream in its natural flow by the proprietors below. As, for example, the proprietor above may use the water for domestic purposes—the watering of cattle and the like—although such use may diminish the volume of the stream to the detriment of lower proprietors. The right to such uses, without which all beneficial use of the water by the riparian owner would be prevented, is allowed *ex necessitate*, and is universally recognized." The court, in Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co. *supra*, says: "All streams, however, are *publici juris*, and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream; and therefore any person living on the banks of the stream has an undoubted right to the use of the water for himself, his family, and his cattle, and for all ordinary domestic purposes, such as brewing, washing, and so on. Those are the common purposes of water in the ordinary mode of using water." The principle is well stated in Strobel v. Kerr Salt Co. 164 N. Y. at page 320, 51 L.R.A. at page 694, 79 Am. St. Rep. at page 651, and 58 N. E. at page 147, as follows: "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes his land. As all other owners on the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. 7 L.R.A. (N.S.)

This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of others, and the maxim of *Sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat*."

After all that can be said, the question is whether the upper riparian proprietor is engaged in the reasonable exercise of his right to use the stream as it flows by or through his land, whether with or without retaining the water for a time or obstructing temporarily the accustomed flow, and whether he is so doing, as the above authorities show, is a question for the jury, under the proper guidance of the court as to the law applicable to the particular state of facts. Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Strobel v. Kerr Salt Co. *supra*. But, in order that this right to have the water of a stream flow with undiminished quantity or unimpaired quality may be successfully asserted, the person who sets up a claim to its enjoyment must show that he is a riparian proprietor, or that in some way he has acquired riparian rights in the stream. There is nothing in this case, as now presented, which tends to prove that the plaintiffs are riparian proprietors in respect to the Enno river. They do not allege that the city of Durham is the owner of any part of the banks of that stream, but, on the contrary, the proof tends to show that it is not. The Durham Water Company has a plant abutting on the river and has been using its waters for some years to supply the city of Durham, but that company, for some unexplained reason, has not been made a party to this suit, nor does it appear even by inference what kind of contract it has with the city for furnishing water. As to all of these matters we are left without any information. It would seem, therefore, that we cannot proceed to administer relief to the plaintiffs by enjoining the acts of the defendant, if this case is treated simply as one for the suppression of a nuisance, unless we had more definite allegation and proof as to the right of the plaintiffs to maintain this action, without the presence in the record of the water company as a party. We express, though, no decided opinion as to this feature of the case, as we find it unnecessary to do so. Assuming that the city of Durham is a riparian owner or has riparian rights in the river, we yet think that the plaintiffs' proof falls short of being sufficient for the court to interpose at this stage of the case a preliminary injunction and restrain the defendant until the hearing from continuing to commit the acts alleged to be injurious to

the plaintiffs. If the defendant, being an upper riparian proprietor, and as such entitled to the ordinary use of the water, including the right to apply it in a reasonable manner to domestic uses, and even to purposes of trade and manufacture, is using the water of the stream in an unreasonable manner, and has defiled the same to such an extent as to constitute an actual invasion of the rights of the plaintiffs, then both are clearly entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. *Baltimore v. Warren Mfg. Co.* supra, and cases cited. Injunction is undoubtedly a proper remedy to prevent the fouling of the water of a running stream by its improper and unreasonable use when prejudicial to the rights of others interested in having the water descend to them in its ordinary natural state of purity. *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Ch. 349, and cases, supra. But have the plaintiffs made out any such case? They must not only establish that they have a right to be protected, but they must, in addition, show by satisfactory proof that the right has actually been infringed in some material way, or that the defendant is about to commit some act which will tend so far to impair the right as that the damage will be irreparable. "It is a well-settled rule of equity procedure that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting, and the injury be doubtful, that will constitute a ground for withholding the injunction. . . . Where the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proofs must show that the apprehension of material and irreparable injury is well grounded upon a state of facts which show the danger to be real and immediate." *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; 2 Story, Eq. Jur. 924a; *Brookline v. Mackintosh*, 133 Mass. 215; *Atty. Gen. ex rel. Holtz v. Heishon*, 18 N. J. Eq. 410; 1 High, Inj. 4th ed. §§ 774, 811; *Crossley v. Lightowler*, L. R. 2 Ch. 483.

In this case the plaintiffs have not shown by any satisfactory proof, such as the law requires, that the river at the intake of the water company has been polluted. It was an easy matter for the plaintiffs to have had the water analyzed at the place where it is drawn into the mains through which it is conveyed to the city, and it appears by the evidence in the case that a chemical and bacteriological analysis could have been made which would have ascertained, with a reasonable degree of certainty at least, whether the water had been corrupted at

the intake by the sewage and waste material deposited in the stream at defendant's mill. There is proof on the part of the defendant that there are so many obstructions in the way of the passage of deleterious matter from the site of the mill to the intake and so many natural means presented for the renewal and purification of the stream by the influx of great quantities of fresh and pure water from its tributaries and by sedimentation, as to make it improbable, if not impossible, that any deadly germs could "survive the journey" for so many miles between the two points on the river. The only evidence offered in answer to the proof introduced by the defendant, and the inference to be fairly drawn from the failure to make a proper analysis to establish the contention which seems susceptible of demonstration in that way, are the opinions of several physicians and one or two laymen, to the effect that the pollution at the outlet of the defendant's sewer will injuriously affect the water at the intake and endanger the health of the citizens of Durham who use the water taken from the river. Opinions of this kind are of the highest value under certain circumstances, but the law requires something more tangible and definite as a basis for seriously interfering with important industrial enterprises. In a case somewhat similar to this, in which just such proof was relied on, the court said: "Speaking with all possible respect to the scientific gentlemen who have given their evidence, . . . I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, [we] . . . ought in these cases mainly to rely in my view, . . . therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." *Goldsmid v. Tunbridge Wells Improv. Comrs.* supra. That case was reviewed at length and approved in *Newark Aqueduct Board v. Passaic*, supra, where a most learned discussion of the subject will be found, and the same may be said of *Baltimore v. Warren Mfg. Co.* 59 Md. 96, where Judge Alvey, who delivered the opinion of the court, states with his usual clearness and force the true principles and grounds upon which the courts proceed in such cases as the one we have under consideration. See also *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Atty. Gen. v.*

Basingstoke, 45 L. J. Ch. N. S. 726. The injury here is entirely prospective, and it is only possible to form an opinion upon evidence which does not enable us to do more than conjecture whether the apprehension of the plaintiffs is well grounded and free from reasonable doubt. So far as the present state of the proof goes, the jurisdiction of a court of equity is invoked to restrain that which is alleged may, or at the most will, create a nuisance, and not that which, in fact, does create a nuisance. *Missouri v. Illinois*, supra; *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704. But if the court should interfere by injunction where it is merely probable that a nuisance will result from the acts of the defendant, we do not think the plaintiffs have sufficiently brought their case within the operation of this rule. *Ellison v. Washington*, 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430; *Barnes v. Calhoun*, 37 N. C. (2 Ired. Eq.) 199; *Simpson v. Justice*, 43 N. C. (8 Ired. Eq.) 115; *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685; *Dorsey v. Allen*, supra; *Stockton v. Central R. Co.* 50 N. J. Eq. 80, 17 L.R.A. 97, 24 Atl. 964.

Proof easily accessible to the plaintiffs, and which would have established the fact of nuisance beyond any doubt, was not produced; but the court is urged to resort to evidence of a secondary and less satisfactory nature upon which to determine the important rights of the parties. Under the facts and circumstances as disclosed by the record, we would have been obliged to reverse the ruling of the court below and leave the plaintiffs to the necessity of making good their allegation of nuisance at the hearing, in order to entitle themselves to injunctive relief; and this course would be pursued if we were confined in our investigation of this case to the mere fact of nuisance. But we are not so restricted, as the legislature has spoken upon the subject of this controversy, and it is our duty to give due heed to what it has said. Its declared will is the law, and must be enforced, if it has been sufficiently expressed or by fair construction it can be ascertained. The legislature, by chapter 670, p. 857, Laws 1899, undertook to protect public water supplies from contamination by providing for a thorough system of inspection and the adoption of such sanitary measures as would be likely to contribute to that end. This law contained no provision as to the discharge of sewage into any streams of the state from which a public water supply is taken, but simply related to the subjects of inspection and sanitation. Believing that such a system was not adequate to the full protection of the people of this state from contamination of the water used for drinking and oth-

er domestic purposes, the legislature passed another act, it being chapter 159, p. 182, Laws 1903, entitled, as the former act, "An Act to Protect Water Supplies." This act contained all of the features of the act of 1899, and provided generally, in § 1, that water companies should take reasonable precautions to insure the purity of water supplied to the public. It is provided in § 2, that companies which are supplied from lakes, ponds, or small streams not more than 15 miles in length shall at their own expense have a sanitary inspection of their entire watershed not less than once in every three calendar months, and special inspections when circumstances seem to require them. It then directs how the inspection shall be made, namely, by a particular examination of the premises of every inhabitant of the watershed and a search in passing from house to house for dead bodies of animals or the accumulation of filth, excepting uninhabited fields and wooded tracts which are free from suspicion. Where the supply of water is drawn from rivers or large creeks having a minimum daily flow of 10,000,000 gallons, the provisions of § 2 shall apply only to the 15 miles of watershed draining into the said river or creek next above the intake of the water company. Provision is then made for an inspection by every city or town having a public water supply of its entire watershed, and it is declared to be a misdemeanor to deposit dead animals or human excreta on the watershed of any water supply, or to defile, corrupt, or pollute any well, spring, drain, branch, brook, creek, or other source of a public water supply. Then follows § 13 of the act, which is as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the state board of health; and the continual flow and discharge of such sewage may be enjoined upon application of any person." This act has been inserted in the Revisal as chapter 76, and is not materially different, as there found, from what it was in the original form. The provision in regard to the flowing or discharging of sewage into a stream from which a public water supply is taken seems to be very explicit and susceptible of but one construction.

The defendant contends: (1) That § 13, chap. 159, p. 185, of the Acts of 1903, being § 3051 of the Revisal of 1905, applies only to sewers maintained within the distance of 15 miles above the intake, which is the watershed, as defined in the 2d and 3d sections of chapter 159, p. 183, of the act, and

§§ 3045 and 3046 of the Revisal of 1905. (2) That, if the provision of § 13 is construed to apply to this defendant whose mill is situated 17 miles above the intake of the Durham Water Company, then it is unconstitutional and void as being, in effect, a taking of the defendant's property without condemnation and without compensation; in other words, it is confiscation. We cannot assent to either of these propositions. If we could think that the acts of the defendant are not within the inhibition of that law, or that its property is about to be unlawfully taken or interfered with, we would not hesitate to interpose and protect it against such contemplated action. But the meaning of the legislature is so clear to us and its power thus to legislate is so well established that we could not so act without plainly disregarding the mandate of the law-making body given in the rightful exercise of its constitutional power.

As to the defendant's first contention, it is clear that by the 2d and 3d sections of the act the legislature intended to establish a watershed solely for the purpose of inspection. This is to be deduced from the very language in those sections; and, further, it appears from the manner in which the inspection is required to be made that sewage was not the source of infection or pollution intended to be guarded against by the inspection of the watershed. It is plainly excluded by the very terms of those two sections. At least it so appears to us. But if there could be any doubt as to the true meaning of that part of the act, we think that § 13 (Revisal 1905, § 3051), which is quoted above, is so broadly worded as to absolutely preclude the construction that the legislature intended to limit the acts therein prohibited to be done to the watershed of 15 miles above the intake. We can give to that section no other meaning, unless we read into it something that is not there and clearly not intended to be there. The act forbidden is "the flow or discharge of sewage into any river from which a public drinking supply is taken," unless purified as therein provided. It does not confine its operation to the watershed, but extends to any stream from which water is taken to be supplied to the public for drinking purposes. To limit its scope as suggested would be to defeat the clearly expressed intent of the legislature, and this we are not permitted to do. We entertain no doubt as to what was intended, and we are constrained to hold that the admitted acts of the defendant are within the prohibition of the statute.

The second position is equally untenable. It will be observed by reading the act that it is not required that the sewage dis-

charged into the stream should injuriously affect the water at the intake; it is quite sufficient if it pollutes the river at the sewer's outlet. The legislature has decided that it is desirable to preserve our natural streams in at least their present state of purity, and, where they have been polluted, to remove the cause as speedily and effectually as possible. It has therefore said that no person shall deteriorate the water at all by sending sewage into a natural stream, until it has been purified and made wholesome, or until all the noxious matter in it has been eliminated. And this means, of course, that the water shall not be poisoned by sewage at the outfall. We must assume that the defilement of the water is an injury which is forbidden by the legislature for perfectly good and sufficient reasons. It is not for us to question the policy or expediency of such an enactment. In this respect the legislature has a large discretion, to be exercised in such way as will, in its judgment, promote the interests and advance the welfare of the people, and it has this discretion to such an extent as to be virtually a law unto itself so far as the manner of its exercise is concerned. Such legislation is not intended merely to abate an existing nuisance, but to prevent that being done which is a menace to the public health, and which it is supposed may become a deadly peril and a public nuisance because fatal in its consequences. It is not, therefore, a void law because it is founded upon mere apprehension of evil, but is a precautionary measure which is clearly within the police power of the state and to be adopted when deemed necessary to secure the public health. We think the general principles we have thus stated will be found clearly stated by Sir George Jessel, for the court, and supported by cogent reasoning, in *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172. That case and this one are not unlike in the facts to which the principle was applied.

But a more elaborate treatment of the doctrine in its relation to the police power as its basis will be found in *State v. Wheeler*, 44 N. J. L. 88. The facts in that case were also like those we now have before us in this record. The language of Judge Magie, speaking for the court, would seem to have been uttered with reference to the facts we have here, did we not know that it was actually used in another case. Its appositeness must be our apology for quoting copiously from that case. The court says: "The whole act plainly shows a design to protect from pollution the waters of creeks, etc., used as the feeders for reservoirs for public use, without any reference to whether such pollution, in fact, appre-

siably affects the waters when arrived at the reservoir. Nor does such a construction render this act objectionable. The design of the act is not to take property for public use, nor does it do so within the meaning of the Constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the state. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim, *Sic utere tuo ut alienum non lēdas*. Nor does such a restraint, although it may interfere with the profitable use of property by its owner, make it an appropriation to a public use so as to entitle him to compensation. . . . Of the right of the legislature thus to restrain the use of private property in order to secure the general comfort, health, and prosperity of the state 'no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' Redfield, Ch. J., in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625. The same view has been always held in this state, and notably in the case of *State ex rel. Sandford v. Court of Common Pleas*, 36 N. J. L. 72, 13 Am. Rep. 422. It was also there held that the extent to which such interference with the injurious use of property may be carried is a matter exclusively for the judgment of the legislature, when not controlled by fundamental law. Nor is there anything to render such legislation objectionable because in some instances it may restrain the profitable use of private property, when such use, in fact, does not directly injure the public in comfort or health. For to limit such legislation to cases where actual injury has occurred would be to deprive it of its most effective force. Its design is preventive, and to be effective it must be able to restrain acts which tend to produce public injury. Many instances of such an exercise of this power can be found. The state regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The state is not bound to wait until contagion is communicated from a hospital established in the heart of a city. It may prohibit the establishment of such a hospital there, because it is likely to spread contagion. So the keeping of dangerous explosives and inflammable substances, and the erection of buildings of combustible materials within the limits of a dense population, may be prohibited, because of the

probability or possibility of public injury. Such instances might be indefinitely multiplied, but these are sufficient to illustrate this case. The object of this legislation is to protect the public comfort and health. For that purpose the legislature may restrain any use of private property which tends to the injury of those public interests. That the pollution of the sources of the public water supply does so tend, no one will deny."

We might well content ourselves with stopping here and resting our judgment upon the unanswerable argument there presented, and we would do so but for the great importance of the question and the far-reaching consequences of our decision. The police power by virtue of which this legislation is vindicated and justified is no new or unusual exercise of the sovereign will. It has its origin in the most ancient maxims of jurisprudence. All property was originally acquired subject to regulation in its use by those cardinal principles embodied in the maxim, "The safety of the people is the supreme law," and that other maxim, "So use your own as not to injure another." This was the original condition imposed upon the right of property in things,—that it should be enjoyed subject to reasonable regulations, when considered necessary to promote the general good of society. A good statement of the nature and extent of this police power is to be found in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625, where Redfield, Ch. J., says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non lēdas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. . . . There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature, to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: (1) That it subjects corporations to virtual destruction by the legislature; and (2) that it is an attempt to control the obligation of one person to an-

other, in matters of merely private concern. The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use." He then proceeds to demonstrate conclusively that the police power resides primarily and ultimately in the legislature, and that private interests of every kind fall legitimately within the range of legislative control, both in regard to natural and artificial persons. "It seems incredible," he says, "how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied." The general conclusion reached is that there can be no manner of doubt that the legislature may, if the public good is deemed to demand it,—of which it is the judge, its judgment in all doubtful cases being final,—require property to be used by persons, as well as their business to be conducted, so as to prevent harm or injury to the public.

The same principle is strongly stated in *State ex rel. Sanford v. Court of Common Pleas*, 36 N. J. L. 72, 13 Am. Rep. 422: "While alcoholic stimulants are recognized as property, and are entitled to the protection of the law, ownership in them is subject to such restraints as are demanded by the highest considerations of public expediency. Such enactments are regarded as police regulations, established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety. They or a just restraint of an injurious use of property, which the legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law. It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition 'that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.' Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative ac-

tion to declare what general regulations shall be deemed expedient. If, therefore, the legislature shall consider the retail of ardent spirits injurious to citizens, or productive of idleness and vice, it may provide for its total suppression. Such inhibition is justified only as a police regulation, and its legality has been recognized in well-considered cases. It is neither in conflict with the power of Congress over subjects within its exclusive jurisdiction, nor with any provisions of our state Constitution, nor with general fundamental principles. *Cooley on Constitutional Limitations*, p. 583, and cases there referred to; *Thurlow v. Massachusetts*, 5 How. 504, 12 L. ed. 256. It is not necessary to amplify discussion on this point, or to criticize the cases in detail. The view here taken underlies the whole subject of police regulations, and cannot logically be narrowed in its application." In *Com. v. Alger*, 7 Cush. 53, Chief Justice Shaw, referring to the police power, says: "This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable." He then cites numerous instances in which the power can be rightfully exercised, and among them the use of property near inhabited villages in such a way as to produce dangerous exhalations, injurious to health and dangerous to life, and proceeds: "Nor does the prohibition of such noxious use of property—a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner—make it an appropriation to a public use, so as to entitle the owner to compensation. . . . He [the owner] is restrained, not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the

maxim, *Sic utere tuo ut alienum non lædas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." A case also directly in point is *State v. Streeper*, 5 N. J. L. J. 116.

The very contention made in this case, that the property of the defendant is taken unlawfully and without due process of law, and that it is denied the equal protection of the laws, thereby violating the 14th Amendment to the Constitution of the United States, was fully met and answered in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, a leading and authoritative decision upon this question. The court, by Harlan, J., there says: "Undoubtedly the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. But neither the [14th] Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." He then asks the question, Who shall determine whether the particular use of property is injurious to the public? and gives this answer: "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few. . . . Under our system, that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." Summing up and stating the result of all the decisions of that court, it is further said: "The principle that no person shall be deprived of life, liberty, or property without due process of law was embodied, in substance, in the Constitutions of nearly all, if not all, of the states at the time of the adoption of the 14th Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the

owner's use of it shall not be injurious to the community." This court "has, nevertheless, with marked distinction and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens. . . . A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests."

It was said in *Munn v. Illinois*, 94 U. S. 124, 24 L. ed. 83, that, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *Sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Chief Justice Taney in the *License Cases*, 5 How. 504, 12 L. ed. 256, are nothing more or less than the powers of government inherent in every sovereignty; . . . that is to say, the power to govern men and things." And again, at page 124, 24 L. ed. at page 83: "A body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." The same court said, in *Boston Beer Co. v. Massachusetts*, 97 U. S. 32, 24 L. ed. 992: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state." But the case of *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, seems to be directly in point. It involved the validity of an ordinance against conducting an unwholesome business within the corporate limits of the village of Hyde Park, and the plaintiff, who at great expense had erected fertilizer works in the county and transported animal matter

through the village, sought to enjoin the enforcement of the ordinance, which it claimed would utterly ruin its business. The same contention was made there as here. The court, in *Mugler v. Kansas*, 123 U. S. at page 667, 31 L. ed. at page 212, and 8 Sup. Ct. Rep. at page 300, referring to that case and answering the contention, said: "The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It [the court] said: 'We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.'"

Cases might be cited almost without number to sustain the general proposition now being considered. We will refer to several, decided in the courts of other states, which have a direct bearing upon the question. *State v. Griffin*, 69 N. H. 1, 41 L.R.A. 177, 76 Am. St. Rep. 139, 39 Atl. 260; *Durango v. Chapman*, 27 Colo. 169, 60 Pac. 635; *Com. ex rel. McCormick v. Russell*, 172 Pa. 506, 33 Atl. 709; *Haskell v. New Bedford*, 108 Mass. 208. This court has said, in *Brown v. Keener*, 74 N. C. 714: "It is too late to question that the public power of a state (which is a part of its general legislative power) extends to the providing for every object which may be reasonably considered necessary for the public safety, health, good order, or prosperity, and which is not forbidden by some restriction in the state or Federal Constitution, or by some recognized principle of right and justice found in the common law. It is unnecessary to consider at present the limits of this extensive power, since it clearly includes the right to provide for and compel the clearing out not only of such water courses as are naturally navigable, but of all such water courses and drains as are not and never were navigable, but which are necessary for carrying off the surplus rain water, thereby promoting the public health, and enabling a considerable portion of territory otherwise uninhabita-

ble to be brought into cultivation. *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 440, 55 Am. Dec. 266; *Coster v. Tide Water Co.* 18 N. J. Eq. 54; *State v. Blake*, 36 N. J. L. 442; *Reeves v. Wood County*, 8 Ohio St. 343; *Cooley, Const. Lim. chap. 16*; 2 Dill. Mun. Corp. § 506." Other cases which have been decided by this court involving in one form or another questions arising out of the exercise of the police power are *State v. Muse*, 20 N. C. 463 (4 Dev. & B. L. 319); *Intendant v. Sorrell*, 46 N. C. (1 Jones, L.) 49; *Pool v. Trexler*, 76 N. C. 297; *Norfleet v. Cromwell*, supra; *State v. Joyner*, 81 N. C. 534; *Winslow v. Winslow*, 95 N. C. 24; *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458; *State v. Pendergrass*, 106 N. C. 664, 10 S. E. 1002; *State v. Stovall*, 103 N. C. 416, 8 S. E. 900; *State v. Hay*, 126 N. C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 446; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50.

It is, of course, no defense that pure and wholesome water can be obtained from other sources than the Eno river. 2 *Farnham, Waters*, § 515. The fact is that the water supply of Durham is drawn from that stream, and that is what protects it, under the act, from being fouled by sewage. The preservation of the public health was the chief concern of the legislature, and the purpose of the act was to remove any possible danger which should menace it. Whether the plaintiffs would have any standing in court without the aid of the statute and if left to depend upon its right to use the water of Eno river under its contract with the water company, if it has one, is a question not presented for consideration, and upon it we express no opinion. Our decision must rest solely on the provisions of the statute, which is susceptible of but one meaning, and which declares explicitly that streams used as is the Eno river shall not be polluted, as disease may be communicated to the inhabitants of towns and cities by the use of the water. The fact that the public supply is taken from the stream is sufficient to bring it within the protection of the act, for we must construe the law as it is written and according to its true intent, looking at the evil sought to be remedied and giving it such effect as will not in the least disappoint the will of the people as expressed therein. If any hardship results, it is not from the construction of the law, but from the law itself and the declared policy of the state that the public health must be safeguarded. The welfare of the public is considered in law superior to the interests of individuals, and, when there is

a conflict between them, the latter must give way. *Necessitas publica major est quam privata*. As the law is plainly written, so must we decide. The remedy of those who may suffer is by appeal to the lawmaking body, who alone can abate the rigor of its enactment.

The judgment must be affirmed, but the court below may so draw its order as to give the defendant a reasonable opportunity to comply with the statute. The injunction should operate so as to produce the least possible injury to the defendant's property and business consistent with the maintenance of the rights and interests of the public.

Affirmed.

NORTH CAROLINA SUPREME COURT.

WILLIE ROLIN, by Next Friend, Appt.,
v.
R. J. REYNOLDS TOBACCO COMPANY.

(141 N. C. 300, 53 S. E. 891.)

Child—unlawful employment—negligence.

1. The employment of a child in a factory in violation of the provisions of the statute is evidence of negligence in an action by the child to recover for personal injuries inflicted by a machine in the factory.

Case Note.—Employment of child in violation of statute as negligence which will sustain an action by the child for personal injuries:—The violation of a statute forbidding the employment of children under a certain age, or their employment at certain kinds of work or without complying with certain conditions, is held by the weight of authority to be negligence as matter of law, in an action by the child for injuries received during the course of the employment. *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, Affirming 116 Ill. App. 121; *Morris v. Stanfield*, 81 Ill. App. 284; *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Brower v. Locke*, 31 Ind. App. 353, 67 N. E. 1015; *Woolf v. Nauman Co.* 128 Iowa, 261, 103 N. W. 785; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Cooke v. Lalance Grosican Mfg. Co.* 33 Hun, 351; *Hickey v. Taaffe*, 32 Hun, 7.

In *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, however, it was held that the employment in a sawmill of a boy under the age of sixteen without procuring from the school authorities a certificate permitting his employment, as required by statute, together with an injury occurring while he was engaged in his work about certain machinery because of the failure to guard the machine, made out a prima facie 7 L.R.A.(N.S.)

Negligence — injury to child — proximate cause.

2. The jury may find that the employment, contrary to statute, of a child in a factory, was the proximate cause of his injury by the starting of the machine by another child after he had put his hand into it to remove an article thrown into it by such other child.

Child—presumption of negligence.

3. A child under twelve years of age is presumed to be incapable of so understanding and appreciating danger from attempting to remove an article from a machine at rest as to make him guilty of contributory negligence and bar his recovery in case the machine is started to his injury.

Same—contributory negligence—question for jury.

4. Whether or not a child is guilty of contributory negligence in any given case is a question for the jury in view of his age, intelligence, knowledge of the surroundings, and capacity to know and appreciate the danger.

(May 8, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Forsyth County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

case of negligence against the employer, in an action by the boy for injuries thus received; so that if plaintiff had rested upon this proof, and no evidence had been introduced to contradict it, he would have been entitled to recover, though this prima facie showing might be rebutted by evidence that the machine which caused plaintiff's injury was properly guarded, or that plaintiff himself contributed to the accident. The court said that the violation of the statute, followed by injury from causes necessarily incident to the employment and business of the employer, shifted the burden of proof which would otherwise rest upon the plaintiff. It was contended here that it was the operation of the machinery, and at most the improper protection of the same, that was the proximate cause of the injury, and not the violation of the statute; but the court said that authorities of the highest respectability hold that the violation of a statute prohibiting the employment of a child in a hazardous occupation, where such employment is prohibited by law, establishes a right to recover for negligence; that in such case liability is to be presumed from the employment in disobedience of law; also that even the imposition of a penalty by the statute did not oust the remedy by suit for negligence.

And in *Breckenridge v. Reagan*, 22 Ohio C. C. 71, the employment of a child in violation of a statute forbidding the employ-

Statement by Connor, J.:

Action for damages for personal injuries sustained by plaintiff while in defendant's employment. Plaintiff testified: "I commenced work for the defendant about a year ago, May, 1904. I went in there one Monday morning. Mr. Nichols, boss man in the room, spoke to me and asked me if I wanted to weigh fillers. I told him, 'Yes.' He took me over and put me to weighing. Then he put me to cutting lumps on a table. They were making 3-inch work. I worked at that place three days on one fortnight, and on the second fortnight six days. After cutting lumps I then was a sweeper on the floor. I cleaned up about machines and around the floor. That evening at 4 o'clock we got out of the factory. The weigh boy

went down the house to wash his hands. The man that run that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh boy ran up and threw a piece of cut tobacco in the machine. I reached my hand in there to take it out. He pulled the lever and run, and the machine caught my hand and tore it off. I don't know the fellow who took me out of the machine. Mr. Nichols took me up in the house above and he said, 'Did you not tell me you were twelve years old?' I said 'No.' I was eleven years old in June, 1903. When cutting off lumps I was 12 inches away from the machine. No one explained to me the dangerous character of the machine, nor told me anything about it. I was born June 4, 1892. I would

ment of any child under the age of sixteen by any firm or corporation at employment whereby its life or limb is endangered or its health likely to be injured is held to be "some evidence" of negligence, in an action by the child for injuries received while thus employed.

So, in *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, Affirming 62 App. Div. 43, 70 N. Y. Supp. 790, where it was held that the violation of a statute forbidding the employment in factories of children of a certain age may be found to be negligence which will support a civil action for injuries resulting therefrom, although its violation is punishable as a misdemeanor, Haight, J., in delivering the opinion of the court, said that at least a question of fact was presented for the determination of the jury as to the defendant's negligence, while Parker, Ch. J., in concurring, said that, although the violation of the statute would not, as matter of law, charge the offender in damages for all injuries sustained, yet such violation, in case of injuries which could not have happened but for its violation, might constitute evidence of negligence to be considered by the triers of fact; that, while the offense against the state was punishable by it as a misdemeanor, the violation of the statute was, as against the child, whom the state deems incompetent to contract for such forbidden service, a "wrongful and negligent act," which of itself furnished "some evidence" of negligence in cases where the accident could not have happened but for the employment. O'Brien, J., dissented in this case, saying he did not think the mere employment of the child, although in violation of the labor law, was any proof of actionable negligence, and that it would not do to say there was a question of fact as to the negligence, for there was none; that there was no dispute about the violation of the statute, and its violation proved negligence or it did not; that, if it did, then the plaintiff was entitled to recover, as matter of law, and there was nothing for the jury to do except to as-

sess the damages; that, if it did not prove negligence, then the action failed.

The language of Parker and Haight, JJ., in this case is also criticized in *Lee v. Sterling Silk Mfg. Co.* 47 Misc. 182, 93 N. Y. Supp. 560, where it was held that the employment of a child in violation of the statute forbidding any child under the age of fourteen to be employed in any factory, was negligence *per se* in case of injury to the child. The court said that violation of the statute was either a breach of duty by employer to employee, or an act of negligence, as some would have it phrased, which makes the employer liable, or else it is not; that there can be no middle ground; that it cannot be left to the jury to find in one case that it does make him liable, and in the next that it does not; that the question is not one of fact, but of law. And, in referring to the language of Haight, J., in the *Marino Case*, to the effect that the violation of the statute raised at least a question of fact for the determination of the jury, and to the language of Parker, Ch. J., that the violation of the statute as against the child was a wrongful and negligent act which by itself furnished some evidence of negligence, said: "The dubious tone of these learned opinions leaves trial judges in doubt as to what to do. The violation of the statute is 'some' evidence of negligence, or 'at least' presents a question of fact, say these opinions; but a trial judge, in charging a jury, cannot be dubious, or blow both hot and cold. He has to state the law explicitly. Where this phrase of 'some evidence' was first used on this head I do not know. . . . The truth is (as is apparent to our educated profession) that the violation of a duty created by a city ordinance or any other statute is no different to a violation of a duty created by a rule of the common law. Just the same in each case, if it injures another, the wrongdoer is liable to him as a matter of law. There is no distinction whatever. . . . Confused verbiage is not suffered in any science to obscure plain principles. Every piece of evidence is 'some evidence.' An ordinance is

not have been hurt if the boy had not pulled the lever. The machine was set, and you had to pull the lever that made it work and set it. At time I was hurt I worked by the side of John Dillon all that day. Table and truck between me and the machine. The lever is in front of the machine. I did not get a lump and try to press it in the machine. He (Dillon) had pressed a lump that day for me. It was not after quitting time when I got hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine. I saw others cleaning up the machine, and I did so. No one ever asked me to clean up the machine, or do anything about it. It was part of my duty to clean up around the machine. Will Hairston is the name of the boy that pulled

the lever of the machine on me. He is working down there in the factory now. There was a belt attached to the machine running at the time. No one told me to clean up around the machines. Other boys were at work cleaning up."

There was other evidence in regard to plaintiff's age, extent of injury, etc. At the conclusion of the evidence defendant demurred and moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted. Judgment. Appeal.

Mr. Louis M. Swink, for appellant:

The employment of such a child contrary to the statute "is negligence *per se*, and irrebuttable."

Fitzgerald v. Alma Furniture Co. 131 N.

'some evidence' in the general mass. But if A injure B by the violation of a duty to B imposed by the ordinance, he is liable as matter of law; otherwise the ordinance has no weight or force in the case, and would only serve to mislead a jury the same as an inapplicable statute or common-law rule. To have instructed the jury in the present case that the violation of the statute was 'some evidence' of the defendant's violation of the duty he owed to the plaintiff under the statute, or of his negligence, if you prefer; and that it was for them to say whether it was enough to establish the fact of liability,—would have been quite absurd, it seems to me, and only a puzzle to the jury. Is it possible that it may be left to a jury to say it is enough in one case and not enough in the next case? It makes the defendant liable in every case or else in none."

But in *White v. Witteman Lithographic Co.* 58 Hun, 381, 12 N. Y. Supp. 188, it is again held that the mere hiring of a child under the age of thirteen, in violation of statute, is not sufficient to establish negligence; that the violation of the statute is evidence only upon the question of negligence, and that there must be other evidence of negligence to establish it. The case was affirmed in 131 N. Y. 631, 30 N. E. 236, but this point seems not to have been raised upon appeal.

Even though the violation of the statute is negligence, yet, in order to entitle the injured child to recover, it must, of course, be shown that the wrongful employment was the proximate cause of the injury. As said in *Queen v. Dayton Coal & I. Co.* 95 Tenn. 464, 30 L.R.A. 83, 49 Am. St. Rep. 935, 32 S. W. 460, where the wrongful employment was held to be negligence *per se*: "Of course, we do not hold that, if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is

shown that the injuries were sustained in consequence of the employment.

So, in *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117, where the wrongful employment was also held to be negligence *per se*, recovery was denied on the ground that the negligence was not the proximate cause of the injury, which resulted from the act of a third person, who had come to the premises to obtain wood, in carelessly throwing a stick of wood against the child.

Some of the cases, however, are very liberal to the child in determining what may be deemed the proximate result of the violation of the statute, and seem to regard the mere fact of the wrongful employment sufficient to render the employer liable for almost any injury which might happen to the child while he is on the employer's premises.

Thus, in *Marquette Third Vein Coal Co. v. Dielie*, 110 Ill. App. 684, Affirmed in 208 Ill. 116, 70 N. E. 17, it was held that the employment of a boy in a mine in violation of a statute providing that no boy under the age of fourteen shall be permitted to work in or about any mine, and that before any boy can be permitted to work in any mine he must produce to the mine manager or operator an affidavit that he is fourteen years of age, renders the mine owner liable for any injury which may occur to the child in the mine or by the operation of the mine, even if the injury occurs while the child is absent from his post of duty, or while violating orders.

Again, in *Iron & Wire Co. v. Green*, 108 Tenn. 164, 65 S. W. 399, it was held that, under a statute forbidding the employment of any child less than twelve years of age in any workshop, mill, factory, or mine, one employing a child in violation of the statute was liable for every injury resulting from such employment; and that, even if the injury happened, as contended, because of the child's action in leaving the building where he was employed and going into the yard and playing with some panels of iron fence on the premises, which fell upon him, nevertheless the master was liable, as the causal

C. 636, 42 S. E. 946; Iron & Wire Co. v. Green, 108 Tenn. 161, 65 S. W. 399; Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Marquette Third Vein Coal Co. v. Dielie, 110 Ill. App. 684; Perry v. Tozer, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117.

In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law.

Comyns, Dig. F, p. 453; Marino v. Lehmaier, supra; Troxler v. Southern R. Co. 122 N. C. 902, 30 S. E. 117, 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550; Greenlee v. Southern R. Co. 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115.

Defendant was negligent in that it employed the plaintiff to work in a dangerous place without giving him any instructions, or explaining to him the dangerous character of the machines about which he was to work.

Thomp. Neg. 978; Fitzgerald v. Alma

connection between the employment and the injury was clear, since, had the child not been employed by the company, there was no reason to suppose he would have been on the premises.

There are other cases that seem to confuse the question of negligence in violating the statute with the question of proximate cause.

Thus, in Belles v. Jackson, 4 Pa. Dist. R. 194, the court says: "The illegal employment . . . does not *per se* constitute negligence. Such employment must be the direct or proximate cause of the injury complained of." This seems to hold that the employment is negligence only where it is shown to be the proximate cause of the injury. The effect, of course, upon the child's right to recover, is the same as if the court had said that the wrongful employment was negligence, but that to entitle the child to recover it must be shown that the negligence was the proximate cause of the injury. The latter statement of the rule, however, is more accurate. The former statement is likely to cause confusion in thinking and an apparent conflict between cases which are really in harmony.

Again, in Evans v. American Iron & Tube Co. (C. C. N. D. Ohio, E. D.) 42 Fed. 519, where it was held that while, in a prosecution under a statute forbidding children under twelve years of age to be employed in factories, the fact of the wrongful employment would be all that was necessary to se-

Furniture Co. supra; Bailey, Personal Injuries Relating to Master & Servant, § 2766. Messrs. Manly & Hendren for appellee.

Connor, J., delivered the opinion of the court:

The plaintiff bases his right to recover on the facts admitted by the demurrer upon two propositions: That his employment by the defendant, he being under twelve years of age, was in violation of the provisions of § 1, chap. 473, p. 819, Acts 1903, prohibiting employment of children under twelve years of age, was *per se* negligence, or at least evidence of negligence; and that such negligence was the proximate cause of the injury sustained by him. The appeal, for the first time, presents to us for construction and application the act passed by the legislature for the protection of young children by expressly prohibiting their employment in mills and factories. The first section is plain and calls for no construction by the court. It provides "that no child under twelve years of age shall be employed in any factory or manufacturing establishment in this state." The provision in regard to oyster-canning factories is not material to any question presented by this appeal. The 2d section prescribes the hours during which persons under eighteen years

cure conviction, in a civil action for the injury other considerations might enter into the case before the defendant could be held liable for the illegal employment, the court said that in a civil case, where the illegal employment was the direct and proximate cause of the injury, the defendant would be liable; but that, if it was found that he gave the boy employment at a safe and easy task in an unexposed position, and that, if the child had stayed at his post, he would not have been injured, then the employment could not have been negligence or the proximate cause of the injury. Here, again, is found the same confusion of statement in regard to the two distinct questions of negligence and proximate cause. It may be true that on the facts stated the wrongful employment may not have been the proximate cause of the injury, but, nevertheless, such employment may have been negligence.

The mere employment of a child under twelve years of age in a factory contrary to statute is also held, in Kutchera v. Goodwillie, 93 Wis. 448, 67 N. W. 729, not to constitute actionable negligence, though it may subject the employers to the penalty prescribed by the statute.

There are other cases in which this question is raised, but not directly decided, the cases turning upon some other point, such as proximate cause, assumption of risk, or contributory negligence.

of age shall work. The 3d section provides that parents of children seeking employment shall give certificates in regard to their age, and makes any person knowingly and wilfully violating the provisions of the act indictable, etc. The act is the result of the well-considered, and we think wise, conclusion of the general assembly, reflecting and crystalizing into law the will of the people of the state. It is therefore not only our duty, but in entire harmony with our judgment, to give to the statute such a construction and application as will effectuate the intention of the general assembly, remedy and prevent the continuation of an evil which threatens the welfare of the young children, and, thereby, the best and highest interest of the state. Referring to, and applying the provisions of, an act in almost the same language as ours, the court of appeals in New York, in *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, says: "It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many of the articles used by mankind were manufactured. Numerous factories had been established throughout the country filled with machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive, with the result that injuries to them were of frequent occurrence. We think it is very evident that these reasons induced the legislature to establish definitely an age limit under which children shall not be employed in factories." The supreme court of Tennessee, in *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460, held that the employment of a minor within the age prohibited by the statute was negligence; that the breach of the statute was actionable negligence. In *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, it is said: "Authorities of the highest respectability hold that the violation of a statute prohibiting the employment of a child in a hazardous occupation where such employment is prohibited by law establishes a right to recover for negligence; hence, in such cases, liability is to be presumed from the employment in disobedience of law. . .

. Unless we can say that the statute has no effect in a suit for damages where the law had been violated, we are required to hold that the employment which the legislature positively forbids furnishes evidence tending to show, at least presumptively, that one of the causes of the injury in this case was the violation of the statute, in analogy to the well-known doctrine that ordinances regulating the hitching of horses, the speed of trains in cities, or other subjects of municipal

control are held to be evidence to sustain the charge of negligence. . . . It is well settled that a wrongdoer is at least responsible for the results likely to occur, or resulting as a natural consequence from his misconduct, or such as might have been reasonably anticipated."

We have, in accordance with the uniform current of authority, held that the violation of a town ordinance regulating the speed of trains and street cars is at least evidence of negligence. *Norton v. North Carolina R. Co.* 122 N. C. 910, 29 S. E. 886; *Edwards v. Atlantic Coast Line R. Co.* 129 N. C. 78, 39 S. E. 730; *Davis v. Durham Traction Co.* (at this term) 53 S. E. 617. The principle was applied to the violation of a statute requiring fire escapes to be maintained in houses rented to tenants. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Earl, J.*, saying: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty, causing damage, it cannot be doubted that the tenants have a remedy." In *Marino v. Lehmaier*, supra, *Parker, Ch. J.*, in a concurring opinion, says: "Against such an accident the state attempted to guard this boy, among others. But the defendant disregarded the law and employed and gave directions to one of the subjects of the state in violation of the state's policy, and the outcome of it was an injury to the child, which could not have happened had the law been observed. In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other facts, as evidence tending to show negligence on the part of defendant." The learned chief judge cited a number of cases to sustain his conclusion. Before the passage of the statute the present chief justice, in *Ward v. O'Dell Mfg. Co.* 126 N. C. 946, 36 S. E. 194, speaking for two members of this court, said that, notwithstanding there was no statute prescribing the age within which children should not be employed in mills and factories, "there is an aspect in which the matter is for the courts; that is, whether it is negligence *per se* for a great factory to take children of such immature development of mind and body and expose them for twelve hours per day to the dangers incident to a great building filled with machinery constantly whirring at a high speed." The same line of thought is expressed and sustained by numerous authorities in *Fitzgerald v. Alma Furniture Co.* 131 N. C. 636, 42 S. E. 946. Certainly, with the positive

prohibition imposed by the legislature against the employment of a child under twelve years of age, there can be no question that such employment is very strong, if not conclusive, evidence of negligence. If the age is known to the defendant, the employment is a positive defiance of the law; if the employment is without pursuing the method prescribed, and so easily followed, to learn the truth, its failure to do so gives it but little, if any, better status. Independent of the statute, the courts have uniformly held, and the text writers so declare, that the employment of young children either upon or in buildings where dangerous machinery is operated imposes the duty of carefully explaining to them the danger, and constant warning and watchfulness for their protection and safety. It is not an unreasonable burden upon employers, because they take children into their service with full knowledge of the risk to which they are exposed, and should be required to take the consequences of such employment.

We do not entertain any doubt that, upon the evidence before the court, the question of defendant's negligence should have been submitted to the jury. Defendant says that, notwithstanding its negligence, no cause of action accrued to plaintiff because the injury was not the proximate result of such negligence, but of an entirely unforeseen and unavoidable agency, the other boy who pulled the lever. It does not appear whether this boy was under twelve years of age. It has been frequently held that when persons negligently left dangerous machines or other instrumentalities exposed to the interference of children, and by reason thereof they have sustained injury, such result should have been contemplated as reasonably probable, fixing liability on the original negligent act. In this connection, it is said, in *Marquette Third Vein Coal Co. v. Dielie*, 110 Ill. App. 684, referring to the same suggestion made by defendant: "If plaintiff was injured while absent from the post of duty, or while violating his orders, or if it was carelessness or negligence for him to run between the sides of the moving cars and the mine wall, still, in our judgment, those facts would not prevent a recovery under the second count. The statute absolutely forbids the employment of a child of that age in a mine. One reason, no doubt, is that immature children are liable not to understand the significance and importance of the regulations prescribed for the mine and the employees therein. They may thoughtlessly disobey orders, or expose themselves to peril, or do acts which would be careless in an adult. The company which violates this statute ought not to be allowed to screen itself from liability because the child has been injured by reason

of those childish traits which give rise to the statute. . . . Such laws are sustainable under the police powers of the state, and should be so construed as to accomplish the object sought to be attained, and to correct the evils sought to be remedied. Holding the employers of children in violation of this statute to a strict liability for any injury that may happen to the child while engaged in such inhibited employment ought to have a wholesome influence tending to check the evils against which this legislation is directed." The court concluded: "We hold defendant assumed all risks of injury to the boy arising from his employment in the mine." The court of appeals of New York, in *Hickey v. Taaffe*, 105 N. Y. 36, 12 N. E. 286, after discussing the duty of giving such instruction as will enable him to fully understand and appreciate the danger incurred, says: "If a person is so young that even after full instructions he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and an employer puts or keeps him at such work at his own risk." It is therefore a question for the jury to say whether, upon competent testimony, the plaintiff was given that full and careful instruction in regard to the danger incident to his employment, and whether he was capable of understanding such danger after instruction. *Morris v. Stanfield*, 81 Ill. App. 264, was an action by a minor for injuries sustained by an unprotected saw. The defendant contended the proximate cause of the injury was the interference of another person. The court said: "If appellee was under thirteen years of age, and was employed in appellant's factory, every day of his employment was a separate and distinct violation of law. . . . If it was negligence to put a boy under thirteen years of age at work in a factory within a few inches of an unprotected buzz saw, any act of negligence of a fellow servant, not wilfully intended to injure appellee, that brought him in contact with the saw, was a concurrent act of negligence. Such act may have been the immediate intervening cause, but the unlawful employment, continuing, was, in combination with the intervening act, a proximate cause of the injury." The principle was applied in *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418: The defendant owned or had control of a turntable located in a portion of the town where children were in the habit of playing. The turntable was not locked or otherwise fastened. The plaintiff's child, with other children, was playing upon it when the child was killed. In passing upon one of the defendant's exceptions, the court said: "It is also urged that the

objection to the admission of the evidence should have been sustained because the petition shows that plaintiff's son was injured by the acts of other children in revolving the turntable. This point we think is not well taken. If defendant was negligent in not securing the turntable so that it could not be revolved by children to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured will not excuse defendant, if such act ought to have been foreseen or anticipated by it. That it ought to have been foreseen and provided against is shown by the case of *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592." In *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739, in which a parent was suing for injury sustained by his son, a boy of sixteen years of age, the court said: "This boy occupied a very different position [from an adult]. How could he be expected to know the peril of the undertaking? He was a mere youth without experience and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and, doubtless, entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so." In *Lynch v. Nurdin*, 1 Q. B. 29, it appeared that the defendant's servant left a horse and cart unhitched on the street. The plaintiff, with other children, was playing with the horse and climbing into the buggy, when the plaintiff was hurt by the horse moving away. To an action for damages, the defendant said that the plaintiff brought the injury upon himself. Denman, Ch. J., after discussing the conduct of the defendant's servant in leaving the horse unhitched, said: "But the question remains, Can the plaintiff then, consistently with the authorities, maintain his action, having been, at least, equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them." In *Iron* 7 L.R.A.(N.S.)

& Wire Co. v. Green, 108 Tenn. 161, 65 S. W. 399, the same defense was made that the defendant's wrongful employment of the child was not the proximate cause of the injury. Beard, J., said: "It [defendant] had no right to employ this minor. While in its employment, on its premises, and foolishly playing with panels, the property of the company, too heavy for his strength to hold, yet with boyish heedlessness disregarding this fact, this injury is inflicted upon him. Had he not been employed by this company, there is no reason to suppose he would have been on its premises where the temptation occurred to him to prank with these panels to his serious hurt. In each of the propositions presented by the respective parties to the suit, we think there is causal connection between the employment and the injury." The doctrine is thus stated by Bailey, in his work on *Personal Injuries* (1291): "When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children, wherever they go, must be expected to act upon childish instincts and impulses, a fact which all persons who are *sui juris* must consider and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character, and one likely to do an injury to the child itself or to others, is liable in damages for injury resulting, which is a natural result of the original wrong, though there may be an intervening agency between the defendant's act and the injury." For this statement of the law the author cites a number of cases, among others, *Lynch v. Nurdin*, *supra*, which Mr. Beach says is the leading English case on the subject and has been generally followed in this country, both in the Federal and many of the state courts. *Contrib. Neg.* §§ 137-140; *Stout v. Sioux City & P. R. Co.* 2 Dill. 294, Fed. Cas. No. 13,604, 17 Wall. 657, 21 L. ed. 745. This was one of the series known as the "Turntable Cases" (75 Mo. 653, 42 Am. Rep. 418). The case was tried by Judge Dillon, and on appeal Mr. Justice Hunt said: "The evidence is not strong, and the negligence is slight; but we are not able to say that there is not evidence sufficient to justify the verdict. . . . The charge was in all respects sound and judicious." In *Queen v. Dayton Coal & I. Co.* 95 Tenn. 464, 30 L.R.A. 83, 49 Am. St. Rep. 935, 32 S. W. 640, it is said: "Of course, we do not hold that, if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause

wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute."

The learned counsel for defendants cite us to a number of cases more or less in conflict with the line of authorities which we have noted. In a few cases it is held that the statute prohibiting the employment of young children does not change the rule in respect to negligence, and that in such actions the rules and principles governing prior to the passage of the statute prevail. They are clearly out of harmony with the best considered and, we think, sound view. Several of them, upon the peculiar facts in the record, hold, as matter of law, that the violation of the statute was not the proximate cause of the injury. In other cases the alleged negligence was in the failure of defendant to box, or otherwise protect, machinery in the manner required by statutes, wherein it is held that plaintiff's recovery for injury sustained is barred by working with such machines in the presence of obvious danger, etc. The distinction between such cases and ours is pointed out in *American Car & Foundry Co. v. Armentraut*, 214 Ill. 609, 73 N. E. 766: "The distinction is that in those cases the employment of the servant was lawful. Here the employment was unlawful. The injury resulted from the unlawful employment, and while appellee was engaged in doing the precise thing that appellant directed him to do."

Defendant relies upon the decision of this court in *Hendrix v. Cooleemee Cotton Mills*, 138 N. C. 169, 50 S. E. 561. There the plaintiff was a boy of twelve years of age, hence not within the protection of the statute. The plaintiff, at the time of the injury, was, at the request of another boy, doing something entirely out of his line of employment. He was accustomed to the elevator. It must be conceded that expressions are to be found in the opinion tending to sustain the defendant's contention, but we think the cases may be distinguished. Plaintiff says: "After cutting lumps I then was a sweeper on the floor. I cleaned up about machines and around the floor. That evening at 4 o'clock we got out of the factory. The weigh boy went down the house to wash his hands. The man that ran that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh boy ran up and threw a piece of cut tobacco in the machine. I reached my hand in there to take it out. He pulled the lever and ran. . . . It was not after quitting time that I got hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine. I saw others cleaning up the machine, and I did

so." There is much in this testimony from which a jury may reasonably have drawn the inference that the child was acting in the line of his employment. It may be that we do not correctly interpret his testimony, but it impresses us, with our knowledge of the alertness and desire of children to be useful as this child by seeking employment showed himself to be, that he thought it was his duty to take the piece of tobacco out of the machine. Certainly it is not a necessary, or even a fair, interpretation of his conduct that he was wanton and reckless. Is it not rather the conduct of a boy seeking to discharge his duty to his employer? It was for the jury to draw such inferences from his testimony as are reasonable. *Stout v. Sioux City & P. R. Co.* supra.

We think a reasonable construction of his conduct in taking the tobacco out of the machine is that he was, or reasonably supposed that he was, discharging his duty. He was, it seems, required to clean up the machine. We should hesitate to conclude that the other boy wilfully and therefore wickedly threw the lever deliberately intending to crush the plaintiff's hand. It is more in accordance with childish impulse that he did it to frighten the plaintiff and to see him jerk his hand back. While it was a reckless and wanton act, it was one of the freaks and pranks which might not unreasonably be anticipated from leaving boys together in a mill, surrounded by dangerous machinery. It was for that reason, among others, that the legislature prohibited the employment of children in such places. The fact that the statute was enacted, as we know, after several ineffectual efforts, puts an employer upon notice that in the eye of the law, based upon experience, it was dangerous to life and limb of children to be so employed and exposed to the very kind of danger by which the plaintiff was injured. To permit the defendant to escape liability for violating the statute, by saying that it did not anticipate this particular condition, with its disastrous results, would be to nullify the law. Of course, it did not anticipate this particular condition or result. If it had done so, the employment would have been not negligent, but criminal. Neither did the servant who left the horse unhitched, in *Nurdin's Case*, anticipate that children would play with and frighten the horse and cause the plaintiff to suffer injury; but the court held that he ought to have done so,—so in the Turntable Cases the same defense was made. If the plaintiff be required to show that, in every negligent act, the particular result was in fact anticipated, it would be difficult to maintain any action for injury sustained by the negligence of another. *Drum v. Miller*, 135 N. C. 204,

65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421. The law leaves the decision of the question of proximate cause to the jury, except when upon the facts but one inference could be drawn, as in the Turntable Cases and many others in the Reports. The state says to employers that they must not take the children under twelve years of age into their mills and factories; that to do so endangers their lives and limbs, dwarfs them mentally, morally, and physically; that it is upon the children that the permanent power and welfare of the state depend. They must not, below the tender and immature age fixed by the statute, be brought into contact with iron and steel machinery propelled by the powerful agencies of steam or electricity. Considered from any point of view,—the right of the child to have the opportunity to grow to at least the age named in the statute in a pure atmosphere, without danger of mutilation of body, dwarfing of mind, and to attend the schools provided by the state,—the legislation is founded upon a wise and humane policy. Its violation followed by injury gives a cause of action to the child upon the elementary principle that, "when ever the common law, a statute . . . imposes on one a duty, if of a sort affecting the public within the principle of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom; or, if the matter of the law involves only the interests of individuals, anyone who has received harm from another's disobedience may have his suit against him for the damages." Bishop, *Non-Contract Law*, § 132; *Greenlee v. Southern R. Co.* 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115; *Comyns*, Dig. p. 453; *Troxler v. Southern R. Co.* 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550. The defendant says, whatever its breach of duty may have been, the plaintiff was negligent, and by such negligence contributed to his injury. The authorities cited by the learned counsel, applied to the conduct of an adult or one not within the protection of the statute, fully sustain their contention.

But when we come to measure the duty of the child in regard to the exercise of care for his safety, an entirely different principle controls. Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine, to say that a child of twelve years comes within that class. Adopting the standard of the

law in respect to criminal liability, we think that a child under twelve years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act or conditions produced by others as to make him guilty of contributory negligence. Mr. Labatt says: "The essential and controlling conception by which a minor's right of action is determined, with reference to the existence or absence of contributory fault, . . . the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible." *Mast. & S.* § 348. It is in such cases a question for the jury. 4 *Thomp. Neg.* § 4587; *Beach, Contrib. Neg.* 136. "Whether he could be guilty of contributory negligence or not was a question of fact to be determined by the jury, dependent upon the other fact whether it had been shown that deceased had capacity to be guilty of contributory negligence. Between seven and fourteen a child is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity." *Tutwiler Coal, Coke & I. Co. v. Enslen*, 129 Ala. 336, 30 So. 600; *Glover v. Gray*, 9 Ill. App. 329. In several cases it is held that, when a statute is violated and results in the injury of the child, the defense of contributory negligence is not open to the defendant. *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766. The better view seems to be otherwise. The Tennessee court, after discussing the question, concludes: "It is hardly necessary to add that contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess." "As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and, if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary

care in a person of full age and capacity." 7 Am. & Eng. Enc. Law, 2d ed. p. 409; Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645.

His Honor erroneously sustained the demurrer to the evidence. In the light of the testimony, he should have submitted the case to the jury, instructing them that, if they found the facts as testified to, the defendant was guilty of negligence in employing the plaintiff, either knowing his age, or failing to have the certificate of his parents as provided by the statute; that, if they found that such negligence was the proximate cause of the injury, they should answer the first issue "Yes." In regard to the alleged contributory negligence of the plaintiff, he should have instructed the jury in accordance with the principles announced by the authorities herein cited. The jury could take into consideration the age, intelligence, and knowledge of the plaintiff in regard to the machine and his capacity to know and appreciate the danger. We have given to the questions presented upon this appeal a careful examination. It is the first time that we have had occasion to construe the statute, and it is conceded that the courts of other states are not uniform in the construction given similar statutes. It is a matter of importance to employers of labor in mills and factories to know the standard of their rights and liabilities. The industrial life and development of the state are not only consistent with, but promoted by, the exclusion of young children from mills and factories. The child, educated and developed before beginning work of this kind, becomes not only more useful and efficient, but in all respects a better citizen.

While not necessary to the decision of this appeal, we note that the 1st section of chapter 473, p. 819, Laws 1903, is omitted from the Revisal. The statute, as incorporated in §§ 3362-3364, Revisal 1905, makes the prohibition dependent upon "knowingly and wilfully" employing a child. The original act, in declaring the prohibition, did not contain these words. Section 3, making the employment of the child a misdemeanor, properly required the act to be done "knowingly and wilfully." The omission of § 1 was doubtless an oversight. It may be of importance in the trial of actions, such as this, for injuries sustained, in regard to the burden of proof. We simply note this change to the end that, if the general assembly should desire, they may restore § 1, which, under the language of the enacting and repealing clauses of the Revisal, would seem to be repealed.

There must be a new trial.
7 L.R.A.(N.S.)

OREGON SUPREME COURT.

J. A. MORTON, Appt.,

v.

OREGON SHORT LINE RAILWAY COMPANY, Respt.

(— Or. —, 87 Pac. 151.)

Water—flood—right to combat.

1. The swollen current of a stream during floods, which has not become separated from the main body of the stream, is not surface water which the riparian proprietor may combat as a common enemy, to the injury of adjoining proprietors.

Riparian right—jetty.

2. A riparian proprietor cannot, even to protect his own land, project jetties into the stream if the effect is to deflect the current or shoal the water to the injury of a lower proprietor.

Same—channel—land and main land.

3. The passage between an island and the main land through which a portion of the river flows is a channel which cannot be obstructed by one riparian owner to the injury of another.

Evidence—judicial notice.

4. The court will take judicial notice of the laws of nature.

Injunction—deflection of stream.

5. Injunction will lie to compel the removal of a jetty placed in a stream in such a manner as to deflect the current to the injury of a lower riparian owner by depriving him of the natural flow of the stream and washing away his bank by casting the water directly against it.

(October 23, 1906.)

Case Note.—Right of upper proprietor to deflect water in stream to the injury of lower proprietors:—As shown in 2 Farnham on Waters, p. 1565, one of the rights of a riparian owner is to have the stream flow as nature directs. One consequence of the interference with the flow by an upper proprietor may be to deflect the current so as to cast it directly against the banks of the lower proprietor, the inevitable consequence of which would be the washing away or destruction of a portion of his land. The authority, so far as it exists, is to the effect that such action on the part of the upper proprietor is wrongful, even though it is done by the upper proprietor for the purpose of protecting his own property. Gillespie v. Forrest, 18 Hun, 110; Dayton v. Robert, 8 Ohio C. C. 649. So, if the water is taken out of the stream, it cannot be returned at such an angle that the current will cause injury to the property of the lower owner. Briscoe v. Young, 131 N. C. 386, 42 S. E. 893; Valley R. Co. v. Franz, 43 Ohio St. 623, 4 N. E. 88. So, an upper proprietor cannot cut a tail race so as to turn the water into the foot, instead of the head, of another proprietor's pond, if the result will be to hasten the flow of the water and

A PPEAL by plaintiff from a decree of the Circuit Court for Malheur County in defendant's favor in a suit to enjoin interference with the current of a stream. Reversed.

Statement by Moore, J.:

This is a suit by J. A. Morton against the Oregon Short Line Railway Company, a corporation, to enjoin the maintenance of obstructions to the flow of water in a stream. The complaint states, in substance, that the plaintiff is the owner of certain real property in section 28, township 18 S., of range 47 E., in Malheur county, which land lies west of and borders on the Snake river;

that in 1904, the defendant built above such premises in the west channel of the stream certain dams which deflected the water, depositing sediment in the channel, and shoaling it so as to prevent the operation of plaintiff's private ferryboat from his land to an island in the river, and also depriving his arid land of water from the river for subirrigation; that these obstructions caused another channel to form in such a direction as to force a current directly against the bank of his land, cutting away a wide margin thereof, and, if such encroachment is permitted to continue, it will force a channel through a depression in his premises, making an island of a part thereof

fill the pond with sand. *Hulme v. Shreve*, 4 N. J. Eq. 116. The rule applies not only to piers and projections from the shore, but also to structures placed in the bed of the stream. *Spencer v. Hartford, P. & F. R. Co.* 10 R. I. 14. Therefore, a railroad company will be liable for deflecting a current to the injury of a lower proprietor by the construction of a bridge pier in the river. *De Baker v. Southern California R. Co.* 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610. Although in that case the court held that, since the railroad company was acting under authority of a municipal corporation, if the injury was caused by a defective plan, for the consequences of which the city would not be liable, the railroad company would not be liable. This latter ruling is erroneous, however, since the deflection of the current so as to injure the lower property constitutes a taking or injury of it within the protection of the Constitution. The injury, however, must be such as could reasonably have been foreseen, and, therefore, there is no liability for injuries caused by a flood rushing through an opening left for the passage of logs. *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 Rawle, 9, 26 Am. Dec. 111. And a successor in title to the one who erects the structure will not be liable for injuries caused by it if he assumed no duty with respect to it, and does not adopt or interfere with it in any way. *For-dyce v. Russell*, 59 Ark. 312, 27 S. W. 82. Opposed to the above authorities is a Vermont case decided in 1858, *Henry v. Vermont C. R. Co.* 30 Vt. 638, 73 Am. Dec. 329, which the court says is one of new impression. The court also says that, since no brief or argument had been submitted on the part of plaintiff, it may have failed to apprehend the true ground of plaintiff's claim. In that case it appeared that the railroad company had built piers in the river which turned the current directly against the bank of the plaintiff, an owner of land farther down the stream, the effect of which was to cut out and wash away a large quantity of the land. The court denied the right of action for three reasons: First, it was not a cause of injury whose operation could be calculated or limited in its extent and operation, or defined in any 7 L.R.A. (N.S.)

mode, and, by consequence, not one which, in the nature of things, could be guarded against; second, it is not a cause of damage which inevitably produces its effect, but only one which, in its operation, may require greater precautions against injury to be used by proprietors below; hence, the law rather chooses to leave each proprietor to guard his own shore than to require riparian owners above to forego any use of the water which they deem beneficial to themselves. Thus, mill owners, or those who may use water from a running stream, have never been required to restore the water to the stream at any particular points, or so as to leave the force and direction of the stream precisely the same as before; third, the act complained of is merely consequentially injurious, producing no direct injury, like the flowing of land, even by means of an obstruction in a running stream. And the damage to the riparian owner below is so remote and uncertain a consequence that the law has not held the owner above liable for such consequences. From the fact that the court so completely misapprehended the rights of the respective owners, and departed so completely from the principles which have been adopted by other courts, it would seem that this decision is of little value. So, in *Covington Harbor Co. v. Phenix Bridge Co.* 10 Ohio Dec. Reprint. 657, which was an attempt to recover damages for injuries caused by an exercise of authority granted by the United States government, a lower court in Ohio held that it was bound by the decisions of the Supreme Court of the United States, which hold that an exercise of the sovereign power which is not a physical encroachment upon private property, and causes only consequential and indirect damages to it, is not a taking of private property for public use, and gives no right of action; and therefore it denied recovery. While that decision is to some extent supported by analogous decisions of the Supreme Court of the United States, it would seem that such decisions so far ignore the constitutional property rights of individuals that the Constitution, and not the *dictum* of the court, would prevail, and that, therefore, a decision based upon such reasoning was of little value.

to his irreparable injury, to redress which he has no plain, speedy, or adequate remedy at law. The answer denied the material allegations of the complaint, and averred, in effect, that in 1883 the defendant built its railroad through Malheur county on the right of way now occupied thereby and thereafter maintained its roadbed and track, operating trains thereon for the benefit of the public; that at the time the railroad was constructed the water of Snake river, during each freshet, flowed through a swale situated between the roadbed and the west channel of the river, and the floods in that stream have cut and are cutting away the bank near the track, thereby endangering the roadbed to such an extent that the defendant was compelled to build the obstructions complained of, to prevent its property from being destroyed; and that the swale is the so-called channel referred to in the complaint as the west channel of the river, but that such swale is, and at the time the railroad was constructed was, at least 300 feet west of the west channel of Snake river. The reply having put in issue the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court made certain findings and dismissed the suit, from which decree the plaintiff appeals.

Messrs. Will R. King and W. H. Brooke, for appellant:

No dams or obstructions of any kind can be maintained in the channel of a stream so as to obstruct the flow thereof to the injury of a lower riparian proprietor.

Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 737; *Cox v. Bernard*, 39 Or. 53, 64 Pac. 860; *Jones v. Conn*, 39 Or. 30, 54 L.R.A. 630, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068; *Oregon Constr. Co. v. Allen Ditch Co.* 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

To divert or obstruct a water course is a nuisance for which equity affords a remedy.

Taylor v. Welch, 6 Or. 200; *Shively v. Hume*, 10 Or. 76; *Mendenhall v. Harrisburg Water Power Co.* 27 Or. 38, 39 Pac. 399; *Angell, Watercourses*, § 332; *Weiss v. Oswego Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Shaw v. Oswego Iron Co.* 10 Or. 371, 45 Am. Rep. 146; *Krause v. Oregon Iron & Steel Co.* 45 Or. 378, 77 Pac. 833.

The steps taken by defendant to protect its track from invasion by the river must be such as not to injure landowners on the stream below.

Beidler v. Sanitary District, 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118; 2 *Farnham, Waters*, § 530, pp. 1722-1728; *Freeland v. Pennsylvania R. Co.* 197 Pa. 529, 58 L.R.A. 7 L.R.A. (N.S.)

206, 80 Am. St. Rep. 850, 47 Atl. 745; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; *Mundy v. New York, L. E. & W. R. Co.* 75 Hun, 479, 27 N. Y. Supp. 469; *Wood, Nuisances*, §§ 173, 350; *Gerrish v. Clough*, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561.

Messrs. P. L. Williams, F. S. Dietrich, and A. N. Soliss, for respondent:

A riparian owner may construct the necessary embankments, dykes, or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition and to bring the stream back to its natural course.

Gulf, C. & S. F. R. Co. v. Clark, 41 C. C. A. 597, 101 Fed. 678; *Angell, Watercourses*, § 333; *Barnes v. Marshall*, 68 Cal. 569, 10 Pac. 115; *Hoard v. Des Moines*, 62 Iowa, 326, 17 N. W. 527.

A private person cannot maintain a suit to enjoin a threatened nuisance, or to abate an existing nuisance, unless he can allege and prove that his injury is different, not only in amount, but in kind, from that sustained by the public.

High, Inj. 3d ed. §§ 762, 763; 10 *Enc. Pl. & Pr.* p. 897; 14 *Enc. Pl. & Pr.* p. 1137; 20 *Enc. Pl. & Pr.* p. 933; 21 *Am. & Eng. Enc. Law*, pp. 78, 79; *Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125; *McCloskey v. Kreling*, 76 Cal. 511, 18 Pac. 433; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756; *Payne v. McKinley*, 54 Cal. 532; *Aram v. Schallenberger*, 41 Cal. 449; *Lewiston Turnp. Co. v. Shasta & Weaverville Wagon Road Co.* 41 Cal. 562; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 575.

Where a railway company is seeking to make its track safe for public travel it will not be prohibited from so doing at the instance of one injured thereby, when such injury is comparatively small, and may easily be ascertained and compensated for in money.

Atchison, T. & S. F. R. R. Co. v. Meyer, 62 Kan. 696, 64 Pac. 597; *Portland v. Baker*, 8 Or. 356; *Curtis v. Winslow*, 38 Vt. 690; *Smith v. Schlink*, 15 Colo. App. 325, 62 Pac. 1044; *McGregor v. Silver King Min. Co.* 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091.

Moore, J., delivered the opinion of the court:

The transcript shows that the plaintiff is the owner of the real property mentioned, and that his land borders on the west bank of the Snake river. The township referred to was surveyed in 1874, and the field notes thereof, a copy of which was offered in evidence, show that the left bank of the river,

as meandered, then intersected the south boundary of section 33 at a point 68.35 chains east of the southwest corner of that section, and extended northwesterly by a curved line to a point west, but near the center, of section 33; thence, by a similar line northeasterly, to a point east of the northeast corner of that section; thence westerly and northerly by a curved line to a point west of, but near the center of, section 28; and thence northeasterly to a point 2.80 chains east of the northeast corner of the latter section. A sketch of the margin of the river, as indicated, will disclose that, when the government survey was made, the stream flowed around a peninsula over which the boundary between sections 28 and 33 extended. The defendant, in 1883, constructed its railroad from Huntington, Oregon, southerly through the premises hereinbefore described, and also through adjoining land on the south, now owned by H. M. Plummer. The defendant offered in evidence a blue print of the *locus in quo*, reduced to a scale of 400 feet to the inch, which indicates the original course of the river as meandered, the line of the railway as constructed, and other data. It appears from this plat that the railroad was built about 14 rods west of the meander line at the bend near the center of section 28, and about 52 rods west thereof at the curve near the middle of section 33. An extraordinary freshet in Snake river in 1894 cut across the base of the peninsula a new channel, which extends northeasterly over what theretofore had been a meadow. Prior to such change, a large part of the river below the peninsula flowed in a channel that separated plaintiff's land from Datey island, east of his premises; but, after such flood, the greater volume of water flowed east of that island. Immediately north of section 33, but south of Datey island, the change in the channel of Snake river formed a large sand bar, constituting an island, the surface of which was above the ordinary stage of water. The bar is separated from the left bank of the river by a narrow channel which extends northerly, and is also severed from Datey island by a broader channel that extends northwesterly; the waters of which unite and flow by plaintiff's premises. The freshet adverted to and the annual floods in the river have washed away the left bank of the stream in sections 28 and 33, nearly to the east line of the right of way of the railroad, and, to prevent further injury therefrom, the defendant placed several hundred car loads of rock along the margin of the river; and in 1903, with Plummer's consent, it built, where the swale had been, five jetties that extend from the bank down

stream at an acute angle with the thread thereof. These obstructions were made by driving parallel rows of piling about 12 feet apart, and filling the intervening space with brush and rock. The lower jetty is about 215 feet long, and extends nearly across the channel west of the sand bar at the head thereof. The other jetties are from 50 to 75 feet in length. Another extraordinary freshet in 1904 caused the bank of plaintiff's land, for a distance of about half a mile, to be washed away to the depth of 100 feet or more, whereupon he instituted this suit, and, at the trial, offered testimony tending to show that the lower jetty prevented the water from flowing in the channel west of the sand bar, thereby permitting the current in the channel between the bar and Datey island to flow nearly at right angles against his bank, damaging it; that the closing of the channel west of the sand bar caused sediment to be deposited, shoaling the channel east of his land, and preventing him from operating, by force of the current, a ferryboat which he maintained for his own use from his premises to Datey island, a part of which he held by a lease from year to year, and another part thereof was claimed by his son as a homestead where cattle were pastured in which he had an interest; and that, if the lower jetty be maintained, the diminution of water in the channel will prevent the subirrigation of his land, which is arid, and will also permit the water in the channel north of the sand bar to cut into a swale on his premises, thereby forming a new course through his land and creating an island. The testimony, relating to the injury which it is claimed will result to plaintiff's land by the maintenance of the lower jetty, though given by persons living in the vicinity of his premises, who are acquainted therewith, know the character of the soil, and the effect thereon of freshets in the river, consists of the opinions of several witnesses, and it is possible that the disastrous consequences which they predict may not eventuate. It was stipulated that three civil engineers who were employed by the defendant would, if present, testify that in the early spring of 1906, they made accurate measurements of the left bank of the river through the plaintiff's premises, setting stakes along the margin of the stream, and that returning to his land in the latter part of July, after the annual freshet had subsided, they found that no part of the bank had been washed away during that season, but that the water in the river in 1906 was not as high as it was the preceding year. The foregoing is deemed a fair statement of the material facts involved, and based thereon, the question to be

determined is whether or not the jetties can legally be maintained where they are built. The defendant's counsel insist that, the river having suddenly changed its channel in 1904, thereby endangering the railroad track, their client, to protect its property, was authorized to restore the flow of the stream to its original bed, and hence the decree should be affirmed.

It has been held that the person across whose land a freshet in a natural stream suddenly causes a new channel to be formed may, within a reasonable time, restore the flow of water to its original bed. *Farnham. Waters*, § 491; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L.R.A. 349, 43 N. W. 879. It will be remembered that the defendant built the jetties into the river from the bank of Plummer's land with his consent, and, as he is a riparian proprietor on the new channel, the railway company, as his licensee, secured such right to change the flow of the current as he possessed. *Slater v. Fox*, 5 Hun, 544. An examination of the blue print referred to shows that the upper jetty is built nearly half a mile below the original meander line of the river where it commenced to cut the new channel, and, as the barriers complained of do not force the water around the peninsula, they were evidently constructed to prevent injury to the railroad grade by deflecting the current. Instead, therefore, of attempting to restore the stream to its ancient channel, the defendant, by building the jetties, has in fact recognized the new way as the true water course, and tried to confine it to the bed as at first made. The swollen current of Snake river during floods is nevertheless a part of that stream, at the place where the jetties are built, and not surface water, within the accepted meaning of that term, against which a land proprietor may combat as he would oppose a common enemy, though he thereby injures the real property of others. *Price v. Oregon R. & Nav. Co.* 47 Or. 350, 83 Pac. 843. The defendant's counsel, in support of the decree rendered, cite the case of *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678, upon the authority of which the trial court evidently relied. In that case a railroad company, to protect its roadbed, a part of which had been washed away by the gradual change of the channel of a river, built dikes some distance from the bank of the stream on what was formerly solid ground, to restore the current to its original channel. These dikes encroached upon the channel as it existed when they were built, and deflecting the current a subsequent freshet in the river washed away part of the land of a riparian proprietor, who, in an action to recover the

damages sustained, secured a judgment, in reversing which the circuit court of appeals says: "A riparian owner may construct the necessary embankments, dikes, or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if he does no more, riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury his action causes them." In that case, as the means adopted to prevent the roadbed from injury from encroachments of the channel consisted of dikes, the term "other structures," referred to in the opinion quoted, evidently means similar formations, and not jetties placed in a stream to deflect its course. The conclusion reached in the case adverted to is at variance with the rule announced in *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165, where it was held that, though a riparian proprietor was authorized to protect the bank of his land from injury from the encroachment of a natural stream, he could not, without incurring liability, erect any structure for that purpose which would injure the property of others. These cases illustrate the conflict that exists in respect to this important subject. Which rule is founded on the better reason, or supported by the greater weight of judicial utterance, is not necessary to a decision herein.

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land, are synonymous, and mean a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake, bay, etc., the ends of which extend across low land to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A dam, however, is a structure, composed of wood, earth, or other material, erected in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier, or to retain it within the obstruction. A jetty is a kind of a dam, usually built in the manner hereinbefore described, and intended to deflect the current so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank. Assuming, without deciding, that an embankment may be built by a riparian proprietor to prevent his land from being submerged in extraordinary freshets, we think a jetty cannot be classed as "other structures," specified in the case relied upon, and

that when they, by deflecting the current or by shoaling the water, injure a lower riparian proprietor, the author of the obstruction violates the maxim, *Sic utere tuo ut alienum non laedas*. One of the issues to be tried is the identity of the water course west of the sand bar at the head of which the long jetty is built. "The channel," says a distinguished text writer, "is the passageway between the banks through which the water of the stream flows." Farnham, Waters, § 417. This definition was undoubtedly intended to apply only to the entire uninterrupted space occupied by water flowing between well-defined banks. The description of a channel, as given by the learned author, is broad enough, however, to include the flow of water between an island and a bank of a stream, and hence the exact meaning of the word embraces the passageway that was obstructed by the defendant's lower jetty. As the blue print shows this to be a water course which is indicated by the explanatory words: "Very swift and shallow;" and shows the passageway to be the most westerly route, we have no doubt that it is, as alleged in the complaint, the west channel of the Snake river.

It appears from the transcript that the lower jetty was intended to close this entire channel, but that the water, deflected by the angle of the barrier, washed the sand from the outer end of the obstruction, permitting a part of the current to continue in the bed of the stream west of the sand bar, but causing the greater volume to flow east thereof. As a jetty is a species of dam, and the lower obstruction deprives a riparian proprietor of the accustomed flow of water in the channel of the stream, is the deprivation of the right which is incident to the estate such an injury as will authorize the granting of the relief sought? The plaintiff and his witnesses express the opinion that, if the water is permitted to flow in the west channel, it will continue its course along the bank of his land and diverge the current, which otherwise strikes his premises at nearly right angles. This consensus of opinion is not based on observations as to the effect of the water at the line of injury to plaintiff's land during the flood of 1904, but the consequences assumed, though speculative, seem so reasonable and dependent upon the laws of nature, of which a court will take judicial notice, that we are forced to the determination that injury must necessarily result to plaintiff's premises, and to his property rights incident thereto, if another freshet should occur in the river. The conclusion thus reached makes such a case as entitles the plaintiff to equitable intervention, but, as the lower jetty is the

only one of which he seriously complains, that obstruction only will be ordered abated.

The defendant's objections to the plaintiff's right to institute this suit and to prosecute this appeal not being deemed important, the decree is reversed, and one will be entered here requiring the defendant, within three months from the entry of a mandate herein in the lower court, to remove the long or lower jetty; the plaintiff to recover his costs and disbursements in both courts.

VIRGINIA SUPREME COURT OF APPEALS.

GEORGE G. HERRING, Appt.,
v.
J. WILTON.

(— Va. —, 55 S. E. 546.)

Nuisance—howling dogs—injunction.

1. The maintenance of howling and barking dogs and whining puppies on neighboring premises, to the great and continuous annoyance and discomfort of a property holder and his family, so that their rest is broken, sleep interrupted, and their reasonable use and enjoyment of their home disturbed, is a nuisance subject to be enjoined.

Same—equity jurisdiction—remedy at law.

2. The jurisdiction of equity to abate a nuisance is not destroyed by the passage of a municipal ordinance purporting to award an easy and expeditious remedy for the inconvenience caused thereby.

(November 22, 1906.)

Case Note.—Keeping of barking dogs as a nuisance:—There seems to be no question but that the barking of dogs may become such a nuisance as to entitle persons annoyed thereby to some remedy to prevent it; but the question whether a nuisance exists depends upon the extent of the annoyance. Thus *Brill v. Flagler*, 23 Wend. 354, which is fully set out in *HERRING v. WILTON*, sustains the right to kill a dog which is in the constant habit of coming on one's premises and about his dwelling day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of his family, if the nuisance cannot be removed in any other way.

And in *Laverty v. Hogan*, 2 N. Y. City Ct. Rep. 197, the court remarks *obiter*, on the authority of *Brill v. Flagler*, supra, that dogs accustomed to bark at night and disturb the neighborhood are nuisances; and they may be killed by any person annoyed thereby.

And *Hubbard v. Preston*, 90 Mich. 221, 15 L.R.A. 249, 30 Am. St. Rep. 426, 51 N. W. 209, sustains the right of one to shoot into a large pack of dogs, where such dogs have

A PPEAL by defendant from a decree of the Circuit Court for Rockingham County enjoining the keeping of dogs upon his property in such a way as to constitute a nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. J. B. Stephenson and H. W. Bertram, for appellant:

The foundation for the interference of equity in restraint of nuisance rests in the necessity of preventing irreparable mischief.

High, Inj. p. 565; Wade v. Miller, 188 Mass. 6, 69 L.R.A. 820, 73 N. E. 849; Powell v. Bentley & G. Furniture Co. 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1086.

When a summary remedy is provided by statute for the abatement of nuisances, a court of equity may properly refuse to interfere.

1 High, Inj. 572; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; Powell v. Foster, 59 Ga. 790.

Messrs. Sipe & Harris, for appellee:

To constitute a nuisance, it is sufficient if the noxious thing produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable.

Rex v. Neil, 2 Car. & P. 484; Rex v. White, 1 Burr. 337; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Soltan v. De Held, 2 Sim. N. S. 133; 1 Addison, Torts, 317; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197; Masonic Temple Asso. v. Banks, 94 Va. 695, 27 S. E. 490.

The jurisdiction of a court of equity to

become an intolerable nuisance by congregating about his premises, barking, quarreling, and fighting there, if it is a reasonable and necessary means of ridding himself of the nuisance.

And in Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, the court states *obiter* that the dog is a noisy animal, and may in that way become a nuisance and be destroyed; but that whether dogs kept on the premises of their owner may, by their noise, become nuisances to adjoining proprietors so as to subject their owners to an action for a nuisance seems to be an open question.

And in Force v. Dahn, 10 N. J. L. J. 252, as digested in 37 Century Dig. col. 1553, an order to show cause why a nuisance consisting of the barking of a dog, constantly annoying the neighbors at night, should not be enjoined, was allowed.

But in Street v. Tugwell, 2 Selwyn, N. P. 4th Am. ed. 299, a verdict was rendered for defendant in an action on the case for keeping dogs so near plaintiff's dwelling as to disturb him in the enjoyment thereof, although the evidence showed that some six or seven pointers were kept so near his

restrain by an injunction the creation or continuance of a nuisance which is likely to produce irreparable injury is well established and constantly exercised.

Masonic Temple Asso. v. Banks, 94 Va. 697, 27 S. E. 490; Wood, Nuisances, 3d ed. § 809; United States v. Luce, 141 Fed. 409; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; Camfield v. United States, 167 U. S. 522, 42 L. ed. 261, 17 Sup. Ct. Rep. 864; Brill v. Flagler, 23 Wend. 357.

Although the nuisance sought to be enjoined may be punished criminally, such punishment does not prevent the exercise of the restraining power of equity.

High, Inj. § 572; 2 Beach, Inj. § 1048, p. 1044; Hull v. Watts, 95 Va. 13, 27 S. E. 829.

Keith, P., delivered the opinion of the court:

Wilton, the appellee in this court, filed a bill in the circuit court of Rockingham county, in which he states that he is a resident of the town of Harrisonburg, and that contiguous to him is the property occupied by George Herring; that for three years past Herring has maintained on the lot on which he resides a kennel, about 100 or 125 feet distant from Wilton's residence, in which he is breeding dogs for sale, having at times as many as seven or eight, and rarely so few as two or three; that the dogs keep up an incessant barking, especially during the night, by which the complainant and his family are so annoyed and disturbed as to be prevented from obtaining such sleep and rest as health requires; that, by reason of the repetition of this nuisance, he has be-

come an intolerable nuisance by congregating about his premises, barking, quarreling, and fighting there, if it is a reasonable and necessary means of ridding himself of the nuisance.

And in Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, the court states *obiter* that the dog is a noisy animal, and may in that way become a nuisance and be destroyed; but that whether dogs kept on the premises of their owner may, by their noise, become nuisances to adjoining proprietors so as to subject their owners to an action for a nuisance seems to be an open question.

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house that his family were prevented from sleeping during the night, and were greatly disturbed during the day; and Lord Kenyon refused a new trial. He stated, however, that, if defendant continued the nuisance, plaintiff might bring a new action if he deemed it advisable.

And Bowers v. Horen, 93 Mich. 420, 17 L.R.A. 773, 32 Am. St. Rep. 513, 53 N. W. 535, denies one's right to kill his neighbor's valuable dog, of which he has never made complaint, although knowing the owner, merely because it barked around his house at night, and had caused him other annoyance by chasing cats into trees, and leaving tracks on his freshly painted porch, and had once been found in his henhouse, in which he did no damage except, perhaps, to break one egg.

And Jacquay v. Hartzell, 1 Ind. App. 500, 27 N. E. 1105, denied the right to kill a dog because it was in the habit of going from its master's premises and barking at travelers and teams passing along the highway, where it was not vicious and did not attack or imperil the safety of anyone, and was not barking at the time it was killed.

come extremely nervous, at times almost unfit to attend to business; that the health of his family is being seriously and permanently impaired, and they are being deprived of the use and enjoyment of their home; that he has complained to Herring, but is unable to obtain from him any permanent relief; and that complainant, impelled by the desire to avoid litigation between himself and a neighbor, has borne with the situation until he can no longer endure it without serious and permanent injury to the health of himself and his family. He further avers that Herring is without visible means to respond in damages to an action at law, and charges that any judgment against him commensurate with the damage sustained will be wholly unavailing. He prays that Herring, his agents, etc., may be enjoined from keeping upon his premises dogs causing the injurious noises and disturbances complained of; that the nuisance of the kennel may be discontinued and abated; and for general relief.

A temporary injunction was granted in accordance with the prayer of the bill, and at a subsequent day the defendant answered the bill, admitting that for a number of years he has been keeping a few dogs for his own pleasure, and for the profits derived from their sale, but denying that they have been creating a nuisance to the plaintiff and his family, or that the dogs kept by him could have been a nuisance to anyone in a normal condition of health and nerves. He denies that he has kept the number of dogs with which he is charged in the bill, and states in detail the number kept by him at various times. He denies that he is unable to respond in damages for any nuisance he may have occasioned; and finally claims that the plaintiff's annoyance is due to his nervous temperament, and asserts that neither the plaintiff nor any member of his family has ever been made ill or prevented from attending to business.

Upon these issues evidence was taken, and, the case coming on to be heard, the circuit court perpetuated the temporary injunction, and Herring obtained an appeal from one of the judges of this court.

We think the weight of evidence establishes that plaintiff and his family were subjected to great and continuous annoyance and discomfort by the howling and barking of the dogs and the whining of puppies upon the premises of appellant; that their rest has been broken, their sleep interrupted; and that they have been seriously disturbed in the reasonable use and enjoyment of their home.

In *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325, Judge Alvey, delivering the opinion 7 L.R.A. (N.S.)

ion of the court, says: "In all such cases, the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant."

In *Spelling on Injunctions*, § 431, it is said that "noises which tend to disturb rest and quiet in the neighborhood may be restrained. . . . To warrant an injunction against a noise as a nuisance it must be shown that the noise is such as to produce actual physical discomfort to a person of ordinary sensibilities, and is unreasonably and unnecessarily made."

In *Brill v. Flagler*, 23 Wend. 357, a case in which Flagler sued Brill for killing his dog, and the defendant pleaded that the dog was accustomed to come upon the premises of the defendant in the nighttime as well as in the daytime, and, by his barking and howling, annoy and disturb the defendant and his family, speaking of this plea the court said: I am of opinion that the facts which the plea sets up constitute a bar to the action. "The demurrer admits that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and willfully neglected to confine him, and that defendants, unable to remove the nuisance in any other way, killed him. No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and, upon general principles, justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so as he commits no riot in the doing of it."

That case, it is true, was an action at law, but it states clearly and forcibly the annoyance and inconvenience arising from the barking and howling of dogs, that they constitute a nuisance, and in that case excused what would otherwise have been a trespass. It declares that the remedy by action at law would be a mockery and far

too dilatory and impotent for the exigency of the case, thus presenting a case for the interposition of a court of equity. It is true, also, that in that case the dog came upon the premises of the man who shot him. It was, therefore, somewhat in the nature of a trespass, while a nuisance generally results from the commission of an act beyond the limits of the property affected. High, Inj. 2d ed. § 739. Especially is this true of noises; and many other illustrations might be added. Dogs in a neighbor's yard may effectually murder sleep, and destroy the reasonable enjoyment of a home.

It is urged on the part of plaintiff in error that an ordinance of the town of Harrisonburg afforded an easy and expeditious remedy for whatever inconvenience appellee may have suffered.

In *Kelly v. Lehigh Min. & Mfg. Co.* 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, this court said: "Where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words." And this was reiterated in *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227, where it was said: "Where courts of equity have once acquired jurisdiction, . . . they do not lose such jurisdiction merely because courts of law have been subsequently authorized to administer the same or similar relief." Spelling, Inj. §§ 398, 399.

We are of opinion that a court of equity has jurisdiction in such matters, and that in this case it has been properly exercised.

The decree of the Circuit Court is affirmed.

Buchanan, J., absent.

WASHINGTON SUPREME COURT.

RUSSELL WAYLAND, Appt.,

BOARD OF SCHOOL DIRECTORS OF
SCHOOL DISTRICT NO. 1, in Seattle, et
al., Respts.

(— Wash. —, 86 Pac. 642.)

Schools—secret societies—regulation.

A board of school directors has, under a statute authorizing it to adopt rules and regulation for the well-being of the school, authority to debar members of high-school fraternities organized against its will, although with consent of parents of the pu-

pils, and meeting out of school hours, from participating in certain privileges attendant on membership in the school, such as connection with athletic teams, musical, literary, and military societies, and to deprive them of customary graduation honors.

(August 15, 1906.)

APPPEAL by plaintiff from a judgment of the Superior Court for King County in a proceeding to enjoin defendants from depriving plaintiff's minor son of certain school privileges. Affirmed.

The facts are stated in the opinion.

Messrs. Perry & Hanson and O. L. Willett, for appellant:

The board cannot exclude from school any but those named in the statute.

Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54.

It gives to the school board power to expel pupils for certain misconduct only.

Pierce's Code (Wash.) 7295.

Whether a rule or regulation of a school is reasonable or valid is a question of law for the court.

Fertich v. Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. 605.

Mere membership in a Greek fraternity

Case Note.—Forbidding student's affiliation with secret society:—The only other case in which the question of the right of school authorities to exclude pupils from educational institutions supported by the state, because of their connection with secret societies, appears to have been raised, is that of *State ex rel. Stallard v. White*, 82 Ind. 278, 42 Am. Rep. 496, in which the right of the board of trustees and faculty of Purdue university, which is the Indiana state agricultural college, to make membership in a Greek-letter fraternity a disqualification for admission as a student to the university, was denied, and where an applicant who was refused admission because of his refusal to sign a pledge to disconnect himself as an active member from such society during his connection with the university was held to be entitled to mandamus to compel his admission. The court said that, since the university was an institution of learning primarily endowed by Congress, and continued in existence very largely by appropriations made by the general assembly of the state, it was therefore an educational institution sustaining relations to the people at large analogous to those occupied by other public schools and colleges of the state maintained at public expense, and one in which all inhabitants of the state had a common interest; that the general principles underlying the educational principles of the state were consequently applicable to the governmental control of the university; and it distinguished the case of *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, where the rule

does not disqualify one for admission as a student in a public school.

State ex rel. Stallard v. White, 82 Ind. 287, 42 Am. Rep. 496.

Where a child of school age is wrongfully denied admission to the public school of a district, an injunction may properly issue to restrain the directors from interfering with her attendance.

Mizner v. School Dist. No. 11, 2 Neb. (Unof.) 238, 96 N. W. 128.

The authority of the board of directors ceases with the expiration of school hours.

Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; State ex rel. Clark v. Osborne, 24 Mo. App. 309; King v. Jefferson City School Board, 71 Mo. 628, 36 Am. Rep. 499; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471; School Trustees v. People, 87 Ill. 303, 29 Am. Rep. 55.

Messrs. Kenneth Mackintosh and R. W. Prigmore, for respondents:

The wisdom and necessity for such rules rest in the sound discretion of the board.

Dillon v. Whatcom County, 12 Wash. 391,

41 Pac. 174; Selde v. Lincoln County, 25 Wash. 198, 65 Pac. 192; Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553; State ex rel. Schraeder v. Superior Court, 29 Wash. 6, 69 Pac. 366.

That the meetings were out of school hours is immaterial.

Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387; Kinzer v. Toms (Iowa) 3 L.R.A.(N.S.) 496, 105 N. W. 686.

Courts are without authority to control, or in any manner review, revise, or modify, the action of the board, unless it has clearly exceeded its broad discretionary powers.

Bourne v. State, 35 Neb. 1, 52 N. W. 710; Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133; Board of Education v. Booth, 110 Ky. 807, 53 L.R.A. 787, 62 S. W. 872; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Watson v. Cambridge, 157 Mass. 561, 32 N. E. 864; Board of Education v. Purse, 101 Ga. 422, 41 L.R.A. 593, 65 Am. St. Rep. 312, 28 S. E. 896; Hutton v. State, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122; King v.

of an incorporated college forbidding students to become members of secret societies was held not to be unreasonable, and to be clearly within the power of the college authorities to make and enforce, on the ground that Wheaton college was an institution resting on private endowment and deriving no aid whatever from taxation or other public source, and also on the ground that the regulation in that case had reference to the government and control of students after they had been admitted to the institution. The court said it was clearly within the power of the trustees absolutely to prohibit any connection between the Greek fraternities and the university; that they also had the undoubted authority to prohibit the attendance of students upon the meetings of such Greek fraternities, or from having any other active connection with such societies, so long as the students remained under the control of the university, whenever such attendance upon the meetings of, or other active connection with, such fraternities might tend in any material degree to interfere with the proper relations of the students to the university; but that the possession of this great power over a student after he had entered the university did not justify, as a condition of admission into the university, anything which might be construed as an invidious discrimination against a student on account of his previous membership in any one of the Greek fraternities; adding: "If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school, then membership in any other secret or similar society may be converted into a like disqualification, and in this way discriminations might be made against large classes of the 7 L.R.A.(N.S.)

inhabitants of the state in utter disregard of the fundamental ideas upon which our entire educational system is based. Membership in an inherently immoral society or fraternity might, perhaps, be urged against the admissibility of a student, upon the ground that such relation to such a society or fraternity tended to establish a want of moral character or moral fitness in the applicant." One judge in this case dissented on the ground that, although the rule of the university in question, taken literally, might be deemed to be an unwarranted effort to interfere with the freedom of those who became students to have any connection whatever with the Greek fraternities from the time of admission until their final departure, though they formed such connections elsewhere and in such a way as not to affect their conduct as students, yet, when properly construed, it had reference simply to the conduct of students as such while in attendance, and not when, in vacation or other times, they might be absent from college, beyond the limits of supervision by the faculty, and under the authority or admonition of their parents or guardians; and that the faculty so understood it, as shown by the pledge tendered to the student in this case, whereby he was required, not to sever his connection, but only to cease active membership in the society which he had joined. This judge also said that the distinction made between the right to attach conditions to the admission of students and the right to make rules and regulations for their government after admission seemed to him unsubstantial and immaterial.

The general question of the power of school authorities over pupils while outside of school grounds is considered in a case note in 3 L.R.A.(N.S.) 496.

Jefferson City School Board, 71 Mo. 628, 36 Am. Rep. 499; *Deskins v. Gose*, supra.

Crow, J., delivered the opinion of the court:

This action was commenced by appellant against the board of school directors of school district No. 1 in Seattle, King county, Washington, and other school authorities of said district, to restrain them from enforcing certain rules which deprive members of Greek-letter fraternities of the privileges of said high school, except that of attending classes. The appellant, George Wayland, a minor eighteen years of age, sues by Russell Wayland, his guardian *ad litem*, on behalf of himself and other members of the Gamma Eta Kappa fraternity. He alleges that all members of said fraternity are of school age and entitled to all the privileges of said high school; that they are unjustly prohibited from belonging to debating clubs, athletic teams, school bands, glee clubs, orchestras, cadet corps, and other kindred organizations of said school, and that, unless they withdraw from said fraternity, they will also be deprived of the customary honors attending graduation; that they have no privileges except that of attending classes; that said rules are in excess of lawful authority; that there is nothing objectionable in said fraternity; that its meetings are held at the homes of members, with the consent of their parents, every two weeks, from 8 to 10 o'clock P. M., and never during school hours; that they are not under the jurisdiction of the school authorities, but are under parental control; that at said meetings improper conduct is prohibited, and that a high-class literary program is carried out. The answer pleaded an affirmative defense, substantially alleging the facts afterwards found by the trial court. From a final judgment refusing injunctive relief, this appeal has been taken.

The trial court made findings of fact, from which it appears that at the time of the commencement of this action George Wayland was a student in the Seattle high school, and also a member of a certain secret Greek-letter society, known as the "Gamma Eta Kappa fraternity;" that the membership in said fraternity and in other similar high-school secret societies was confined particularly to high-school students; that such societies were therefore usually known as high-school fraternities; that members other than such students were admitted as honorary members only; that said Gamma Eta Kappa fraternity was first organized in Seattle during the year 1900, at which time a request was made by it for the use of the name of said Seattle high

school; that, before acting on said request, the high-school authorities instituted a careful investigation to ascertain the probable effect of such societies on the school; that after such investigation, and after receiving reports from many prominent educators, all of whom unqualifiedly condemned the influence of said societies as highly deleterious and injurious, the school board of said Seattle district, on May 7, 1901, passed a resolution whereby said request for the use of the name of the Seattle high school in connection with said fraternity was refused, and membership of students in any secret society connected with said school forbidden; that at all times thereafter it was contrary to the rules and regulations of said high school for pupils to become members of the said fraternities; that afterwards said George Wayland, while a student in said school, became a member of said Gamma Eta Kappa fraternity as did other students; that it was also contrary to the said rules and regulations for students to become pledged to said secret societies; that said rules and regulations were from time to time modified to meet emergencies in accordance with the activities of said societies in pledging or initiating members; that on May 5, 1905, the school board, by final action, amended its former rules so as to provide that all students who were then members of any high-school secret society, or pledged to become such, who would promise that, so long as they remained students of said high school, they would not become members of any other such secret society, or give any promise or pledge to become such, or solicit any other student to give any promise or pledge to become a member of any high-school fraternity or secret society, and in good faith kept such promise,—such students would be restored to the privileges of such school; otherwise all students who thereafter should become members of, or in any way pledge or bind themselves to join, any high-school fraternity or secret society, or should initiate or pledge any other students, or in any way encourage or foster the fraternity spirit in the high school, should be denied all the privileges of the high school except those of the class room; that the influence of the said Gamma Eta Kappa fraternity and similar secret societies, and the membership and pledging of students therein, permeating said school, injuriously affected the good order and discipline thereof; that, in adopting the various rules and regulations aforesaid, and in denying certain privileges of said school to pupils who refused to comply therewith, the respondents at all times acted in good faith and in the exercise of an honest judg-

ment; that such action was at all times general in its application, and at no time special, malicious, or arbitrary; and that all such rules and regulations, and particularly those in force and effect at the time of the institution of this suit, were reasonable and necessary, and were wholly within the powers of the respondents.

It will be observed that no attempt is being made by the respondents to deny appellant any instruction afforded by class work, or by the required curriculum of the school. He is only denied certain other privileges, such as participation in athletic, literary, military, musical, or class organizations. In other words, the respondents made it optional with appellant to determine whether, against the known wishes of the school authorities, he would continue his membership in said secret society, and thereby forfeit participation in the privileges above mentioned, which were no part of the class work or curriculum, or whether, by complying with the adopted rules, he would elect to enjoy the privileges of which he is now deprived. The appellant contends that the trial court erred (1) in making certain of the above findings of fact to which he has excepted; and (2) in entering judgment dismissing his complaint. Appellant especially complains that the evidence does not sustain the finding that all active members of the Gamma Eta Kappa fraternity were high-school students, and that any members not students were honorary members only. There may have been an instance in which an active member was not a student when initiated, but he had been a student immediately prior thereto, and there is no evidence that he did not intend to so continue. In any event, it is immaterial whether he, or even other members, were students. It clearly appears that the fundamental purpose was to organize with students of the Seattle high school. The evidence shows that this particular Gamma Eta Kappa fraternity is a branch or chapter of a general organization having other chapters in various high schools throughout the country; that it is subordinate to a general or parent governing body, and that the entire organization is essentially a confederation of associations composed in the main of high-school students. We call attention to a certain periodical which, with the consent of both appellant and respondents, was admitted in evidence, and is entitled: "The Gamma Eta Kappa Magazine, Quarterly Devoted to the Interest of the Gamma Eta Kappa Fraternity of the United States of America, and Published by the Grand Conclave." This magazine appears to be in the

charge of one general editor located in San Francisco, assisted by chapter editors, members of twenty distinct chapters including Rho Gamma chapter, the one of which appellant is a member, purporting to be connected with the Seattle high school. In this magazine we find the following editorial: "In former editorials we have frequently dwelt upon our old stand-by the high-school fraternities versus school boards and principals, but we feel compelled to again state the facts, on account of recent developments. The principal of the Seattle high school does not know what a fraternity is, or he would not attempt to enforce his proposed futile plans. It is simply a case of all educators not educated. Imagine the monarch that could prohibit a man from wearing a fraternity pin. The Sacramento board of education by a vote of 6 to 3 recently decided 'to forbid any member of the Sacramento high school from joining a frat society in that school.' There is no penalty affixed, and the resolution was simply adopted to quell public sentiment in order to secure a favorable vote from the people on new school bonds. In voting on this motion but one member of the board expressed the belief that the law would uphold them in attempting to crush a society in a public institution; in other words they are educated. We hope that others will learn and save us the trouble of summoning our army of able attorneys, who are willing to defend us in the courts, and in doing so will make these uneducated beings feel their lack of knowledge with humiliation and chagrin at the expense of the poor unfortunates."

This magazine also publishes a letter from the Rho Gamma or Seattle chapter, in which the existing differences between it and the Seattle high-school authorities are discussed. This letter in part says: "And now comes the most unkindest cut of all. Beginning with the coming school year, in addition to the restrictions already imposed, all members of fraternities and sororities will be denied the right of graduation or of representing the school in any field of effort or competition. This is according to an open letter from Supt. Cooper to Prof. Twitmeyer. He calls Mr. Twitmeyer's attention to a recent ruling of the board which authorizes his action. According to the ruling, the superintendent is given authority to 'repeal all existing regulations.' This phrase may or may not be significant, for, as far as the secret societies are concerned, they will go ahead and prosper as before. There will be no difficulty in pledging and initiating new members as they may be desired, because, far from creating any dismay among the students, it has aroused a feeling of in-

dignation and that natural antipathy to restriction which is inherent in the American youth. . . . It is barely possible that Rho Gamma chapter will incorporate, but it is a question whether such action would help matters any, or would only add fuel to the flame." Letters from the Sacramento, California, and Denver, Colorado, chapters are also published, showing a like spirit of insubordination against lawful school authority. We incorporate these quotations in this opinion to illustrate the seditious spirit permeating this organization, with which the school authorities were obliged to deal. Without further discussion of the evidence, we express our complete satisfaction with each and all of the findings made by the honorable trial court.

The only remaining question is whether the board of education had authority to adopt the rules complained of. Appellant insists that § 2334, Ballinger's Anno. Codes & Statutes, provides who shall be admitted to the public schools, and that the board of education cannot exclude any pupils so entitled to attend. No issue need be taken with this contention. The board has not excluded the appellant from the Seattle high school, neither has it threatened to expel or suspend him. He can and does attend school, and, under our construction of the rules adopted, he is at the same time permitted to continue his membership in the Gamma Eta Kappa fraternity, although in doing so he opposes the authority of the board and thereby forfeits certain privileges which are no necessary part of the curriculum or class work from which he is not excluded. Respondents are only seeking to prevent appellant and his associates from dictating the terms on which they shall enjoy certain privileges which are merely incidental to the regular school work, and this they have authority to do. Appellant further contends that, as the fraternities meet out of school hours at the homes of members, and at no time in the school building, and as their parents consent to this action, the board is exceeding its lawful authority in entering their homes, in withdrawing from parents the control of their children, and in dictating what the children shall or shall not do out of school hours. We think this contention unreasonable. The board has not invaded the homes of any pupils, nor have they sought to interfere with parental custody and control. They have not said these fraternities shall not meet at the various homes, nor have they attempted to control students out of school hours. The evidence shows beyond a doubt that these secret organizations when effected foster a clannish spirit of insubordination, 7 L.R.A. (N.S.)

which results in much evil to the good order, harmony, discipline, and general welfare of the school. We can express these conditions in no better terms than by quoting from the testimony of Professor Geiger, the principal of the high school, who says: "I have found that membership in a fraternity has tended to lower the scholarship of the fraternity members, . . . the general impression that one gets in dealing with them is one of less respect and obedience to teachers. It is found that there is a tendency toward the snobbish and patronizing air, not only toward the pupils, but toward the teachers; there is a certain contempt for school authority. This is in a measure, I think, aggravated by the attitude of the parent organization, which seems to encourage members of the fraternity in this contempt for school authority; and one of the most difficult things in dealing with the situation is the fact that the members have this allegiance to a general organization or headquarters, which are often located in a distant city, and which it is difficult to reach, and which exercises upon the members in the local school a very powerful influence. . . . In dealing with these fraternity members, I have been assured more than once that they considered their obligation to their fraternity greater than that to the school." The evidence of this witness with that of the president of the school board and other school authorities overwhelmingly establishes the fact that such fraternities do have a marked influence on the school, tending to destroy good order, discipline, and scholarship. This being true, the board is authorized, and it is its duty, to take such reasonable and appropriate action by the adoption of rules as will result in preventing these influences. Such authority is granted by § 2339 and subdivisions 5 and 6 of § 2362, Ballinger's Anno. Codes & Statutes. It would be difficult to confer a broader discretionary power than that conferred by these sections. Manifestly it was the intention of the legislature that the management and control of school affairs should be left entirely to the discretion of the board itself, and not to the judicial determination of any court. These powers have been properly and legally conferred upon the board, and, unless it arbitrarily exceeds its authority, which it has not done here, the courts cannot interfere with its action. *Kinzer v. Toms* (Iowa) 3 L.R.A. (N.S.) 496, 105 N. W. 686; *Board of Education v. Booth*, 110 Ky. 807, 53 L.R.A. 787, 62 S. W. 872; *Watson v. Cambridge*, 157 Mass. 561, 32 N. E. 864.

The appellant has cited a number of cases which in effect decide that the school board

would have no authority to refuse him admission to the high school. This the board has not attempted to do; hence these citations are not in point. The only case mentioned by appellant which seems to be cognate to the questions here involved is that of *State ex rel. Stallard v. White*, 82 Ind. 278, 42 Am. Rep. 496, in which the supreme court of Indiana held that the officers and trustees of Purdue university, an institution controlled and supported by the state, could not require an applicant, otherwise qualified, to sign a pledge relative to membership in Greek fraternities, as a condition precedent to his admission as a student. The university authorities had adopted a rule that no student should be permitted to join or be connected with any so-called Greek or other college secret society, and, as a condition of admission to the university, or promotion therein, should be required to give a written pledge to observe such regulation. The relator declined to sign such a pledge, and was refused admission as a student for that reason only. The decision which ordered his admission was by a divided court. The majority opinion, however, is not in point as supporting appellant's contention. The appellant has not been refused admission to the high school. The school authorities have only endeavored to exercise a governmental control over him after his admission, without even attempting to suspend him. In the majority opinion in *State ex rel. Stallard v. White*, supra, the court said: "The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution, is quite another thing. . . . It is clearly within the power of the trustees, and of the faculty when acting presumably, or otherwise, in their behalf, to absolutely prohibit any connection between the Greek fraternities and the university. The trustees have also the undoubted authority to prohibit the attendance of students upon the meetings of such Greek fraternities, or from having any other active connection with such organizations, so long as such students remain under the control of the university, whenever such attendance upon the meetings of, or other active connection with, such fraternities tends in any material degree to interfere with the proper relations of students to the university." The above language shows that the Indiana case upon which the appellant relies utterly fails to sustain any of his contentions. Our attention has not been called to any adjudicated case at all similar to this. Citation to authority, however, is unnecessary.

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sary, as, under our statutes, the respondent school board had undoubted authority to take the action of which appellant complains, and the courts should not interfere with said board in the enforcement of the rules and regulations which it has adopted. The judgment is affirmed.

Mount, Ch. J., and Fullerton, Root, and Dunbar, JJ., concur.

WISCONSIN SUPREME COURT.

JOHN CHYBOWSKI, Respt.,

v.

BUCYRUS COMPANY, Appt.

(127 Wis. 332, 106 N. W. 833.)

Trial—disclosure of facts by counsel.

1. Counsel cannot be required to disclose whether or not an insurance company is interested in an action to recover damages for personal injuries, notwithstanding the information is wanted for the purpose of determining the qualification of jurors by ascertaining whether or not they are connected with such companies.

Same—direction of verdict.

2. When the evidence in plaintiff's favor in an action for personal injuries is contrary to all reasonable probabilities, the court should direct a verdict in favor of defendant.

Same—finding contrary to scientific facts.

3. A finding by the jury of a double automatic stroke by a steam hammer will be set aside on appeal where the hammer, weighing 1,250 pounds, was operated by a piston arm working in a cylinder and driven by a pressure of 70 to 90 pounds of steam to the square inch, which was controllable

Case Note.—Right of appellate court to set aside finding of jury upon the ground that it is contrary to scientific principles:

—A diligent search has failed to disclose any cases in which the question suggested in the title has been discussed. Assuming the power of an appellate court to set aside a verdict upon the ground that it is contrary to all the reasonable inferences which the evidence, considered as a whole, permits, it may be conceded that, under some possible circumstances, at least, such right may properly be exercised upon the ground that the verdict, even though nominally supported by the evidence of eyewitnesses, is contrary to nature's indisputable laws. It must be borne in mind, however, in the first place, that there is no presumption that the members of the appellate court are any better informed than the members of the jury which returned the verdict as to the working of the laws of nature. Admitting, however, the superior capacity of the appellate court to deal with scientific principles in the

only by a hand lever, and no defect is shown in the mechanism; since there could be no rebound or double stroke to a hammer of that character without the operation of the controlling lever.

Defective machine—burden of proof.

4. Proof that a machine worked perfectly both before and after an alleged erratic movement which is alleged to have caused a personal injury casts the burden on plaintiff of showing that such movement was caused by a defect in the appliance.

Same—suggested defects.

5. Suggested defects causing an alleged erratic movement of a machine to the injury of an employee are not sufficient to carry the case to the jury if they amount to no more than baseless conjecture.

(February 23, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Marshall, J.:

Appeal from the circuit court for Milwaukee county. Action to recover for personal injuries. Plaintiff complained that while in the employ of defendant the latter failed to furnish him a reasonably safe place in which to do his work, in that his working place was in close proximity to a steam hammer so defective that it was liable to deliver two blows when only one was intended and without any manipulation of the controlling levers for the second strike, and thereby cause the drift pin, used on the occasion in question, if moved out of its place or turned over by the first blow, to fly from its location under the hammer with great force, and to injure any person who might be within its range; that plaintiff was injured in that way, his right leg being fractured above the knee. Judgment was asked in the sum of \$10,000. Defendant answered putting

in issue all allegations in respect to the hammer being defective.

During the impaneling of the jury plaintiff asked defendant's counsel if a certain insurance company was not pecuniarily interested in the litigation. The latter objected to being so interrogated in the presence of the jury, and still further objected to being interrogated at all in his place as defendant's representative, and compelled to answer the questions. He was then called to the stand as a witness, and sworn. The question was then repeated to him, and, under protest, by order of the court, he was compelled to answer, which he did in the affirmative.

The mechanism which it was claimed caused the injury consisted of a hammer weighing about 1,250 pounds, a piston rod, piston head, and cylinder set in a vertical position with such connections that by a proper manipulation thereof the hammer could be caused to drop, striking whatever was on the hammer bed with its own weight accelerated by a steam pressure of from 70 to 90 pounds to the square inch and to rise again to its position and repeat the blow as often as desired, but only by manipulation of the operating lever. There were two levers. One was to control the steam as to turning it on or off from the boiler, and the other to control the application of the steam as to applying it below the piston head to raise the hammer, exhaust it to permit the hammer to fall, and to apply it above the cylinder head to add the force thereof to the gravity power of the falling weight.

There was no way by which the hammer could be raised to deliver a blow, except by drawing the steam lever and raising the operating lever. There was no way by which a blow could be delivered except by putting down the operating lever. If a blow was desired combining the falling weight of the hammer and the steam pressure also, that was accomplished by pressing down the operating lever while the steam was on. If

abstract, such a court might well hesitate to overturn, upon the ground that it is contrary to scientific principles, a verdict sustained by the testimony of apparently disinterested eyewitnesses purporting to state what they actually saw, for the reason that there may have been some fact or circumstance not apparent from the record, or, perhaps, not shown even on the trial, that, if shown, would have reconciled the testimony of the eyewitnesses with the scientific principles applicable to the subject. To set aside a verdict sustained by the testimony of apparently disinterested eyewitnesses whom the jury have credited involves, first, the assumption of the correctness of the appellate court's understanding of the scientific principles applicable to

the facts as shown by the record, and, secondly, the assumption that all the facts which could affect the question are before the court. Ordinarily, of course, an appellate court is entitled to base its decision upon the showing made by the record; but, if the court undertakes to go outside the record and test the verdict by reference to scientific principles, it would seem that it cannot properly close its eyes to the possibility that there may have been a fact or circumstance, not disclosed by the record, which would reconcile the testimony of the eyewitnesses with scientific principles,—at least, unless the facts and circumstances as shown by the record are such as reasonably to repel the existence of any other fact or circumstance which could affect the matter.

a blow was only desired of the falling weight of the hammer, that was accomplished by shutting off the steam and putting the operating lever down. There was no automatic shutting off or on of the steam, or turning in of the steam above or below the piston head. Every movement of the hammer was positive, following the appropriate movements of the operating lever and steam lever.

The evidence, in the main, was directed to the point of whether on the occasion in question the hammer struck two blows when only one was desired, or, in other words, whether, the appliance being manipulated to strike one blow, two blows were delivered without any movement of the levers. There was evidence for the plaintiff by the boy who operated the levers on the occasion in question, and who had operated them for weeks prior thereto, that the hammer was accustomed to strike two blows when only one was desired, and to deliver the second blow without any change in the controlling lever; that he made complaint on several occasions to the boss of the department, who promised to fix the machine. He testified that, if the levers did their work properly, the machine could not work that way. He attributed the second blow of the hammer to some defect in the machine, but suggested no particular defect, and suggested no cause whatever except a leak of steam. There was other testimony on the part of plaintiff to the effect that a second blow might be caused when only one was desired by water in the cylinder, or by a leak of steam around the piston head where it entered the cylinder. The evidence on the part of defendant was to this effect: The hammer worked perfectly prior to the occurrence in question and thereafter. It was an utter impossibility for such a hammer to rebound after striking a blow and strike a second blow as testified to by plaintiff's witness; that such a movement would render the hammer worse than useless. The hammer could only be raised by turning on the steam and raising the operating lever letting steam in below the piston head. So long as the operating lever remained up and the steam on, it was an utter impossibility for the hammer to fall because the full pressure of the steam in the boiler would extend to the cylinder head. The cylinder head could not descend, allowing the hammer to drop without compression of the steam and back pressure on the boiler, which was an impossibility, the pressure customarily being 70 to 90 pounds to the square inch. The hammer, after being raised by the steam pressure, could not be made to fall otherwise than by shutting off the steam and dropping the operating

lever. No movement of the hammer was possible except in response to proper movements of the levers mentioned, the one designed to turn on and off the steam and the other to apply it.

At the close of the evidence defendant's counsel moved the court to direct a verdict in favor of defendant. The motion was denied. The jury rendered a special verdict, finding, in effect, as follows: The steam hammer was out of repair, causing it to strike two blows when only one was desired, notwithstanding proper manipulation of the controlling levers by the hammer boy. That defective condition of the hammer was the proximate cause of plaintiff's injury. The defendant, by the exercise of ordinary care, might have known of such defective condition of the hammer for a sufficient length of time before the accident to have remedied the same. The plaintiff was not guilty of any want of ordinary care contributing to the injury. Three thousand dollars will be required to compensate him for his injury.

After verdict defendant's counsel moved the court to change the finding in respect to the hammer being defective and striking two blows when only one was desired, so as to negative any such condition, and by striking out the finding in respect to the hammer being defective, as claimed by plaintiff, and the defects having existed so long that defendant, by the exercise of ordinary care, might have discovered them a sufficient length of time before the accident to have remedied the same, and to give judgment in its favor of no cause of action. The motion was denied. The court then, on motion, rendered judgment in favor of plaintiff for the amount of damages found by the jury.

Messrs. Hoyt, Doe, Umbreit, & Olwell and Joseph B. Doe, for appellant:

It is error to permit the fact to appear that defendant carried insurance.

Herrin v. Daly, 80 Miss. 340, 92 Am. St. Rep. 605, 31 So. 790; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Manigold v. Black River Traction Co. 81 App. Div. 381, 80 N. Y. Supp. 861; Lipschutz v. Ross, 84 N. Y. Supp. 632; Wildrick v. Moore, 66 Hun, 630; Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202; George A. Fuller Co. v. Daragh, 101 Ill. App. 664; Sawyer v. J. M. Arnold Shoe Co. 90 Me. 369, 38 Atl. 333; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610; O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577, 36 S. E. 59.

Messrs. Ryan, Ogden, & Bottum, with Mr. K. Shawvan, for respondent:

It was proper to show the interest of the insurance company.

Faber v. C. Reiss Coal Co. 124 Wis. 554, 102 N. W. 1049; 17 Am. & Eng. Enc. Law, pp. 1125, 1126, 1131; 1 Thompson, Trials, §§ 101, 102; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Bank of University v. Tuck*, 107 Ga. 211, 33 S. E. 70; *Grant v. National Railway Spring Co.* 100 App. Div. 234, 91 N. Y. Supp. 805; *American Bridge Works v. Pereira*, 79 Ill. App. 90; *Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337; *O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151, 28 N. E. 923; *Meyer v. Gundlach-Nelson Mfg. Co.* 67 Mo. App. 389; *Spoonick v. Backus-Brooks Co.* 89 Minn. 354, 94 N. W. 1079.

Marshall, J., delivered the opinion of the court:

In *Faber v. C. Reiss Coal Co.* 124 Wis. 554, 102 N. W. 1049, it was held that a juror may properly be interrogated upon the *voir dire* as to whether he is in the employ of, or in any way concerned with, any insurance company which is pecuniarily interested in the litigation, the examination being conducted in the presence of jurors already in the box and those not yet drawn, if thought best, and in such reasonable manner as not to place improper matter before them or suggest impropriety in the company's connection with the case. In other words, such examination is proper so long as conducted "strictly within the right" to discover the state of mind of the juror as regards the matter in hand or any collateral matter reasonably liable to unduly influence him. The learned circuit court seems to have considered the conclusion in that case with what was said in support thereof as warranting the extraordinary proceeding detailed in the record. If there is anything in the former case suggesting the propriety of requiring counsel to state either from his place as such or from the stand as a witness, as was done here, whether an insurance company is concerned in the litigation, we are not conscious of it. It would seem that the words in the former case to the effect that the questions propounded must be to the juror and "strictly within the right" as to his status respecting the controversy in hand, by necessary implication, condemn the proceeding under consideration.

The mere fact that an insurance company was concerned in the litigation was wholly immaterial. The attitude of the court as to compelling appellant's counsel to bear evidence in respect thereto, notwithstanding assurance of respondent's counsel that

the information sought for was wanted only as a basis for interrogating the jury, clearly gave undue importance to the insurance company's connection with the case, since no such basis was necessary. It was a matter quite likely to prejudice the jury, and should not have been adverted to at all except by questions to the particular juror under examination and "strictly within the right" to discover whether any bias or basis therefor on his part existed. The pretense that it was necessary to interrogate counsel, as was done, to obtain a basis for such discovery, should not have appealed successfully to the court.

All cases, but particularly such as the one in hand, should be managed from the bench with the most scrupulous and constant regard for the existence of those mere ulterior matters liable to be referred to purposely or apparently so, in a way to improperly influence the jury. That is due to the parties, and is due as well to the jurors themselves. They have the single function to perform of determining the truth as to controverted issues of fact solely from the competent evidence produced in their hearing and the law as given to them by the court. When their true position, and that only, is kept before them from the beginning to the end of the trial, and they are inspired by the guiding hand of the judge to win distinction by putting aside every influence except the evidence and the law proper for their consideration, the jury system is commonly vindicated as being the best that has been designed or is designable for the discovery of truth in the administration of justice. The proceeding under consideration was a wide departure from that standard. It was wholly unnecessary to the ostensible purpose thereof. The effort to interrogate counsel, at the very outset, should have been firmly repressed, and the attention of the interrogator directed to the only legitimate subject in hand,—that of determining whether the juror was in any wise concerned in any insurance company interested in the litigation. The discovery in that regard might well have been obtained by one or two proper questions not calculated to unduly suggest the fact of the company's connection with the case.

In addition to the foregoing, the proper solution of the question as to whether the evidence warranted the finding that the steam hammer was defective, and thereby it was caused to make two strokes when only one was intended, producing the injury complained of, so effectually disposes of this appeal, and, under the present practice, in view of the record, of the litigation as well, that it does not seem advisable to discuss

any other matter. We will consider such additional matter briefly.

Nature's unchanging and unchangeable laws and the unvarying and invariable principles of mechanics cannot be turned aside by the verdict of a jury, even if the matter concerning the same is given into their hands accompanied by a judicial suggestion that there may be reasonable doubt in respect thereto. This court has often spoken decisively on that subject for the guidance of trial courts, as well as for the purposes of the particular cases in which the matter was involved. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Montayne v. Northern Electrical Mfg. Co.* (Wis.) 105 N. W. 1043.

When the evidence in relation to a controverted question of fact on the one side accords with what must necessarily have been the case under given undisputed and indisputable circumstances, and the evidence on the other side is opposed thereto, obviously there is no room for conflicting reasonable inferences, consequently no question for solution by a jury. Whether such situation does or does not exist in any case is a matter for the court to determine. It cannot escape the responsibility of solving it and doing so considerably. Such a situation often presents the most severe test of judicial courage which trial courts are subjected to. Failure to satisfy such test in all respects gives ground, unjustly it seems, for much of the criticism often heard of the jury system. The duty devolves upon the presiding judge, in every jury trial, before giving the controversy over to the jury for a determination, of deciding whether, under the evidence and the law applicable thereto, there can fairly be said to be reasonable inferences favoring one side, as well as such inferences favoring the other; so that the truth of the matter may be with the former or with the latter. It is easy to see that in case of a decision in the affirmative, when the conclusion clearly should be in the negative, the jury must naturally regard such decision as suggesting that their function as to determining a conflict between reasonable inferences is necessarily called into action. They take the case, in such circumstances, at the hands of the court accompanied by a decision, in advance by paramount authority, that the evidence, in view of the law applicable thereto, will sustain a verdict either way according as the same may be viewed by them. Upon their going wrong, harsh criticism thereof and of the jury system itself, is quite out of place. The fault is not with the system, but with its administration. *Mushach v. Wisconsin Chair Co.* 108 Wis. 57-59, 84 N. W. 36.

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Where the evidence is sufficient only to give rise to mere conjecture in favor of the plaintiff, or to suggest merely a possibility of the truth being as claimed by him (*Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729; *Sorenson v. Menasha Paper & Pulp Co.* 56 Wis. 338, 14 N. W. 446; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217-225, 78 Am. St. Rep. 905, 80 N. W. 1020; *Spencer v. Chicago, M. & St. P. R. Co.* 105 Wis. 311, 81 N. W. 407; *Stafford v. Chippewa Valley Electric R. Co.* 110 Wis. 331-345, 85 N. W. 1036); or the evidence in his favor is contrary to all reasonable probabilities,—the jury are placed in a false position by being directed to determine upon which side are the major and controlling probabilities. The court in such circumstances, without a motion in that regard, should apply the law thereto and dispose of the litigation accordingly. Refusal in that regard, in face of a proper motion invoking judicial action, is no less than the denial of a right. *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307-330, 80 N. W. 644; *Optenberg v. Skelton*, 109 Wis. 241, 85 N. W. 356. We are not unmindful that error now and then in respect to such matters is consistent with the most careful judicial administration. What has been said has reference particularly to those extreme cases, of which this is one, which are too plain to admit of any reasonable controversy.

It requires but the most ordinary appreciation of the operation of a machine—combining a block of steel, weighing 1,250 pounds, more or less, for use as a hammer, suspended above an anvil bed by a piston rod having its upper end armed with a piston head inclosed in a cylinder in the ordinary way for utilizing the power of steam under compression, the whole appliance being erected in a vertical position with connections so as to permit of the piston head being made to oscillate only by the necessary valves controlling the application of steam being operated by hand power as to each movement of the piston, as in this case; that is, such appliance not having any automatic device to cause the movement of the piston head in one direction to reverse the application of the steam pressure so as to produce a return motion—to perceive that a stroke of the hammer without the appropriate precedent movement of the controlling device is out of the question. It seems perfectly obvious that every movement of the piston head must necessarily be preceded by such appropriate shifting of the controlling device by the person in charge thereof. It follows that these must be re-

garded as verities respecting the case in hand: When the hammer boy, as the one attending the machine was called, turned on the steam and raised the controlling lever so as to open the inlet below the piston head and the exhaust above, the hammer necessarily was elevated to a position of readiness for a strike. It could not go back against the steam pressure. It necessarily remained in the position of readiness for a strike, the steam pressure being continued, till the controlling lever was put down opening the exhaust below the cylinder head. After a blow was struck the hammer could not rebound against steam pressure applied above the piston head to accelerate the downward motion, in case of such acceleration. In case of the steam being shut off instantly upon the blow being delivered there could yet be no return motion to a position requisite for a second strike. The hammer would necessarily remain down by its own weight and by the steam pressure above the piston head as well till such pressure was reduced by condensation. The hammer could not go back for a second strike except in response to a reverse motion of the controlling device, opening the exhaust above the cylinder head and the inlet below. The testimony of a witness to the contrary of this only evidenced ignorance or something worse. Any amount of such contrary evidence could not raise any conflict for solution by a jury. Reasonable doubt respecting the truth of a matter arrived at by methods of positive demonstration cannot be created by any amount of mere speculation or conjecture, or even positive contrary evidence from the mouths of witnesses.

Proof that the machine worked perfectly both before and after the accident, which was very satisfactorily made, cast the burden on plaintiff to show that the alleged second strike of the hammer, if one occurred, was caused by a defect in the appliance. In this we put aside the evidence as to the double and uncontrollable action of the hammer as not worthy of belief. In any event it was efficiently rebutted, so far as such double motion of the hammer suggesting that it was the result of any defect in the machine. *Vorbrich v. Geuder & P. Mfg. Co. supra*. There was no attempt to lift the burden thus cast on respondent, except by proof that the alleged second motion of the hammer might have been caused by a leak of steam at the entrance of the piston rod into the cylinder, or by water in the cylinder. There was no proof of a definite character that any such leak existed, or that there was water in the cylinder. Moreover, it is readily seen that if there were such a leak it could not possibly have caused the alleged undesired motion of the hammer.

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The entrance of the piston rod into the cylinder was below the piston head. Such a leak could not have been active except when the hammer was up and the steam pressure was on, and then the effect could only have been a mere waste of energy of a trifling character, necessarily supplied as fast as it occurred in case the steam was on, and otherwise it could only have permitted of a slow descent of the hammer as the steam escaped. In no event could it have caused the cylinder head to rise, lifting the hammer, or have caused any efficient motion of the hammer whatever. The suggestion of water in the cylinder is likewise hardly worthy of consideration. Water in the cylinder below the piston head, in case of any accumulation thereof at that point, would necessarily be forced out by the downward motion of the piston head. Water could have accumulated above the cylinder head only by condensation of the steam which caused the downward motion or a leaky valve, and such accumulation, if one occurred, could not in any event have caused a reverse motion, or any motion, of the hammer. Neither of the suggested explanations of the alleged double motion of the hammer was supported by anything better than baseless conjecture, as it seems to us. This is in accordance with the evidence, and is self-evident.

The judgment appealed from is reversed, and the cause remanded with directions to grant the motion made in appellant's behalf for a correction of the verdict and for judgment in his favor dismissing the action with costs.

WISCONSIN SUPREME COURT.

ALEXANDER KLUG, Appt.,

v.

GEORGE D. SHERIFFS, Respt.

(— Wis. —, 109 N. W. 656.)

Portrait—contract to paint—breach.

An artist who, after filling an order to paint a portrait from photographs of the deceased wife of his customer, proceeds without orders to paint another, cannot compel the customer to pay for it if it is placed in his possession for inspection and retained by him, since the act of painting it constitutes a violation of the contract and breach of trust.

(Dodge, J., dissents.)

(November 7, 1906.)

Case Note.—Right to duplicate portrait or photograph without the consent of the person under contract with whom the original was produced: — Though this question has been seldom passed upon by the

A PPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in defendant's favor in an action brought to recover the value of a portrait alleged to have been painted by plaintiff for defendant. Affirmed.

Statement by Kerwin, J.:

This is an appeal from a judgment of the circuit court of Milwaukee county dismissing the plaintiff's complaint. The plaintiff an artist, contracted with defendant to paint a portrait of his deceased wife, and for such purpose, at plaintiff's request, defendant furnished two photographs, one taken indoors; and the other, a group photograph, taken out of doors, in which she appeared with others. The photographs were furnished for the purpose of aiding plaintiff in the work. It was agreed between plaintiff and defendant that a portrait should be painted from the "outing" photograph for \$175, which was done, and the portrait delivered and paid for. A few days after defendant received

the portrait, plaintiff wrote him that, without any direction, he had painted a portrait of his deceased wife from the "indoor" photograph, and asked whether defendant desired to see it. Defendant, by letter, requested that the second portrait be brought to his house, which was done. The painting was never returned or paid for. This action was brought to recover for goods sold and delivered of the alleged value of \$190. The case was tried by the court without a jury, and the court found "that, without any authority, contract, or permission from said defendant, said plaintiff painted and prepared a second portrait of defendant's deceased wife from the aforesaid photographs, while the same were still in his possession. That after said plaintiff had delivered the first portrait to said defendant, and had received the agreed price therefor, he, the said plaintiff, notified said defendant that he had painted a second portrait of defendant's deceased wife from said photographs, and inquired whether said defendant desired to

courts, the few cases which have considered it clearly sustain the principle upon which the decision in KLUG v. SHERIFFS rests. These cases hold that an artist, or a photographer, who contracts, for a compensation, to make a portrait for another person, has no right to print copies therefrom for his personal use or profit. The chief ground upon which this doctrine is based is that of implied contract, though it has also been held that such an act on the part of the person contracting to make the picture constitutes a violation of confidence.

The case of KLUG v. SHERIFFS, however, seems to be the only case in which one engaged to make a portrait has attempted to compel the person for whom it is made to pay for a duplicate made without authority.

In Pollard v. Photographic Co. L. R. 40 Ch. Div. 345, 60 L. T. N. S. 418, it was held that a photographer who takes a negative likeness of a lady to supply her with copies for money will be restrained from selling or exhibiting copies thereof, on the ground that there is an implied contract not to use the negative for such purpose, and also on the ground that such sale or exhibition is a breach of confidence.

Again, in Moore v. Rugg, 44 Minn. 28, 9 L.R.A. 58, 20 Am. St. Rep. 539, 46 N. W. 141, it is held that a photographer employed to make and furnish a party with a certain number of photographs of herself has no right to print and dispose of any copies without the consent of the person so employing the photographer, on the ground that the contract between the subject and the photographer implies that the negative shall not be used for any other purpose.

So, in Corliss v. E. W. Walker Co. 31 L.R.A. 283, 64 Fed. 280, 57 Fed. 434, there is a *dictum* to the effect that, when a person engages a photographer to take his picture,

agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence, for the photographer to make additional copies from the negatives.

Another *dictum* to the same effect is found in Press Pub. Co. v. Falk, 59 Fed. 324, where the court says: "When a person has a negative taken and photographs made for pay in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture or capable of producing pictures of that person, and all photographs so made from it, belong to that person, and neither the artists, nor anyone else, has any right to make pictures from the negative, or to copy the photographs, if not otherwise published, for anyone else;" citing Pollard v. Photographic Co. and Moore v. Rugg, *supra*.

And in Dielman v. White, 102 Fed. 892, the court says: "If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron. It is not necessary to decide if the artist retains the right to make for another a replica. Reproduction by the artist may be a question of artistic ethics, rather than of law." But in this case the work of art ordered was not a portrait, and the question involved was the right of the patron to permit reproductions thereof.

Again, in a similar case, it was said that, if the sale and delivery of a picture by the artist who painted it is absolute and unconditional, the whole property passes to the purchaser, including the right of publication. Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784.

In Boyd v. Dagenis, Rap. Jud. Quebec, 11

see said second portrait, to which inquiry said defendant replied, and instructed said plaintiff to bring said second portrait to his house; and, in response to said suggestion so made by said defendant, the plaintiff brought said second portrait to the house of defendant, and, upon inquiry as to the price of said second portrait, stated that the same would be one hundred and seventy-five (\$175) dollars, which price said defendant refused to pay him therefor, and also refused to surrender to him, the said plaintiff, the said portrait, for the reason that said plaintiff had received no instruction, authority, or direction to paint same, and the defendant then and there offered to destroy said portrait, which said plaintiff refused to have done. That at the time of the delivery of said portrait, as aforesaid, said defendant offered to have the picture removed from the frame, which said plaintiff had placed thereon; and, prior to the commencement of this action, the defendant offered and tendered to said plaintiff the frame in which said picture was set, and the plaintiff refused same, and still refuses same; that said defendant has ever since said day held himself in position, and has been ready and willing, to return said frame, but said plaintiff refused, and still refuses, to receive the same. That said plaintiff had no authority to paint said second portrait from the photographs in his possession, thus received for the purpose of painting said first portrait, and that the doing of the same was a breach of faith on the part of said plaintiff, and he acquired no property rights or interest in said picture by reason thereof." Judgment dismissing the plaintiff's complaint, with costs, was ordered, from which this appeal was taken.

C. S. 66, it was held, without passing on the merits of the case, that there was no misjoinder of causes of action where two or three persons of whom a photograph had been made brought an action of damages against the photographer for printing and exposing in his window a copy of the photograph, the plaintiffs having paid for and received all the copies that they had ordered.

But the right of a widow, who brought an action against a photographer for selling copies of photographs of her deceased husband, for which she had paid, to recover, was denied in *Marsh v. Shackford*, 67 N. H. 96, 36 Atl. 607, where she failed to show ownership of the photographs in herself. The court said that, in the absence of an express statement of her ownership, it was to be inferred that her claim was that the title passed to her, as matter of law, when she paid for the photographs, but that this was an incorrect view of the law; that whatever 7 L.R.A. (N.S.)

Mr. A. C. Umbreit, for appellant:

By the great weight of authority the "right of privacy" is denied.

Schuyler v. Curtis, 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22; *Roberson v. Rochester Folding Box Co.* 171 N. Y. 540, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442; *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L.R.A. 219, 80 N. W. 285.

Mr. J. W. Wegner for respondent.

Kerwin, J., delivered the opinion of the court:

The facts in this case are substantially undisputed, and the questions of law are: (1) Whether the painting of the second portrait was an invasion of the so-called "right of privacy;" and (2) whether the painting of the second portrait was a breach of trust, contract, or confidence, and whether the plaintiff acquired any property in the second portrait.

1. Upon the first proposition, as regards the right of privacy, the authorities seem to leave the question in some uncertainty, as to the extent to which courts will go in enforcing the right. In *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L.R.A. 219, 80 Am. St. Rep. 507, 80 N. W. 285, it was held that equity will not restrain the use of the name and likeness of a deceased person as a label for a brand of cigars named after him, though offensive to the family of the deceased, so long as it did not amount to a libel. In *Schuyler v. Curtis*, 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22, it was held that the individual right of privacy, which any person has during life, dies with the person, and any right of privacy which survives is a right pertaining to the living only. In this case the plaintiff brought an action to restrain de-

the rights of the husband in the negative may have been, they did not pass as an incident of the photographs to any person who might pay for them.

And where, at the invitation of a photographer, an actress gave him a sitting for her photograph in her public character, he making no charge, and in return for the sitting giving her a number of complimentary copies, it was held in *Ellis v. Marshall*, 64 L. J. Q. B. N. S. 757, that he had a copyright in the photograph as author; but this case was an action by the photographer to restrain the publication of copies of the photographs by third persons, to whom the subject had given permission to publish such copies.

As to the broader question of use of negative or photograph plates generally, without the consent of the party who has paid for the same, see note in 50 L.R.A. 397.

fendants from making a statue or bust of deceased, Mrs. Schuyler, or from receiving subscriptions for the purpose of defraying the cost of making the same, and also restraining them from using the name of Mrs. Schuyler, or of circulating any description of her in connection with the "Woman's Memorial Fund Association." The action was brought by relatives of Mrs. Schuyler, and it was held that the action could not be maintained; it appearing that the motive of the parties interested in erecting a bust was to do honor to the memory of the deceased. Again, the question was considered by the court of appeals of New York, in *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, Chief Justice Parker writing the opinion, in which he reaches the conclusion, substantially: "An individual's so-called right of privacy, founded upon the claim that he has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise, does not exist in the law, and is not enforceable in equity. . . . An injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints, or copies, of a photograph of a young woman as part of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect; but, on the contrary, the gravamen of the complaint is that the likeness is so good that it is easily recognized, and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician." There is, however, in each of these cases a vigorous dissenting opinion by Justice Gray. The late case of *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, by the supreme court of Georgia, approves the doctrine laid down in the dissenting opinion of Justice Gray in the New York cases, and, in a very able and exhaustive opinion reviewing the cases, holds that the right of privacy is a form of property as much as the right of immunity of one's person. Most of the leading cases are collected and discussed in this case. In the opinion the court

quotes approvingly the following language from the dissenting opinion of Justice Gray in *Roberson v. Rochester Folding Box Co.* supra: "The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that everyone, in exercising a personal right, and in the use of his property, shall respect the rights and properties of others. He must so conduct himself in the enjoyment of the rights and privileges, which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection." It will be seen, however, upon examination of the cases cited as sustaining the so-called "right of privacy," that many of them turn upon property rights or breach of trust, contract, or confidence. *Levy v. Clements*, 175 Mass. 376, 50 L.R.A. 397, 56 N. E. 735; *Morison v. Moat*, 9 Hare, 241; *Prince Albert v. Strange*, 2 De G. & S. 652; *Tuck v. Priest*, L. R. 19 Q. B. Div. 629; *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345; *Gee v. Pritchard*, 2 Swanst. 402; *Woolsey v. Judd*, 4 Duer, 379. See also 4 *Harvard Law Rev.* 193, and 3 *Northwestern Law Rev.* 1; *Corless v. E. W. Walker Co.* 31 L.R.A. 283, 57 Fed. 434, 64 Fed. 280.

2. We think the case before us does not turn upon the so-called "right of privacy," but upon contract relations. The plaintiff seeks to recover at law for the alleged value of the picture, upon the ground that he had a property right in it, and that the defendant, by retaining it, became liable as a purchaser. The complaint is to recover for goods, wares, and merchandise sold and delivered to the defendant. The plaintiff, under a contract to paint the portrait, received the two photographs for the purpose of aiding him in the painting of the original picture, which he painted, and

was paid for in accordance with the contract. He then undertook, without any authority from the defendant, to paint the second portrait; and, as he says in his letter to defendant, "decided to risk having one painted, which I should be pleased to have you see, either at your home or mine, as it suits your convenience." There is no claim that plaintiff ever had authority to paint the second portrait, or that defendant ever assented thereto. Under the contract, plaintiff had no right to hold the photographs or use them for any other purpose than to aid him in painting the original picture. No express authority to use them for any other purpose was given, and none can be implied from the nature of the engagement. When the original picture was painted, plaintiff's contract with defendant was performed, and he had no right to retain the photographs for any other purpose. When he undertook to produce another picture from the indoor photograph, he violated his contract with defendant, and such act amounted to a breach of the trust reposed in him under the contract relation existing between them. In *Lévyreau v. Clements*, supra, defendant contracted with plaintiff for a certain number of cuts from defendant's dies to be used by defendant in his business. The plaintiff, in addition to the number of cuts contracted for by defendant, printed a certain number extra for his own use without the knowledge of defendant. By mistake, the extra cuts or folders were delivered, with the others, to defendant, which was immediately discovered, and demand made upon defendant for them, which was refused. Defendant kept the extra cuts not ordered, and used them the same as the others. In an action of trover, the lower court ruled plaintiff could recover, and the judgment was reversed upon appeal. The court said (page 379 of 175 Mass., page 400 of 50 L.R.A., and page 736 of 56 N. E.): "The plaintiff had no right to use the dies to have impressions of them printed for his own use, and his use of them in having 80 extra copies of the folder struck off for himself, for the purpose of advertising his own business of making dies, was a breach of trust toward the defendant, which would have entitled the latter to have, at least, if the matter were of sufficient consequence, an injunction to restrain the plaintiff from using the folders thus wrongfully obtained, and to a decree ordering them to be destroyed." In *Tuck v. Priester*, supra, the plaintiffs employed defendant, who was a printer in Berlin, to make for them copies of drawings. Defendant made the copies ordered, 7 L.R.A. (N.S.)

and also, without the knowledge or consent of plaintiffs, made other copies, and exported them to England. It was held that there was an implied contract that defendant should not make any copies of the drawing other than those ordered by plaintiffs, and that plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract. In *Pollard v. Photographic Co.* supra, a photographer who had taken a negative likeness under agreement to supply the person with copies was restrained from selling or exhibiting copies, on the ground that there was an implied contract not to use the negative for such purpose; and, further, because such sale or exhibition was a breach of confidence. In *Prince Albert v. Strange*, 2 De G. & S. 652, it was held that, where a workman intrusted with copperplates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself in violation of the trust, and sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own, the plaintiff was entitled at hearing to a perpetual injunction to restrain the publication of the catalogue, and to a decree ordering the impressions to be destroyed. We think the doctrine of the above cases rules the case before us, and that plaintiff had no right to paint the second picture or use the photographs for such purpose. The plaintiff, being guilty for a breach of contract, and of trust and confidence as well in painting the second portrait, could acquire no property in it, and therefore had none to sell to defendant or anyone else.

It follows that the plaintiff was not entitled to recover.

The judgment of the court below is affirmed.

Dodge, J., dissenting:

No rule is more elementary than that one who knowingly accepts and avails himself of services, performed by another is bound by implied promise to pay for such services although neither requested nor authorized in advance. *Wheeler v. Hall*, 41 Wis. 447, 451; *Wellauer v. Fellows*, 48 Wis. 105, 4 N. W. 114; *Goodland v. LeClair*, 78 Wis. 176, 47 N. W. 268; *Williams v. Williams*, 114 Wis. 79, 84, 89 N. W. 835; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 120 Wis. 1, 8, 97 N. W. 515; *Indiana Mfg. Co. v. Hayes*, 155 Pa. 160, 26 Atl. 6; *Bartholomae v. Paull*, 18 W. Va. 771; *Ford v. Ward*, 26 Ark. 363; *Abbot v. Third School District*, 7 Me. 118. Here the

plaintiff painted the picture in question, knowing that defendant would not thereby be placed under any liability, but would have the right after its completion to avail himself of the service or reject it. At defendant's request it was placed in his possession to enable him to decide whether he would reject or would accept it, with complete understanding that plaintiff expected payment in the latter event. Defendant has retained it. He cannot now be heard to say that he did not expect to pay for it. His acts give him full benefit of plaintiff's work, and he should not, by his own testimony to a mental state of disapproval, be permitted to deny the legal effect of such acts. He could have refused or surrendered the picture, if dissatisfied, with no prejudice to any so-called "rights of privacy," as they existed before plaintiff, at defendant's request, put it in the latter's possession. The cases cited in the court's opinion (*Leveau v. Clements*, *Tuck v. Priester*, *Pollard v. Photographic Co.* and *Prince Albert v. Strange*) clearly have no relevancy. In them the plaintiff was attempting to acquire advantage to himself in breach of the understanding under which he had acquired an opportunity to do so. His motive was bad; approximately fraudulent. Here, on the contrary, plaintiff was attempting to confer a benefit upon defendant; in good faith believing that the latter's desire for a picture of his deceased wife would be best satisfied by the service rendered and tendered for acceptance or rejection by the latter. I think plaintiff is entitled, upon the facts, to recover the reasonable value of the benefit conferred on defendant, and therefore must dissent from the court's decision.

I fear that the marked prominence given to quotation from a dissenting opinion in *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, may suggest approval of the views quoted as to existence of any legal right of privacy. I certainly am not prepared to yield concurrence therewith, nor did I understand that the court in any degree adopted them; but, on the contrary, decided to express no opinion on that important and vexed subject.

WISCONSIN SUPREME COURT.

JOHN GEREG, Appt.,

v.

MILWAUKEE GAS LIGHT COMPANY,
Resp't.

(128 Wis. 35, 107 N. W. 289.)

Master—foreman and laborer fellow servants.

One engaged in digging a trench for a
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gas main across a public street at night, and the foreman in charge of the gang, are fellow servants, so that the master is not liable for injuries to the former through the failure of the latter to inform him that more cars may be expected on the tracks laid in the street, or in failing to keep watch and warn him of the approach of a car which strikes him.

(April 17, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Cassoday, Ch. J.:

This is an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as a common day laborer digging a trench in which there was to be laid one of the defendant's gas mains on Downer avenue, at its intersection with the defendant's gas main on Lake avenue. It appears from the map in evidence, and is undisputed, that Downer avenue runs in a north and south direction, that Lake avenue runs in a northeasterly and southwesterly direction, and that Sheridan avenue runs from Lake avenue, and at right angles with it, in a northwesterly direction. The point where the gas main to be constructed on Downer avenue was to be connected with the gas main on Lake avenue was on the westerly side of Lake avenue, a little northerly of the northerly line of Sheridan avenue projected easterly, and on the west side of Downer avenue, but near the middle thereof. At the time of the injury the plaintiff and six other men were engaged in digging the trench in which the gas main was to be laid in Downer avenue near such proposed point of intersection, and the trench had then been dug to the depth of 15 inches; and at the time the same was being dug or tunneled under some of the street-car tracks on Lake avenue, where they turned onto Downer avenue, the men so at work were faced toward the south, the plaintiff being further to the south than any of the others, and where he would be struck by a passing street car unless he

Note.—As shown by note to *Illinois Steel Co. v. Ziemkowski*, 4 L.R.A. (N.S.) 1161, there is some conflict on the question whether a servant whose duty it is to warn others is in that matter a vice principal, though the trend of the decisions is to hold that he is not, unless his superiority of rank is such as to make him a vice principal, or some special consideration brings the facts within the domain of some duty which is conceded to be nondelegable.

got out of the way. While so at work a street car suddenly and without being observed by the plaintiff came down on Downer avenue from the north, and struck the plaintiff on the left side or hip, and severely injured him. That occurred about 2 o'clock on Sunday morning, July 26, 1903. The men had worked there the Saturday before, and on that day were told by the foreman to return to the work the next morning as soon as the cars stopped running, which was supposed to be about 2 o'clock A. M. The men, including the plaintiff, reached the place about 11 o'clock on that Saturday evening and lay down on the grass to rest before starting to work. The foreman arrived between 1 o'clock and 2 o'clock in the morning, and after a little while ordered the men to start to work, and soon after the accident occurred. The work was being done under the supervision of the defendant's foreman, who had stepped away just prior to the injury, and was at the defendant's tool wagon, a block away, at the time of the accident, without stationing anyone to keep a lookout during his absence. The early morning hour was selected for doing the work, so as to avoid the presence of the cars. Two cars passed on the track in question after the men were set to work,—the one which struck the plaintiff, and another about fourteen minutes afterwards. The foreman testified that the men requested him to set them at work because it was cold, and that, when he directed them to begin work, he told them, in the presence of the plaintiff, that there were a couple more cars to come down, and it was all right to go to work; that they would watch the cars. On that Saturday afternoon the foreman was told by the defendant's superintendent to station one man to keep a lookout for coming cars; that there was nothing unusual about such instructions. The reason for giving such instructions, according to the testimony of the superintendent, was that when men were working close to the track with their heads in line with the street car it was dangerous, though not dangerous if a man was careful on his own account. There was evidence tending to prove that, prior to the accident, the plaintiff was not told that other cars or any car was liable to pass after they went to work that morning, and that he was not warned by the foreman or anyone that a car was liable to pass after he so went to work. At the close of all the testimony the court directed a verdict in favor of the defendant, and from the judgment entered thereon, dismissing the complaint, the plaintiff brings this appeal.

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Messrs. Lenicheck, Fairchild, & Boesel, for appellant:

Whether an act is that of a fellow servant or a vice principal depends not on the grade or position of the person doing it, but on the character of the act.

Horn v. La Crosse Box Co. 123 Wis. 399, 101 N. W. 935.

The negligence of the defendant's foreman to give proper warning was imputed to the defendant.

Ibid.; Wysocki v. Wisconsin Lakes Ice & Cartage Co. 121 Wis. 96, 98 N. W. 950; Baumann v. C. Reiss Coal Co. 118 Wis. 330, 95 N. W. 139; Nix v. C. Reiss Coal Co. 114 Wis. 493, 90 N. W. 437; Jarnek v. Manitowoc Coal & Dock Co. 97 Wis. 537, 73 N. W. 62; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Promer v. Milwaukee, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90; Cadden v. American Steel Barge Co. 88 Wis. 409, 60 N. W. 800; Hulehan v. Green Bay, W. & St. P. R. Co. 68 Wis. 520, 32 N. W. 529; Luebke v. Chicago, M. & St. P. R. Co. 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; Brabbits v. Chicago & N. W. R. Co. 38 Wis. 289; McGovern v. Central Vermont R. Co. 123 N. Y. 280, 25 N. E. 373; St. Louis, A. & T. R. Co. v. Triplett, 54 Ark. 289, 11 L.R.A. 773, 15 S. W. 831, 16 S. W. 266; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764; Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235; Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39; McLaine v. Head & D. Co. 71 N. H. 294, 58 L.R.A. 468, 93 Am. St. Rep. 522, 52 Atl. 545; Cheeney v. Ocean S. S. Co. 92 Ga. 726, 44 Am. St. Rep. 113, 19 S. E. 33; Louisville, E. & St. L. Consol. R. Co. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; Davis v. New York, N. H. & H. R. Co. 159 Mass. 532, 34 N. E. 1070; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; 1 Shearm. & Redf. Neg. 5th ed. §§ 185b, 203, 204.

Any servant of the company who is charged with the performance of any duty which the company owes its servants is a vice principal in respect to such duty.

20 Am. & Eng. Enc. Law, 2d ed. p. 55; Baumann v. C. Reiss Coal Co.; Nix v. C. Reiss Coal Co.; McMahon v. Ida Min. Co.; Promer v. Milwaukee, L. S. & W. R. Co.; Davis v. New York, N. H. & H. R. Co.; St. Louis, A. & T. R. Co. v. Triplett; Belleville Stone Co. v. Mooney; Evansville & T. H. R. Co. v. Holcomb; Louisville, E. & St. L. Consol. R. Co. v. Hanning; McGovern v. Central Vermont R. Co.; and Northern P. R. Co. v. Amato, — *supra*.

Messrs. Miller, Mack, & Fairchild, for respondent:

Defendant performed its full duty by giving sufficient regulations and instructions.

Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; Harris v. Cameron, 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W. 437; Douglas v. Chicago, M. & St. P. R. Co. 100 Wis. 405, 69 Am. St. Rep. 930, 76 N. W. 356; Portance v. Lehigh Valley Coal Co. 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; Bain v. Northern P. R. Co. 120 Wis. 412, 98 N. W. 241; Luebke v. Chicago, M. & St. P. R. Co. 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136; Wiskie v. Montello Granite Co. 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; Okonski v. Pennsylvania & O. Fuel Co. 114 Wis. 448, 90 N. W. 429; Baumann v. C. Reiss Coal Co. 118 Wis. 330, 95 N. W. 139.

The giving of notice of the approach of danger, where it does not enter into the creation or maintenance of a safe place, is not necessarily a primary duty of the master, but is a secondary duty, which may be delegated to competent fellow servants under proper rules.

Note to *Tedford v. Los Angeles Electric Co.* 54 L.R.A. 121.

The foreman was a fellow servant with the plaintiff.

Hoth v. Peters, 55 Wis. 405, 13 N. W. 219; Heine v. Chicago & N. W. R. Co. 58 Wis. 525, 17 N. W. 420; Ewald v. Chicago & N. W. R. Co. 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12; Peschel v. Chicago, M. & St. P. R. Co. 62 Wis. 338, 21 N. W. 269; Toner v. Chicago, M. & St. P. R. Co. 69 Wis. 188, 31 N. W. 104, 33, N. W. 435; Dwyer v. American Exp. Co. 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; Grant v. Keystone Lumber Co. 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535.

Cassoday, Ch. J., delivered the opinion of the court:

There is no claim of any want of care on the part of the defendant or its superintendent in selecting the foreman who had charge of the men at the time of the accident, nor in failing to instruct or direct him to conduct the work in a way to save the men, as far as possible, from being struck by passing street cars. There is no claim that the place where the men were at work was in itself inherently dangerous. It is conceded that the work in which the plaintiff was engaged at the time of the accident was being done under the supervision of the foreman. The only negligence claimed is that the foreman failed to inform the plaintiff that other cars were liable to pass at or about the time in

question, or to provide a watchman to warn the plaintiff and other workmen of the approach of such car. The trial court directed a verdict in favor of the defendant, on the ground that such alleged negligence of the foreman, if any, was the negligence of the plaintiff's fellow servant, for which the defendant was not liable.

The important question is whether the plaintiff and the foreman were fellow servants at the time in question. As claimed by counsel for the plaintiff, the answer to the question does not depend upon the rank or grade of the negligent servant, but upon the nature or character of the act in the performance of which the injury was incurred. *Dwyer v. American Exp. Co.* 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; *Kliegel v. Weisel & V. Mfg. Co.* 84 Wis. 148, 53 N. W. 1119; *Stutz v. Armour*, 84 Wis. 623, 54 N. W. 1000; *Wiskie v. Montello Granite Co.* 111 Wis. 443, 449, 87 Am. St. Rep. 885, 87 N. W. 461, and cases there cited; *Okonski v. Pennsylvania & O. Fuel Co.* 114 Wis. 448, 90 N. W. 429. In several of these cases the negligent act complained of was the act of the foreman conducting the work. Thus, in one of the cases cited, it was held: "A foreman who personally conducts the blasting in a quarry is a fellow servant of those who assist him in such work, and one of the latter cannot recover for injuries caused by the unexpected explosion, beneath the rock upon which he was at work, of powder which the foreman had negligently permitted to remain there after the partial explosion of a blast." *Wiskie v. Montello Granite Co.* supra. In another of the cases cited it was held that "the facts that the foreman had authority to hire, discharge, and direct the dock force, and was charged with the duty to see that the docks were so operated as to be safe, and to provide necessary lights, signals, and warnings, did not render him other than a fellow servant of plaintiff while performing the specific act mentioned." *Okonski v. Pennsylvania & O. Fuel Co.* supra. As indicated, the place where the plaintiff was at work at the time of the injury was not of itself inherently dangerous. It was only made dangerous by the approach of the street car over which the defendant had no control. Of course, it has often been held by this and other courts that it is the duty of the master to provide and maintain for his servants a reasonably safe place for the doing of their work, and that such duty is personal to the master and cannot be delegated to another. *Bessex v. Chicago & N. W. R. Co.* 45 Wis. 477; *Hulehan v. Green Bay, W. & St. P. R. Co.* 58 Wis. 319, 17 N. W. 17, 68 Wis. 520, 32 N. W. 529; *McClarny v. Chicago M. & St. P.*

R. Co. 80 Wis. 277, 280, 49 N. W. 963. But that principle has no application to a case where, as here, the place in itself was reasonably safe, but was liable to be rendered unsafe by the sudden approach of a car, which might have been foreseen, and therefore avoided, had not the foreman failed to notify the plaintiff that other cars were liable to pass, or to provide a watchman to warn the plaintiff and other workmen of the approach of such car.

As indicated in some of the cases cited, the mere fact that the negligent person happened to be such foreman did not prevent him from being the fellow servant of the men. Numerous additional illustrations might be cited. Thus, it has been held that a foreman in a lumber yard and an employee therein are fellow servants. *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219. So, the foreman in raising and erecting a water tank and the workmen under him are fellow servants. *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269. So, a watchman employed to guard a car repairer is a fellow servant of such repairer. *Luebke v. Chicago, M. & St. P. R. Co.* 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136. So, a brakeman on an approaching freight train was held to be a fellow servant of workmen engaged in repairing the track, but who failed to give sufficient notice to those in charge of the train. *Cooper v. Milwaukee & P. du Ch. R. Co.* 23 Wis. 668. See *Toner v. Chicago, M. & St. P. R. Co.* 69 Wis. 197, 198, 31 N. W. 104, 33 N. W. 433, and cases there cited. We must hold that the plaintiff in this action and the foreman in charge of the men were fellow servants, and hence that the verdict was properly directed in favor of the defendant.

The judgment of the Superior Court for Milwaukee County is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

I. V. NEWMAN et al.

v.

W. C. NEWMAN et al., Appts.

(— W. Va. —, 55 S. E. 377.)

Will—trust—life estate.

1. The will below does not vest in the widow an absolute fee estate, but vests in her a life estate, and creates a trust in her as trustee for the benefit of her children.

Trust—laches.

2. The defense of laches, though not applying, as a general rule, to an express trust, does apply to a constructive trust. 7 L.R.A.(N.S.)

Same—constructive.

3. Where a trustee holding under an express trust uses the trust property in the purchase and conveyance of land to another, in violation of the trust and with notice of it, it creates a constructive, and not an express, trust in that third person; and laches will apply in favor of such person as a defense against the enforcement of such trust. Limitation of action—coal in place.

4. The statute of limitations, for want of adverse actual possession, does not apply in favor of one claiming coal in state of nature in place not developed.

(October 23, 1906.)

APPEAL by defendants from a decree of the Circuit Court for Mason County in favor of complainants in a suit brought to establish a trust in certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Rankin Wiley and J. E. Beller, for appellants:

A power to sell gives a fee.

Fairclaim v. Guthrie, 1 Call (Va.) 5; Riddick v. Cohoon, 4 Rand. (Va.) 547; Melson v. Doe, 4 Leigh, 408; Milhollen v. Rice, 13 W. Va. 519; Brown v. Strother, 102 Va. 145, 47 S. E. 236; Englerth v. Kellar, 50 W. Va. 259, 40 S. E. 466; Melton v. Camp, 121 Ga. 693, 49 S. E. 690; Tyack v. Berkeley, 100 Va. 296, 40 S. E. 904; Parks v. Robinson, 138 N. C. 269, 50 S. E. 649.

Messrs. J. W. English, William Gunn, and Charles E. Hogg, for appellees:

Mary Newman did not take an absolute estate in fee in the property of Isaac Newman, deceased.

28 Am. & Eng. Enc. Law, 2d ed. p. 901; Green v. Collins, 28 N. C. (6 Ired. L.) 139.

The will of Isaac Newman constituted his widow an express trustee for his children therein named and for any that might be born after the date of the instrument.

Headnotes by BRANNON, J.

Case Note.—Laches as a bar to enforcement of trust as against one who knowingly purchased trust property in violation of the terms of an express trust:—The doctrine of the case in hand, that laches will defeat the right of the beneficiary of an express trust to enforce it as against a purchaser of the trust property in violation of the trust with knowledge thereof, is fully supported by authority, and is in harmony with the equally well-established doctrine that the defense of laches is available to the trustee himself where he has repudiated the trust. (See case note in 5 L.R.A.(N.S.) 986, on "Laches which will defeat relief after the repudiation of an express trust.") The assertion of an adverse right by the purchaser of the trust property in the class

Underhill, Tr. 4th ed. p. 10; 2 Story, Eq. Jur. § 980; 2 Pom. Eq. Jur. § 1010; Hogg, Equity Principles, § 553; Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164; Lee v. Enos, 97 Mich. 281, 56 N. W. 552; Stace v. Bumgardner, 89 Va. 421, 16 S. E. 254; Sinking Fund Comrs. v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617; Meek v. Briggs, 87 Iowa, 610, 43 Am. St. Rep. 410, 54 N. W. 456; Currence v. Ward, 43 W. Va. 367, 27 S. E. 329.

One who acquires property with notice, either actual or constructive, that his grantor holds title as trustee stands in the grantor's shoes, and holds the property charged with the trust.

of cases under discussion is equivalent to a repudiation of the trust for the purpose of establishing a basis for the imputation of laches on the part of the *cestui que trust*. As bearing upon the right of the trustee of an express trust to invoke the doctrine of laches as a bar to the assertion of rights by the beneficiary, reference may also be made to the cases of Oliver v. Piatt, 3 How. 333, 11 L. ed. 622, and Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610, which hold that, though the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust, yet time will begin to run against a trust from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest which are fully and unequivocally made known to the *cestui que trust*, as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would, in case of tenants in common, amount to an ouster of one of them by the other; Swift v. Smith, 25 C. C. A. 154, 49 U. S. App. 181, 79 Fed. 709, and Bruner v. Finley, 187 Pa. 389, 41 Atl. 334, which hold that the principle that neither time nor laches will bar the right to enforce an express trust is subject to the exception that, when the trust is repudiated and knowledge of the repudiation is brought home to the *cestui que trust*, the case is brought within the ordinary rules of limitation and laches; and Morse v. Hill, 136 Mass. 60, which seems to recognize the doctrine that laches may defeat the right of a beneficiary to repudiate a sale of the part of the trust estate, made by the trustees to themselves through a third person for an inadequate consideration; although it was held in that case that, under the circumstances, the beneficiary could not be regarded as guilty of laches.

The question under discussion was directly passed upon in Robinson v. Pierce, 118 Ala. 273, 45 L.R.A. 66, 72 Am. St. Rep. 160, 24 So. 984, which holds that a purchaser from a trustee in contravention of the trust in no sense becomes thereby an express trustee, but is a trustee *in invitum* 7 L.R.A. (N.S.)

7 Am. & Eng. Enc. Law, p. 252; 2 Pom. Eq. Jur. § 688; Heth v. Richmond, F. & P. R. Co. 4 Gratt. 482, 50 Am. Dec. 88; Barksdale v. Finney, 14 Gratt. 349; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Adair v. Shaw, 1 Sch. & Lef. 262.

Brannon, J., delivered the opinion of the court:

Isaac Newman died in 1836, leaving a will and a large estate, consisting of various tracts of land and slaves and other personal property. His will contained the following provisions: "I do hereby authorize my beloved widow to dispose of my property real and personal when it shall be for the benefit of the family and in all cases it shall be legal in law for the benefit of my

by construction of law, holding actually in his own right and in hostility to the world, and that staleness will bar a suit by the parties beneficially interested to set aside the conveyance by the trustee in breach of the trust.

And in Lide v. Park, 135 Ala. 131, 93 Am. St. Rep. 17, 33 So. 175, it was held that, where the statutory trusteeship of a husband over the separate estate of his wife was repudiated by his assertion of title in himself, acquired by bidding in the property at a foreclosure sale, and again by his conveyance of the property to third parties, an action to enforce the trust against such property in behalf of the wife or those claiming through her, nearly twenty years after the foreclosure, was barred by the lapse of time, to say nothing of the question of laches.

In Williams v. First Presby. Soc. 1 Ohio St. 478, it was held that, where a trustee makes a conveyance in derogation of the trust, there is such a disclaimer thereof as to render lapse of time thereafter a bar to the assertion of the trust as against those claiming under the conveyance.

In Redford v. Clarke, 100 Va. 115, 40 S. E. 630, it was held that laches would preclude the enforcement of a trust against the purchasers at a trustee's sale on the ground that such sale was contrary to the terms of the trust.

So, also, in Groome v. Belt, 171 Pa. 74, 32 Atl. 1132, it was held that laches would preclude the enforcement of an express trust as against persons taking under the will of the creator of the trust property which was originally the subject of the trust, but for which the creator of the trust had subsequently substituted other property.

In Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328, it was held that the borrower of a trust fund with knowledge of its character is not an actual trustee, but is at most only a trustee *ex maleficio* or by implication or construction of law, to whom the statute of limitations is available as a defense to an action to enforce the trust.

In McLafin v. Jones, 155 Ill. 539, 40 N. E. 330, it was held that, where one third of

eight children namely Junius Eastham Newman, Virginia Eastham Newman, Mary Cath-rine Newman, William Walter Newman, John Green Newman, Susan Ann Newman, Sarah Jane Newman, Isaac Vanburen Newman and if any other shall be born to my wife within nine months after my death. And the court is not to require security for the faithful discharge as I have unbounded confidence in her virtue and love for the interest of those she is left to protect. Subject however to the possibility that she should become the wife of another man; in that event she is to surrender my childrens' property as before named to my brother-in-laws William George and Albert G. Eastham, who I do appoint my Executors in that contingency." He left a number of children. Mary Newman, the widow, made deeds to different children of different tracts of land vested in her by the will, and by her will devised other lands to some of the children, leaving out W. W. Newman, her son. To her said son she conveyed the half of the home farm of 384 acres. The controversy in this case arises from the fact that the widow, Mary Newman, conveyed to Luman Gibbs a small tract of land vested in her by her husband's will in exchange for the coal in a tract of 400 acres of land owned by Gibbs, and Gibbs conveyed said coal to W. W. Newman. Thus Mary Newman purchased said coal with land which she derived under her husband's will. I. V. Newman and others, as children and grandchildren of said Isaac Newman and Mary Newman, brought a chancery suit against the heirs of W. W. Newman, claim-

ing that, as the said 400 acres of coal was purchased with land of the estate of Isaac Newman, it was a trust estate in the hands of W. W. Newman for the common benefit of all those interested in the estate of Isaac Newman; that Mary Newman held the land which she conveyed to Gibbs in trust for the benefit of the children of her husband; and that W. W. Newman was well aware of such trust, and took the deed for the said coal with notice of such trust, and therefor held it subject to their rights, and asked a partition thereof for the common benefit of all entitled under the will of Isaac Newman. The circuit court of Mason county sustained the plaintiffs' claim, holding the land in the hands of the heirs of W. W. Newman to be still subject to the trust created by the will, and imposed upon Mary Newman as trustee under it, and decreed that the said coal be partitioned. From this decree the heirs of W. W. Newman have appealed.

The first question that arises in the case is this: The defense contends that the will vested in Mary Newman an absolute estate in fee for her own absolute use, to be conveyed away as she might choose, without any account to the children of her husband; while the plaintiffs claim that the will created an express trust in Mary Newman, by which she held the estate in trust for the benefit of the children of her husband, saving a life estate to herself. The defense relies upon that rule of law given in many decisions, that where a will devises land to a person to dispose of at his pleasure, such devisee has the absolute

the money realized from the sale of a decedent's property was retained by his executor by direction of the court, to be loaned out for the benefit of the widow during her life, and such funds were misappropriated, laches will bar the right of the persons entitled thereto to reclaim such funds from persons receiving them with knowledge of their character.

And in *Morris v. Duke, 2 Patton & H. (Va.) 462*, it was held, where property belonging to a decedent's estate was assigned by an administrator to his individual creditor in exchange for other securities, which was thereupon assigned by the creditor to the surety upon the administrator's bond, that, assuming a constructive trust in the property so assigned by the administrator to arise from the transaction, acquiescence therein for twenty years by the parties beneficially interested would bar the right to enforce it against the creditor.

Where an administrator purchases property indirectly at a sale of decedent's estate for the payment of debts, he is simply the trustee of a constructive trust, to the enforcement of which laches is a bar. *Miles v. Wheeler, 43 Ill. 123.*
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Where one of the administrators and his brother, who were sons of the decedent, acting for the best interests of the estate, become the purchasers of property belonging to the estate, there is only an implied constructive trust in favor of the heirs, the right to enforce which against the property will be barred by laches. *Hendrickson v. Hendrickson, 42 N. J. Eq. 657, 9 Atl. 742.*

The doctrine that laches may preclude the enforcement by the beneficiary of an express trust of his rights as against a purchaser of the trust property seems also to have been recognized in the case of *Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414*, in which the trustee had pledged stock which the pledgee had notice belonged to the trust estate to secure an individual debt; in *Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251*, in which land subject to an express trust had been sold to a purchaser with notice; and in *Sternfels v. Watson, 130 Fed. 505*, where the trustee had executed a mortgage upon the trust property for his individual benefit; although in none of these cases were the circumstances under consideration held to amount to laches.

property, even though his interest is called by the will a "life estate," and there is a provision whereby what may remain undisposed of at the death of the devise goes to another person. *Melson v. Doe*, 4 Leigh, 408; *Milhollen v. Rice*, 13 W. Va. 519; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731; *Englerth v. Kellar*, 50 W. Va. 259, 40 S. E. 465; *Brown v. Strother*, 102 Va. 145, 47 S. E. 236; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer*, 87 Va. 354, 11 L.R.A. 610, 24 Am. St. Rep. 653, 12 S. E. 618; *Burwell v. Anderson*, 3 Leigh, 348. But we hold that this doctrine does not apply to this case, because we think that it is plain that, though the testator intended to give the widow a support out of the whole estate, yet he did not intend her to consume the whole for her own purposes, but intended to vest in her the property for the benefit of her children. The will gives her a power of disposition, it is true, and that generally carries the absolute ownership; but, if the will evinces a different purpose, that power of disposition does not have that effect. In this case the will, while giving a power of disposition to the widow, yet declares that it is to be exercised for the benefit of the children, naming them. It does not say that she shall exercise the power of sale for her sole use, or that she may consume the proceeds. The will says she shall only exercise the power of disposition "when it shall be for the benefit of the family." This shows a restricted power of disposition. It shows that it can only be exercised for the benefit of the family, widow and children together. The very clause constituting the devise—the vital devising clause—tells that the devise to the widow is for the common benefit of the entire family. Moreover, the will makes the devise subject "to the possibility that she should become the wife of another man; in that event she is to surrender my childrens' property as before named to my brother-in-laws." Now here the testator calls the property "my childrens' property," and provides for the widow's estate to end on her remarriage. If he intended to give her complete ownership, why this provision? We cannot help thinking that, while the testator intended to provide amply for his wife out of his large estate, he yet remembered that he had children to be provided for. He reposed full confidence in his wife to deal justly with his children; even in that clause he manifested an intent that his wife should care for and protect his children with the property vested in her. We deem it hardly necessary on this point to cite authority, since it is only a question of the purpose of Newman as manifested in his will; but I cite *Cressap v. Cressap*, 34 W. Va. 310, 12 7 L.R.A.(N.S.)

S. E. 527, *Milhollen v. Rice*, 13 W. Va. 510, and *Young v. Bradley*, 101 U. S. 782, 25 L. ed. 1044, as reflecting light on this particular matter. As the will gives power of disposition to the widow for the benefit of the children, counsel ask, Who was to say when her act of sale would be proper. We answer, a court of equity, which has power to administer trusts and control trustees. If the will did confer absolute property upon Mary Newman, that would end the case, for she would have perfect right to exchange land which was derived from her husband for the coal, and give it to her son, W. W. Newman, free of any trust; but, as we deny that the will confers such absolute estate, we must go on with further questions arising in the case.

The plaintiffs properly claimed that the will created only a trust estate in Mary Newman, and they say that, as Mary Newman held the land in trust, so did W. W. Newman, and so do his heirs. They say that there is no difference between the tenure of Mary Newman and W. W. Newman. It is undeniable that W. W. Newman, when Gibbs conveyed the coal to him, had full notice of the trust aforesaid. It is settled law that one acquiring trust property with notice of a trust from the trustee is himself a trustee, holding the property on the same trust under which his grantor held it. "A trust fund may be pursued by the beneficiaries as long as the same can be identified, into any land or other form of investment made by the trustee, as the law raises an implied trust as to such property in their behalf." *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300. See *Crumrine v. Crumrine*, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341; *Reel v. Reel* (W. Va.) 52 S. E. 1023; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; *Heth v. Richmond, F. & P. R. Co.* 4 Gratt. 482, 50 Am. Dec. 88; *Vance v. Kirk*, 29 W. Va. 344, 1 S. E. 717; *Barksdale v. Finney*, 14 Gratt. 438. The many authorities sustaining this position are collected in that valuable work, *American & English Decisions in Equity*, vol. 2, p. 652, showing that trust funds may be followed up. *Hogg's Equity Principles*, 763, is full authority on this point. So the right of the plaintiffs to follow up this coal originally is very clear, but they are barred by great lapse of time. The conveyance of the coal to W. W. Newman from Gibbs dates August 16, 1853, and so does the deed from Mary Newman to Gibbs, and this suit was brought in 1902,—a great span of forty-nine years, and none of the parties under any disability. But the plaintiffs say that neither the statute of limitations nor laches applies. They argue that the statute of limitations does not apply to an express trust and that laches

does not. "No statute of limitation runs against an express trust, nor does lapse of time avail until the duties are ended or the trust disavowed." *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579. Express trusts are not liable to the statute, and for the most part not liable to laches, though sometimes even an express trust is lost by great lapse of time. See *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309. That is the law of express trusts, and, if Mary Newman held the title to the coal which Gibbs conveyed to W. W. Newman, doubtless the trust would be enforceable against her; but W. W. Newman is not Mary Newman. She would hold under an express trust; he did not. What is the character of trust under which W. W. Newman held? It was not an express trust, but a constructive trust. Here lies the controlling distinction in this case. W. W. Newman did not take as a trustee by the terms of his deed, as that is an absolute conveyance to him, thus denying any trusteeship. There is no competent evidence to prove that he agreed to hold in trust. I. V. Newman says he did so, but W. W. Newman being dead, and I. V. Newman being a plaintiff, and one to be benefited by the enforcement of the trust, his evidence is wholly incompetent. W. W. Newman, on the theory of the plaintiff, took his estate in the coal *ex maleficio*,—that is, in wrong; in fraud of the rights of those interested in the trust. He took in hostility to their rights, not in acknowledgment of their rights. Say that he took in fraud of their rights. Taking, however, with notice of the trust, equity would make him a constructive trustee under a constructive trust, not under an express trust. He never did a thing to recognize any obligation resting on him as trustee, nor did his heirs. Hogg's Equity Principles, § 552a, p. 738, classifies trusts in two general divisions,—“direct or express trusts (that is, those springing from the agreement of the parties), and into constructive or implied trusts (that is, those created by the rules and principles of equity). Under this latter class fall all those trusts known distinctively as implied or constructive, as well as those called ‘resultant’; those arising from acts of fraud or otherwise; in short, all those that do not spring from the agreement of the parties. . . . A constructive trust is one not created by any words either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice.” I submit that W. W. Newman was not holding under an express trust, but under a constructive trust,—one made or created by the law of equity jurisprudence. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; 7 L.R.A.(N.S.)

2 Minor, Inst. 188; 15 Am. & Eng. Enc. Law, 2d ed. p. 1123. This is not a trust assumed by the consent of Newman, but it is imposed upon him against his will by equity law, because he did a wrong in taking property bought with trust property. Such a trust is sometimes called an “involuntary trust” and sometimes a “trust *ex maleficio*.” “The basis of a constructive trust is fraud, actual or constructive.” 15 Am. & Eng. Enc. Law, 2d ed. p. 1185. It is in the failure of counsel for the plaintiffs to recognize this distinction between express and constructive trusts that their contention fails. Thus, W. W. Newman, holding under a constructive trust, is protected by the lapse of forty-nine years. All the plaintiffs knew of his deed, as it was at once put on record. Outside of that, the evidence fully establishes notice on the plaintiffs of that deed. They were bound to know of it, and did know of it. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. True, the statute of limitations does not apply, because the coal was not developed, and there was no adverse possession of it, as it was in a state of nature. *Wallace v. Elm Grove*, 58 W. Va. 449, 52 S. E. 485. But, this being a suit to enforce a constructive trust, that limitation raised by equity law called “laches” does apply. It is not true that limitation and laches do not apply to any trust. They do not apply to express trusts but do apply to constructive trusts. *Woods v. Stevenson*, supra, holds that “express trusts, cognizable only in equity, are alone free from limitation created by laches or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations, or liable to be barred by laches.” Hogg's Equity Principles, § 567, p. 757, plainly makes this distinction, saying that time does not run against a suit to enforce an express trust till the trustee denies the trust and the beneficiary has notice of it; “but those trusts which arise by operation of law, as all constructive trusts, are within the operation of the statute of limitations.” Many West Virginia and Virginia authorities are cited by Mr. Hogg. In 28 Am. & Eng. Enc. Law, 2d ed. p. 1133, this distinction between express and constructive trusts, for the purpose of limitation, is recognized. There it is stated that when the trust ends in any way the statute runs. The trust of Mary Newman—the express trust—ended with the conveyance by her to Gibbs of trust land, in wrong, for the purchase of the coal. Then it was a hostile claim by W. W. Newman. Then time began to run. A mere constructive trustee may protect himself by limitation. *Sheppard v. Turpin*, 3 Gratt. 373. Laches lies “to suits to charge another with a constructive trust, and the

like." Hogg, Equity Principles, p. 417. So, the plaintiffs are barred of relief by laches. So many years fled away (nearly half a century) from the date of the deed from Mary Newman to Gibbs and the date of the deed from Gibbs to W. W. Newman for the coal (both the same date) 16th August, 1853, until 1902, when this suit was brought, the adverse parties knowing of these deeds. No stronger case could be presented for the application of the doctrine stated in *Trader v. Jarvis*, 23 W. Va. 100; that is: "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver; and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity." See *Phillips v. Piney Coal Co.* 53 W. Va. 543, 97 Am. St. Rep. 1040, 44 S. E. 774. But the defense of laches is rendered clearer still as a bar by the fact that the immediate parties to the transaction, who above all others could speak the truth upon it, had been slumbering in their tombs for many years when this suit was brought. The mother, Mary Newman, died in 1871, seventeen years after the recordation of these deeds. W. W. Newman died in 1884, thirty years after those deeds were made. While Mary Newman and W. W. Newman lived no suit was brought, no claim made; and after W. W. Newman died they waited eighteen years before attacking his children. From appearances these people were people of character. It is not to be presumed that a just mother would do injustice among her children. It is not to be supposed that W. W. Newman, a licensed attorney, and a member of the Virginia senate, would do a wrong to his brothers and sisters. Why this coal was conveyed to him we do not know. If he and his mother were in life, they might give us a perfect defense and justification of this act; but their lips are sealed, and long have been. It is, however, fair to say that the long acquiescence on the part of the other children in this act of the mother and brother, their long silence while the mother and brother were in life, speaks forcibly to tell us that there is some reasonable justification of this transaction. If there had not been, why this long silence and acquiescence by those deeply interested? It is a strong argument against any action by a court of equity after so long a time that the parties to the transaction are dead, so that the truth cannot be known. This is always an argument against relief. *Pusey v. Gardner*, 21 W. Va. 469 (syl. point 6). The disinclination of courts to enforce trusts after long delay is 7 L.R.A. (N.S.)

well stated in the opinion by Judge Dent and the authorities given in *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309.

Another argument against any relief lies in the fact that Mary Newman conveyed and devised to various children different tracts of land, some of which have been sold away and others encumbered by deeds of trust, thus involving rights of third parties. How can these lands be brought into hotchpot?

Another argument advanced by the plaintiffs is that in 1852 the members of the Newman family met and agreed upon a partition of the land orally, which was carried partly into execution by the conveyance by Mary Newman of some lands to some children, and that by that oral family agreement certain of the children were to get the tract of land out of which Mary Newman conveyed a part to Gibbs in exchange for the coal conveyed by Gibbs to W. W. Newman. How can this help the plaintiffs? Saying that that is so, it makes their case worse, because it shows that W. W. Newman, in violation of the agreement, diverted the land from the course it was to take by that agreement, and in conjunction with Mary Newman used it to acquire a deed to himself for the coal. If this be so, surely it was no express trust, but purely a constructive trust,—an act in character adversary to others under said family agreement, and, if possible, time applies all the more from that agreement. It cannot be thought for a moment that W. W. Newman by this act became a voluntary trustee. It was an act of wrong against his brothers,—the wrong of having the trustee divert the trust property from the use to which it was to go under that family agreement; an act repudiating that agreement. Surely he held not as trustee to execute that agreement. I will add that letters from I. V. Newman and Emma Newman to the children of W. W. Newman treat this coal as the legitimate property of W. W. Newman. I. V. Newman pointed out to W. W. Newman's children that the coal land owned by their father, and held it out to them as belonging to them. He paid taxes for them on the coal out of their money. Through these many years W. W. Newman and his children paid taxes on this coal, the other parties paying none. This goes to repel a trust, and shows a recognition of W. W. Newman's right as just. If they owned an interest, why not help pay taxes? Several of the children in numerous ways recognized the right of W. W. Newman and his children to this coal. A writing signed by W. W. Newman, dated 28th November, 1870, is relied upon. It certifies that about 1853 there was an agreement on a division of the property left by Isaac Newman, and that by a deed to certain land thereafter he re-

ceived his portion in full of said estate, and had no claim on the estate of his mother. To what deed does this refer? Both the deed from Gibbs and that from his mother for half the home farm were after that family agreement. It may refer to the deed for the coal. Anyhow, it is only an admission that he had received his share; it does not meet the defense of laches.

What excuse for long delay in suing is given? One that the mother was old, and her children did not wish to disturb her peace. This is no legal excuse. Besides, they would not be suing her, but W. W. Newman, and they waited so long after she died. Another excuse is that W. W. Newman was resident in Virginia. He and his sons after him were frequently in Mason county, visiting some of the plaintiffs, and could have been personally served with process. But personal service was not necessary, since the suit to enforce the trust by partition or conveyance to the heirs was in nature an *in rem* proceeding.

For these reasons, we must reverse the decree of the Circuit Court, and dismiss the plaintiff's bill without relief.

ILLINOIS SUPREME COURT.

GEORGE E. LLOYD & COMPANY, Appt.,
v.

NELSON EDWARD MATTHEWS et al.

(223 Ill. 477, 79 N. E. 172.)

Corporation—contract—execution.

1. Execution by the president of a corporation, on its behalf and for its benefit, of a guaranty which the corporation has power

Case Note.—Presumption that a contract within the powers of a corporation is within the authority of its president: — The extent to which it is necessary to go in proving the authority of a person to act on behalf of a corporation has varied with the changes in the methods of corporate administration attendant upon the development of the corporation as a factor in modern business. This has resulted in a diversity of views as to the showing from which authority to act for the corporation may be deduced. In some jurisdictions the early rule is still adhered to that authority from the board of directors must be shown, while in others such authority is regarded as properly inferable from a proved course of business. But in a number of decisions, of which the case in hand is one, regard is had to the fact that the business of a corporation is now ordinarily carried on by its administrative officers, from which it is to be inferred that acts done by them, and especially by the president, who is the chief administrative officer, within the scope of

to make, is sufficient to establish the liability of the corporation in the absence of anything to show that he did not act by authority of the corporation, notwithstanding the corporation, by verified plea, puts in issue the execution of the instrument.
Instruction—immateriality.

2. If, after having notice of the terms of a guaranty written over his indorsement, the payee of a note ratifies it, any error in an instruction that it was immaterial if the guaranty was written before or after the signature was placed on the note, if the signature was placed there with the intention of guaranteeing it and the words were written in accordance with that purpose, is harmless.

(October 23, 1906.)

APPPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to enforce a guaranty of a note. Affirmed.

The facts are stated in the opinion.

Messrs. Bangs, Wood, & Bangs, for appellant:

Where the execution of a contract of guaranty is denied by verified plea, special authority of the president to execute such contract on behalf of the corporation must be shown.

Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 746; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 292, 5 L.R.A. 673, 22 N. E. 587; McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321; Stark Bank v. United States Pottery Co. 34 Vt.

the corporate powers, were duly authorized. The question is, in principle, one of agency, the presumptions being the same that obtain as to the authority of an agent under like circumstances.

It is said in *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237: "The powers of the president of a corporation, *virtute officii*, over its business and property are strictly the powers of an agent,—powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of its business."

In determining the extent to which the doctrine under discussion has been adopted,

144; *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 708; *Peterborough R. Co. v. Nashua & L. R. Co.* 59 N. H. 385.

Indorsement of a promissory note by the payee is a contract in writing, and cannot be varied by parol evidence.

Hately v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441.

Messrs. Peckham, Smith, Packard, & Ap Madoc, for appellees:

An act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will be presumed to have been authorized.

Cozzen's & B. Typesetting Co. v. Western Ranch & Irrig. Co. 112 Ill. App. 309;

the essential inquiry, then, is whether the courts allow the usage or custom of corporations generally to act through their presidents to be taken into consideration without proof of such custom or usage in the case of the particular corporation involved. In doing this, care must be taken to avoid confusing cases involving the point under discussion with the decisions which pass upon the sufficiency of the proof of authority adduced in the given case, and cases in which the corporation has been held to be bound by way of estoppel. It is, however, difficult, in arranging the decisions, to observe a rigid line of demarcation, since many of the cases which hinge upon the sufficiency of the evidence of authority adduced also discuss the presumptions as to authority that may be indulged in. Several of the following decisions from which quotations have been taken are of this kind; and in several the authority of the president to act for the corporation in the instance in question was only incidentally involved, the question having arisen in suits between other parties.

In *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621, it is said: "The doctrine seems to be settled that, the president of a corporate body being its head, and through him the usual affairs of the company are constantly performed, and such acts are incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, he may perform without express authority. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business of the company."

See also, to the same effect, *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82.

And in *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680, it is said: "As a general rule corporations act through their presidents, and an act done through the president will be presumed to be authorized, unless shown to be otherwise."

In *Smith v. Smith*, 62 Ill. 493, it is said: "In the absence of legislative enactment or

Glover v. Lee, 140 Ill. 102, 29 N. E. 680; *Snyder Bros. v. Bailey*, 165 Ill. 447, 46 N. E. 462; *Bank of Minneapolis v. Griffin*, 168 Ill. 317, 48 N. E. 154.

It is immaterial whether the words of guaranty were placed on the instrument before or after signature.

Kaestner v. First Nat. Bank, 170 Ill. 322, 48 N. E. 998; *Lennon v. Goodspeed*, 89 Ill. 440.

Vickers, J., delivered the opinion of the court:

Nelson E. Matthews and Clark H. Rice, banking partners, doing business at Ottawa, Ohio, brought an action of assumpsit against *George E. Lloyd & Co.* a corporation, on

provision made in the by-laws, corporations usually act through their president, or those representing him. He being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body."

See also, to the same effect, *Gubbins v. Bank of Commerce*, 79 Ill. App. 150; *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.* 101 Ill. App. 349.

In *White v. Sheppard*, 41 App. Div. 113, 58 N. Y. Supp. 563, it is held that the president of a real-estate company, as such, possessed the power *prima facie* to execute a conveyance of its property.

In *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 439, it was said: "The authority which the public may presume is lodged with an officer of a corporation depends much upon the nature of the office, and the character and general objects of the corporation. When any officer is given general authority to manage its business, and especially when he is one of its chief officers, his presumed authority is extended to include any act that can be necessary in the conduct of its business, or that can tend to the promotion of its objects."

In *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799, in which the question arose upon the mortgagee's demurrer to a complaint filed by a creditor of the mortgagor corporation to set aside the mortgage as having been executed by the president without authority, it was said: "When a contract is made in the name of a corporation by the president in the usual course of business, which the directors have power to authorize him to make or to ratify after it is made, the presumption is that the contract is binding on the corporation until it is shown that the same was not authorized or ratified."

In the following cases, in which the authority of the president was put in issue by the corporation, the presumption that his act was duly authorized seems to have been

the indorsement and guaranty on the following promissory note:

\$1,500.00.

Ottawa, Ohio, July 25, 1902.

Sixty days after date, we, or either of us, promise to pay to the order of George E. Lloyd & Co. fifteen hundred dollars, payable at the banking house of Matthews & Rice, Ottawa, Ohio. Value received. If not paid at maturity to bear eight per cent interest from maturity.

Columbia Telephone Manf. Co. [Seal.]

By G. M. Risser, Prest. [Seal.]

W. M. Rees, Secy. [Seal.]

On the back of the note appears the following:

Payment guaranteed. Protest, demand and notice of nonpayment waived.

Geo. E. Lloyd & Co.,

By E. C. Williams, President.

To the declaration, which contained two special counts (one on the indorsement and one on the guaranty) and the common counts, appellant pleaded the general issue and a special plea, verified by affidavit, denying the execution of the guaranty. From a judgment for the face of the note in the circuit court of Cook county an appeal was

taken as a basis for holding the corporation bound thereby.

The case of Chicago Pneumatic Tool Co. v. Munsell, 107 Ill. App. 344, was an action brought against a corporation for the agreed price of certain mica washers to be used in installing an electric plant in the factory operated by the corporation, furnished upon an order given by its president. The presumption in favor of the authority of the president was held to support a recovery, the court saying: "The general rule is, that a corporation acts through its president, and through him executes its contracts and agreements; and an act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body."

In *White v. Elgin Creamery Co.* 108 Iowa, 522, 79 N. W. 283, in which a general denial was interposed by the defendant corporation in an action brought on a contract made by the president to purchase milk for its creamery, it was said that, in the absence of any showing to the contrary, the president of the corporation will be presumed to have authority to act in all matters arising in the ordinary course of its business.

But where it was provided by statute that a note is to be deemed genuine and admitted, unless the genuineness of the signature is denied under oath; and the genuineness of a note executed by its president was denied by the corporation,—such note was held inadmissible in evidence without proof of the president's authority. *Marshall Field Co. v. Oren Ruffcorn Co.* 117 Iowa, 157, 90 N. W. 618.

In *Little Saw Mill Valley Turnp. Co. v. Federal Street & P. Valley Pass. R. Co.* 194 Pa. 144, 75 Am. St. Rep. 690, 45 Atl. 66, an action upon a contract made by the president of a railway company in relation to the compensation to be paid a turnpike company for the use of its roadway, it was held that it could not be presumed that an act which was a proper act to do on behalf of the corporation was done under circumstances rendering it improper.

The doctrine that, where a contract made in the name of a corporation by its president

is one the corporation has power to authorize the president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified, is also laid down in the cases of *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *United States Nat. Bank v. Homestead Bank*, 46 N. Y. S. R. 173, 18 N. Y. Supp. 758; *Patterson v. Ongley Electric Co.* 87 Hun, 462, 34 N. Y. Supp. 209, Affirmed without opinion in 155 N. Y. 674, 49 N. E. 1101; *Davies v. Harvey Steel Co.* 6 App. Div. 166, 39 N. Y. Supp. 791.

On the other hand, in *Mt. Sterling & J. Turnp. Road Co. v. Looney*, 1 Met. (Ky.) 550, 71 Am. Dec. 491, an action for work and labor alleged to have been performed for a corporation under the employment of its president, it was held that the corporation was entitled to an instruction that a promise by the president did not bind the corporation, unless it was proved that he was authorized by the corporation to make the promise.

In *Mathias v. White Sulphur Springs Asso.* 19 Mont. 359, 48 Pac. 624, it was held that a corporation organized to acquire town sites and erect buildings could not be held liable on a contract to prepare plans for a business block made by its president, in the absence of proof that such contract was authorized by the corporation, apparently upon the ground that such a contract was not part of the ordinary routine business, although within the powers of the corporation.

In *Des Moines Mfg. & Supply Co. v. Tilford Mill Co.* 9 S. D. 542, 70 N. W. 839, it was held that a corporation was not bound by the act of its president in ordering machinery for its mill in the absence of proof of authority from the board of directors, in accordance with the general rule that the corporate powers can be exercised only by the board of directors.

And in *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 581, 22 Am. St. Rep. 783, 22 Atl. 575, it was held that the fact that lumber to be used in repairing a building of the corporation was ordered by its president is insufficient to sustain the presumption of authority, the general authority to act for the corporation not being shown.

prosecuted to the appellate court for the first district, where the judgment below was affirmed, and appellant prosecutes a further appeal to this court. Since the judgment of the appellate court settles all the controverted questions of fact adversely to the contention of the appellant, we need only to consider the questions of law raised.

1. It is contended that, even though it be conceded that George E. Lloyd & Company, by E. C. Williams, its president, signed the guaranty, still, as a matter of law, the corporation cannot be held liable without proof of special authority from the corporation to its president to execute the contract of guaranty. A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation. *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson v. South Chicago Brewing Co.* 173 Ill. 213, 50 N. E. 655; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation.

In support of its contention that special authority in the president to sign this guaranty must be shown, the appellant cites and relies upon *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 243; *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 746; *National Park Bank v. German-American Mut. W. & Secur. Co.* 116 N. Y. 281, 5 L.R.A. 673, 22 7 L.R.A. (N.S.)

N. E. 567; and some other cases of like character. Language can be found in these cases, and perhaps in others, which, when considered alone and disconnected from the facts of the case wherein it is employed, seems to sustain the contention of appellant that in order to make a contract binding upon a corporation which has been executed by the company through its president, a resolution of the board of directors or a vote of the stockholders, or other special authority, must be shown where the execution of the instrument is put in issue by a verified plea. Upon a careful examination of these cases, it will be found that they are clearly distinguishable from the case at bar, in that the president, in the execution of the contracts, was using the credit of the corporation to serve his own private interests or that of some third party. Thus, in *Dobson v. More*, supra, where the president and general manager had express authority "to sign notes, drafts, and acceptances in the name of the company, and to make checks upon the company funds in bank for the payment of any proper indebtedness of the company," and the president, merely to aid another company to raise money, executed in behalf of his company a written guaranty on the note of another corporation, it was held, as against the holder of such note with notice of the facts, that the company could not be held liable on such guaranty; there being no authority whatever shown for the president to bind the company, as guarantor, for the indebtedness of another. The powers of a president to bind a corporation by contracts are limited to those matters concerning which the charters and by-laws and the statutes of the state authorize it to make contracts. In *Park Hotel Co. v. Fourth Nat. Bank*, supra, where the president discounted a note for his own private benefit and indorsed by him in the name of the Park Hotel Company, of which he was president, and payable to himself, it was held that the corporation was not liable, and that the bank had notice, by the face of the note, that the president was exceeding his usual and ordinary powers in making a note to himself, and that in the absence of special authority from the corporation no recovery could be had. *National Park Bank v. German-American Mut. W. & Secur. Co.* supra, is a case in all essential features like *Dobson v. More*, supra, and the same rule is applied. Many other cases are to be found illustrating the doctrine announced in the decisions above referred to, but, since this court in *Dobson v. More*, supra, has reviewed many of these cases and approved them, no necessity exists to dis-

cuss them further. The case at bar does not fall within the exception to the general rule recognized in these cases; but, since the guaranty sued on was placed on the note of appellant, and the note was discounted for its benefit, and the proceeds thereof were remitted to appellant, the plainest principles of justice require that the company should be held bound by the act of its president without any proof of authority beyond that which must be presumed from the fact that the president in good faith, and in the regular course of corporate business, and for the benefit of the corporation, executed the instrument sued on.

2. It is next contended by appellant that the court erred in giving instructions for the appellee. Instruction No. 2 is as follows: "The court instructs the jury, as a matter of law, that it is immaterial whether the words of special guaranty are stamped or written on the back of a note above the signature of a guarantor at the time its signature is placed thereon, or afterwards, provided you believe, from the evidence, that the signature was in fact placed there for the purpose of guaranteeing the payment of the note, and the words as 'stamped or written are in accordance with such purpose.'" The objection pointed out to this instruction is that it ignores the question whether the contract of guaranty is *ultra vires*, and that it impliedly tells the jury that parol evidence can be heard to vary or alter an indorsement by the payee of a promissory note. There is no question in this case to which the doctrine of *ultra vires* can have any application. This objection needs no further consideration. The second objection is equally frivolous. The instruction says nothing about the admissibility of parol evidence to alter or vary the terms of a blank indorsement by the payee of a promissory note. If this instruction is to be understood as laying down the law that the holder of a promissory note indorsed in blank by the payee can write out a contract of special guaranty over the signature of the indorser, and rely on parol proof to establish that such was the agreement and understanding at the time of the indorsement, then the instruction is erroneous. There is a well-defined distinction between the contract of an indorser and that of a guarantor of commercial paper. The liability of an unconditional guarantor becomes independent and fixed upon the failure of the principal party to pay the money or perform the act guaranteed (Holm v. Jamieson, 173 Ill. 295, 45 L.R.A. 846, 50 N. E. 702), while that of an indorser is conditional until the statutory diligence has been shown (Bledsoe v. Graves, 7 L.R.A. (N.S.)

5 Ill. 382; Schuttler v. Piatt, 12 Ill. 417; Clayes v. White, 83 Ill. 540). In cases of a blank indorsement the owner of the note may fill out the formal assignment at any time before or at the trial; but this rule has never been so extended as to authorize the holder to write words of a special guaranty above a blank indorsement thereby changing the contract from one of indorsement to one of guaranty. The instruction under consideration is inartificially drawn; but, as applied to the facts in this case we do not think it was misleading. There was some conflict in the testimony as to whether the words above appellant's signature were placed there before it was signed or afterwards; but the evidence shows that, after the signature was placed on the back of the note, appellees wrote a letter to appellant, and also sent a telegram, asking if the indorsement on the note was satisfactory. In this correspondence appellees quoted the language of the guaranty, and received a reply from appellant that it was "perfectly satisfactory." This is an express ratification of the guaranty contract, and therefore it was, under the facts of this case, immaterial whether the words constituting the guaranty were on the note at the time of the signing or were placed there afterwards, since the appellant fully ratified the guaranty contract after it had a copy of it. Under these circumstances instruction No. 2 was harmless.

Errors complained of in giving other instructions and in refusing instructions asked by appellant have been carefully considered, and we see no error in any of the rulings of the court for which judgment should be reversed.

The judgment of the Appellate Court is therefore affirmed.

Petition for rehearing denied December 5, 1906.

NEBRASKA SUPREME COURT.

ROYAL HIGHLANDERS, Appt.,

v.

STATE OF NEBRASKA et al.

(— Neb. —, 108 N. W. 183.)

Taxation—mutual benefit society.

1. A fraternal beneficiary association, conducted for the mutual benefit of its members and for the purpose of providing a fund for the payment of stated dues and fees

Headnotes by BARNES, J.

Case Note. — Fraternal benefit society as a benevolent or charitable association within exception statutes: — The general

from such members for the payment of a special amount upon the death of each member to a beneficiary named by him is not a charitable association, and its property and funds are not used exclusively for charitable purposes so as to be exempt from taxation by the laws of this state.

Same—change of law.

2. Where the legislature has passed an act providing for a new system of raising revenue, and has thereby changed the former methods of procedure relating to matters of taxation, the courts, in construing its provisions, are not bound by any administrative construction of the former revenue law.

Same—deduction of outstanding indebtedness.

3. Under the rule established by the decisions of this court for the taxation of credits a fraternal beneficiary association is en-

titled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against securities in its fidelity or mortuary fund, set apart and devoted exclusively to the payment of such certificates.

(Sedgwick, Ch. J., dissents.)

(June 20, 1906.)

A PPEAL by petitioner from a judgment of the District Court for Hamilton County refusing to exempt its property from taxation. Reversed.

The facts are stated in the opinion.

Messrs. Hainer & Smith, for appellant:

An institution which extends charity to its own members only is a charitable insti-

rule established by the decision is in accord with *ROYAL HIGHLANDERS v. STATE*, holding that fraternal benefit societies, not organized for profit or gain, but purely for the purpose of paying indemnity upon the death of their members, for an agreed compensation, are, in effect, life insurance companies, and not charitable or benevolent institutions, within the meaning of statutory provisions exempting the property of such institutions from taxation.

In *National Council, K. & L. of S. v. Phillips*, 63 Kan. 799, 66 Pac. 1011, it was held that a fraternal benefit society which paid death benefits was not a charitable or benevolent society within the meaning of a statute exempting from taxation property of benevolent associations, used exclusively for benevolent purposes, as such society was engaged in the life-insurance business. The court said: "What the association disburses is denominated 'payment.' Payment is made because the obligation has been created by an antecedent payment made to it. It is so much benefit paid because of so much and so many assessments paid. Its benevolence is purely of a commercial character. . . . Payments are made to it, not because of a charitable motive, but for the purpose of providing for those who are dependent upon the member."

In *National Council, K. & L. of S. v. Phillips*, 63 Kan. 808, 66 Pac. 1014, which approved the preceding case, it was again held that the same society was not within a statute exempting "all money and credits belonging exclusively to . . . beneficial and charitable institutions or associations, appropriated solely to sustain such institutions or associations." Again, in *State Council, C. K. v. Effingham County*, 198 Ill. 441, 64 N. E. 1104, it was held that a similar society, paying death benefits and indemnity for injuries and old age, was not within the purview of a statute exempting from taxation "all property of institutions of purely public charity, when actually used for such charitable purpose," such society not being engaged in a work of purely public charity. A statute was subsequently

adopted exempting "all the money collected and on hand within this state, of every kind and nature, of fraternal beneficiary societies, . . . and used exclusively for the purposes of such societies, and not for pecuniary profit." But in *Supreme Lodge M. A. F. O. v. Effingham County*, 223 Ill. 54, 79 N. E. 23, it was held that this statute was unconstitutional for the reason that, under the decision in the previous case, such a society could not be brought within the class of "institutions of purely public charity," the property of which is permitted by the Constitution to be exempted from taxation, and did not belong to any other of the classes to which the constitutional privilege of exemption extends.

In *Jones's Estate*, 22 Abb. N. C. 50, 2, N. Y. Supp. 671, it was held that an association of bank clerks, extending aid to sick and disabled members as well as paying certain death benefits, did not fall within the purview of a statute exempting from taxation the property of "charitable institutions;" such society being nothing more than a benefit insurance society.

In *Young Men's Protestant Temperance Benev. Soc. v. Fall River*, 160 Mass. 409, 36 N. E. 57, it was held that a society organized for mutual relief, assistance, charity, and benevolence, paying certain sick and death benefits, was not a charitable association within a statute exempting the property of benevolent and charitable societies from taxation, but that it was a mutual relief association. The court said: "A society whose principal income is derived from a fixed, regular, compulsory contribution from its members, which is to constitute a fund to be used exclusively for the benefit of its members, cannot be held to be either a benevolent or a charitable society within the meaning of the statute" creating such exemption.

An association organized under the general incorporation laws, the principal objects and functions of which are to secure to each member thereof the payment, on his death, to his beneficiary or representative, of a certain sum of money, subject to the ful-

tution within the meaning of the law exempting such institutions from taxation.

Hibernian Benev. Soc. v. Kelly (Portland *Hibernian Benev. Soc. v. Kelly*) 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 42 Pac. 3; *Indianapolis v. Grand Master*, G. L. 25 Ind. 518; *Petersburg v. Petersburg Benev. Mechanics' Asso.* 78 Va. 431; *Methodist Episcopal Church, South, Book Agents v. Hinton*, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Episcopal Academy v. Philadelphia*, 150 Pa. 565, 25 Atl. 55; *Academy of Sacred Heart v. Irely*, 51 Neb. 755, 71 N. W. 752; *Scott v. Society of Russian Israelites*, 59 Neb. 571, 81 N. W. 624; *New Haven v. Sheffield Scientific School*, 59 Conn. 163, 22 Atl. 156; *State, Long Branch Fireman's Relief Asso., Prosecutor, v. Johnson*, 62 N. J. L. 625, 43 Atl. 573; *Michigan Sanitarium & Benev. Asso. v. Battle Creek*, 138 Mich. 676, 101 N. W. 855; *Com. v. Young Men's Christian Asso.* 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522; *Union Presby. Theological Seminary v. Little*, 25 Ohio C. C. 609; *Burdine v. Grand Lodge*, 37 Ala. 478; *Savannah v. Solomon's Lodge, No. 1, F. & A. M.* 53 Ga. 93; *State ex rel. Grand Lodge, A. F. M. v. Addison*, 2 S. C. N. S. 499; *Duke v. Fuller*,

9 N. H. 536, 32 Am. Dec. 392; *Curtis v. Androscoggin Lodge No. 24, I. O. O. F.* 99 Me. 356, 59 Atl. 518.

A life insurance company, when its solvent credits are assessed for taxation under a statute which declares that from them "the indebtedness of the taxpayer shall be deducted, and that the excess only shall be taxed," ought to be allowed to deduct them from its "premium reserve."

Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499; *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa, 178, 37 N. W. 141; *Michigan Mut. L. Ins. Co. v. Detroit*, 133 Mich. 408, 95 N. W. 1131; *State ex rel. Breckenridge v. Fleming*, 70 Neb. 523, 97 N. W. 1063.

Messrs. Norris Brown, Attorney General, and M. F. Stanley for appellees.

Messrs. Brome & Burnett, amici curiæ:

The indebtedness of the taxpayer may be deducted from gross credits to find the true value of credits for assessment.

State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063; *Lancaster County v. McDonald* (Neb.) 103 N. W. 78.

Barnes, J., delivered the opinion of the court:

This case is before us on appeal from a

filment of the conditions imposed by the charter and by-laws, two of the qualifications of membership being: a sound physical condition and age under fifty, is essentially a life insurance company, and is not entitled to the benefit of an exemption extended by a statute to secret benevolent or fraternal societies which pay sick or death benefits to widows and orphans, or heirs or relatives of deceased members, notwithstanding that membership is limited to Masons. *Masonic Aid Asso. v. Taylor*, 2 S. D. 324, 50 N. W. 93. The court said, in support of its decision: "A society which, by contract, agrees to pay to the beneficiary of a deceased member a sum of money, is an insurance company whatever may be the terms of payment, or the consideration by the member, or the mode of payment of the sum to be paid in the event of his death."

But in *Hibernian Benev. Soc. v. Kelly*, 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 42 Pac. 3, it was held that a charitable and benevolent society, paying sick, funeral, and death benefits in fixed amounts, with an additional amount in discretion of the local lodge, was a beneficial or charitable institution within the meaning of a statute exempting the property of such institutions; although the exemption in this case was denied upon the ground that the property was not actually occupied by the society. It was also further held that such statute was within a constitutional provision authorizing exemption of property devoted to "such charitable purposes as may be specified by law." "The court distinguishes this 7 L.R.A.(N.S.),

case from those resting upon constitutional or statutory provisions exempting property devoted to "purely public charity;" and says: "But, under constitutional or legislative provisions which, like ours, provide for the exemption of certain property belonging to 'charitable institutions' and used for charitable purposes, it is believed that such an institution is entitled to the benefit of the exemption, although its benefactions are confined to its own members or their families." *Petersburg v. Petersburg Benev. Mechanics' Asso.* 78 Va. 431, cited in the opinion in the last case, holds that the property of a mutual society of which charity is the principal, but not sole, object, is exempt from taxation under a statute exempting the property of Masonic, Odd-Fellow, and other like benevolent associations, which devote the proceeds of their property exclusively to charitable purposes; and that such a statute does not violate a constitutional provision permitting the exemption of property used exclusively for benevolent and charitable purposes. It was said: "Its revenues . . . are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances. These are charitable purposes, and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal."

judgment of the district court of Hamilton county, affirming the order of the board of equalization of that county in the matter of the assessment of the property of appellant (Royal Highlanders, a domestic fraternal beneficiary association) for taxation, for the year 1905. It appears that the association is duly organized under the laws of this state, and has its home office and principal place of business at Aurora, in Hamilton county; that in May, 1905, in response to the demand of the county assessor of said county, the association delivered to him a schedule of its property, from which it appears that it was the owner of certain lots in the city of Aurora, Hamilton county, Nebraska, and the building situated thereon, of the cost and value of \$21,238.56; that it had on hand furniture, fixtures, and office supplies of the value of \$1,200; that it had money in the banks of Aurora amounting to \$13,666.31; that it owned securities deposited as a credit, with the auditor of public accounts of the state of Nebraska, amounting to \$455,900, which credit was its mortuary fund deposited under the provisions of the statutes governing the affairs of such associations, the same having been collected and set apart for the payment of its debt due and to become due on the beneficiary certificates issued to and held by its members. All of said property was claimed by the association to be exempt from taxation, for the reason that it was used exclusively for charitable purposes. It was further claimed that the mortuary fund so deposited with the auditor of public accounts was not subject to taxation because the association had the right to set off the amount of its obligations or debts due, and to become due, on said beneficiary certificates against said credit, which would leave it no net credit for taxation. Thereupon the assessor duly entered all of said property on the tax lists of said county for assessment. Thereafter the association appeared before the county board of equalization and filed its petition and protest claiming said property, and all thereof, as exempt, for the reasons stated in its schedule. The board made an order sustaining the assessment as made by the assessor, and the association appealed to the district court of Hamilton county. To maintain its position in that court, the association filed its petition, setting forth more particularly and at large the matters contained in its protest, and prayed for a judgment declaring its property wholly exempt from taxation, and reversing the order of the county board. To this petition the attorney general and the county attorney of Hamilton county filed a general demurrer, which was 7 L.R.A. (N.S.)

sustained. The association excepted, elected to stand upon its said petition, offered evidence in support of all of the allegations thereof, which evidence was excluded, and thereupon the court rendered judgment against the association, affirming the order of the board of equalization, and dismissing the appeal of the association at its costs.

It may be stated, in passing, that it clearly appears from the petition that the appellant is a fraternal beneficiary association, organized under the provisions of chapter 43 of the Compiled Statutes of 1903 of this state, having a lodge system with ritualistic form of work, and a representative form of government; that it is formed, organized, and carried on for the sole benefit of its members and their beneficiaries, and not for profit; that for and in consideration of certain stipulated payments in the form of fees and dues it issues beneficiary certificates on the lives of its members, payable after their death to beneficiaries named therein in manner and form as provided by its by-laws and the statutes of this state governing such associations; that it has its fidelity or mortuary fund, amounting to \$455,900, deposited with the auditor of public accounts, which fund is set apart and pledged by said association, and by law, for the payment of its beneficiary certificates due and to become due, and constitutes a trust fund for that purpose, and for no other. That of its credit balance at the banks, \$12,174.98 belongs to said fund, and the remainder thereof, amounting to \$491.34, represents a fund used for the purpose of paying the running expenses of the association. The foregoing is an abridged statement of the facts shown by the record, but is quite sufficient as a basis for this opinion.

1. Appellant's first contention is that its entire property is exempt from taxation, because it is used exclusively for charitable purposes. This question must be determined, not by what the association professes to be, but by what it really is, and the nature of the business it conducts. The general trend of judicial opinion in this country is that organizations like the appellant are, in effect, mutual insurance companies. In *State ex rel. Atty. Gen. v. Northwestern Mut. Live Stock Asso.* 16 Neb. 549, 20 N. W. 852, it was held that an association which insured only the property of its members by a policy in the form of a certificate of membership, for a premium paid simply as an admission fee, and by assessing its members to pay for the losses sustained by such certificate holders, was, to all intents and purposes, a mutual insurance company. Again, in *State ex rel. Atty. Gen. v. Farm-*

ers & M. Mut. Benev. Asso. 18 Neb. 276, 25 N. W. 81, the court, speaking of associations like the appellant, said: "Courts have, with a great degree of unanimity, treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract of life insurance." The appellant classes itself as exclusively a charitable organization, but, from an examination of its by-laws, called "original edicts," it appears that it is conducted for the sole benefit of its members and their beneficiaries. Its declared purposes are: "First, to unite for mutual benefit and fraternal protection all white persons of sound physical health and exemplary character, between the ages of eighteen and sixty-five; and to bestow substantial benefits upon the beneficiaries of its membership, admitted between the ages of eighteen and forty-eight years, who are entitled thereto. Second, to cheer and aid the unfortunate, to comfort and provide for the sick and aged, and to bury with becoming honor the dead of our membership. Third, to educate its members socially, morally, and intellectually, promulgating by ritualistic degrees the principles of prudence, fidelity, and valor. Fourth, to establish and maintain funds for the purpose of paying all benefits provided for the members and their beneficiaries, and to defray the expense of management and promotion." All of these purposes are confined to its members, and are dependent upon the payment by them of the assessments required by the by-laws. Beneficiary members get what is paid for, and nothing more. If they cease to pay, they cease to receive. Members continue to pay for the benefit of another, not because of any charitable or benevolent impulse, but because they expect, upon their death, that those whom they are interested in, or bound by law or ties of affection to provide for, will receive the amount which it is agreed in the beneficiary certificate will be paid by the association to such beneficiary. This is neither charity nor benevolence. Payment to the beneficiary does not depend upon his or her financial condition. A wealthy child or widow of the assured member would be entitled to claim the amount named in his certificate, equally with one poor or needy. This benefit is paid because of so much money, and so many assessments, paid by the assured member. This benevolence or charity is purely of a commercial character. It does not seek out the needy, but invites only the able-bodied and healthy. It is a business arrangement. The beneficiary receives payment because of a contract obligation on the part of the association to

make such payment. In *State ex rel. Graham v. Miller*, 66 Iowa, 34, 23 N. W. 241, the court held that the Ancient Order of United Workmen, an association of practically the same character as the appellant, is a life insurance company; that its fraternal character was simply an incident to its many purposes. In *Robinson v. Templar Lodge*, No. 17, I. O. O. F. 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170, the court said of an association similar in character and regulations to the appellant, concerning payments to be made to it, that "these benefits are not charities in the strictest sense. They are dues which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise." It seems clear, therefore, that the appellant is not what may be termed purely or exclusively a charitable organization. It further appears from an examination of its by-laws that its funds are divided into two classes, as follows: "The finance of the fraternity shall be divided into two funds: The fidelity fund and the general fund." The fidelity fund of the association is its mortuary fund, and is set apart for the payment of its beneficiary certificates due and to become due, while the general fund is used for organizing, maintaining, and promoting the best interest, growth, and welfare of the fraternity. In other words, for the payment of the expenses of carrying on its business. So we are of opinion that the property of the appellant is not exempt from taxation by reason of its being used exclusively for charitable purposes.

2. It is further contended that we are bound by the administrative construction of our former revenue law. It is said, in substance, that our Constitution was adopted in 1875; that the legislature of 1879, acting under the provisions of said instrument, relating to taxation, framed a general revenue law, and exempted from taxation all property used exclusively for charitable purposes; that said revenue law has been so construed that no one has ever thought of taxing the funds of a fraternal beneficiary society until the year 1904; that the present revenue act is, in substance, the same as the former one; that the courts are bound by such administrative construction, and should not now hold the property of such associations subject to taxation. The doctrine of estoppel by construction is well established, and the argument of counsel based thereon comes with much force. Indeed, it might be held conclusive, were it not for the fact that, in the year 1903, the leg-

islature, by the adoption of the new revenue law, established more effectual methods than those which theretofore obtained in regard to matters of taxation. It is a fact, within the common knowledge of all, and one of which we may take judicial notice, that formerly so much property escaped taxation as to render the revenue of the state insufficient to pay the expenses incurred in conducting its ordinary business affairs, and we were confronted with a continually increasing state debt. This created a universal demand throughout the state for a new revenue law. In answer to this demand, the legislature, at its session of 1903, adopted our present system. While so much of the present act as designates what property shall be taxed, and what shall be exempt from taxation, is practically the same as those provisions contained in the former revenue law, yet the new act contains such minute directions for listing, valuing, and assessing property for taxation, as to render it extremely difficult for any person or corporation to avoid the payment of taxes upon all of his or its property; and the adoption of the new law has resulted in the taxation of the property of appellant, and other like associations. The power of the state to make such changes, from time to time, in its revenue laws, and adopt such new methods in regard to matters of taxation as may be found necessary to raise an amount of revenue sufficient for its needs, cannot be questioned. The legislature having exercised such power, neither taxing officers of the state, nor the courts, are bound by construction of the former law.

It is further urged that it was the intention of the legislature, in passing the present law, to completely exempt fraternal beneficiary associations from taxation; and our attention is called to the provisions of the act relating to the taxation of what are called old-line insurance companies. It is insisted that, when the legislature provided for taxing such old-line insurance companies upon their gross premiums for the preceding year, and exempted fraternal beneficiary associations and other like societies from that provision, the intention was not to tax such associations at all. It seems to us, however, that excepting such associations from those special provisions constitutes no evidence of an intention not to tax them, but, on the other hand, it shows an intention to tax them the same as all persons, corporations, and other domestic associations are taxed. If the legislature had intended to exempt them from taxation, it certainly would have expressed such intention, and thus put the question beyond all doubt. So we are of the opinion that the

property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations, and other domestic associations.

3. Finally, it is contended by the appellant that it is entitled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against its fidelity or mortuary fund. This is the only remaining question for our determination. It is the settled law of this state that the word "credits," as used in our present revenue law, means "net credits;" that the taxpayer may deduct from his gross credits the amount of his bona fide debts in order to determine the true value of his credits for assessment. *State ex rel. Breckenridge v. Fleming*, 70 Neb. 523, 97 N. W. 1063; *Lancaster County v. McDonald* (Neb.) 103 N. W. 78. The state insists that this fund is money loaned and invested, and therefore must be taxed. "Money loaned or invested," within the ordinary meaning of the term, is money or capital laid out with a view of obtaining a profit or income therefrom. The fact that the fund in question has assumed the form of bonds, mortgages, and other securities does not of itself fix its nature or determine its use. It is the use to which it is put that determines its character. That this fund is not "loaned or invested for profit," within the ordinary meaning of the term, seems clear. As above stated, the fidelity or mortuary fund of the association is set apart by its by-laws, and the laws of this state, as a trust fund, for the payment of its beneficiary certificates. This fund must be kept and conserved for that particular purpose. The statute provides how it shall be invested for its preservation, and the manner in which it may be withdrawn from time to time for the purpose of paying the beneficiary certificates of the association as they become due. It is a credit which was created for that particular purpose and no other. A like question was before the supreme court of Alabama in *Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499, where it was held that a life insurance company, when its solvent credits are assessed for taxation, is entitled to have deducted therefrom its premium reserve. The same question was before the supreme court of Iowa in *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa, 178, 37 S. W. 141. The court said: "It is plain that the legislature enacted this statute to secure to the policy holders the performance of the obligation to pay the amount secured by the policy. This statute therefore recognizes the existence of a debt from the company to the policy holders, and pro-

vides for securing its payment through this reserved fund. To us it seems plain that the plaintiff is indebted to each of its policy holders, and the aggregate amount of such indebtedness equals this reserve fund, which should be deducted from plaintiff's money and credits in listing the same for taxation."

In *Michigan Mut. L. Ins. Co. v. Detroit*, 133 Mich. 408, 95 N. W. 1131, the question of the right of a mutual life insurance company (organized for profit), under a statute practically like our own, to set off its reserve-fund credits against its mortuary debts for the purpose of taxation was before the court, and it was held that it had the right to deduct the amount of its policies from its premium reserve; that the reserve fund of the company represents its indebtedness to its policy holders, and should be exempt from taxation. It is contended by the state, however, that the foregoing decisions furnish no authority for the determination of the question involved in the instant case; that they apply only to old-line life insurance companies, and the reason given for such contention is that the policies of old-line companies have a present surrender value, while the beneficiary certificates of fraternal associations have no such value. It seems to us that this is a distinction without a difference. It is difficult to understand why old-line insurance companies, which are organized for the purpose of gain and profit, should be accorded the privilege of the set-off, and that right denied to beneficiary associations, which are organized solely for the purpose of conserving the interests of their members, and are prohibited by law from being conducted for the purpose of gain. It seems clear to us, therefore, that the beneficiary certificates issued to the members of the appellant association create a debt against it, for the payment of which the fund, or, in other words, the credit, in question is specifically pledged. So we are of opinion that the certificates create a bona fide debt, payable out of the particular credit or fund known as the "fidelity or mortuary fund" of the association, and may, for the purpose of taxation, be set off against credits or securities in such fund. We are also of opinion that all of the property of the association which has not been segregated, set aside, transferred to, and become a part of the securities in its mortuary fund is taxable, under the provisions of our present revenue law. It follows that the trial court erred in sustaining the demurrer to the appellant's petition, and in rendering judgment affirming the order of the board of equalization.

For the foregoing reasons, the judgment 7 L.R.A.(N.S.)

of the District Court is reversed, and the cause is remanded for further proceedings according to law.

Letton, J., concurring:

I concur in the view expressed in the opinion of Mr. Justice Barnes as to fraternal beneficiary associations, such as the Royal Highlanders, not being charitable associations and entitled to exemption from taxation for that reason. I also agree that this court is not bound by any administrative construction of the former revenue law for the reasons set forth in his opinion. With the conclusion reached I also concur, but, since I do so mainly upon grounds not mentioned in his opinion, I deem it proper to briefly state my views.

The question whether or not the securities held in pledge by the Royal Highlanders, or other domestic fraternal beneficiary associations, or whether the reserve held by domestic old-line life insurance companies, are taxable as the property of the respective associations or corporations, is purely one of statutory construction. The controlling question for the court to determine is: What was the intention of the legislature with respect to the subject-matter? To ascertain this intention is the sole duty of the court in the premises, and, when this is determined, the construction must stand until such time as the legislature may determine that the court has incorrectly interpreted the meaning of its language, and enacts a new provision so clear and specific that all may understand. To ascertain the intention of the lawmaker, we must consider the whole statute, its purpose, and object, and the means provided in the act for attaining the desired end. Uniformity in taxation is essential under our Constitution, and it must be presumed that the legislature intended, as nearly as possible, taking into consideration the innumerable phases, conditions, and forms in which property appears, to secure uniformity. In accomplishing this result, it is proper to classify property, individuals, or corporations, and by §§ 58, 59, 60, and 61 of the law under consideration (Laws 1903, pp. 404, 405, chap. 73), this classification has been made so far as concerns insurance companies. These sections have been the subject of consideration in *State ex rel. Breckenridge v. Fleming*, 70 Neb. 523, 97 N. W. 1063, and in *Aachen & M. Ins. Co. v. Omaha* (Neb.) 101 N. W. 3, and they were upheld as a proper exercise of the taxing power in that behalf. By § 59 all foreign life and accident insurance companies, except fraternal beneficiary associations and mutual assessment companies, were placed in one class, and by § 61

all domestic life, fire, accident, or surety companies, except fraternal beneficiary associations and mutual assessment companies, were placed in another class. By the provisions of § 59 each foreign company is required to pay into the state treasury 2 per cent of the gross amount of premiums received by it during the preceding calendar year for business done in this state. This is a business tax imposed under the second clause of § 1, art. 9, of the Constitution, and such companies are also liable for taxation upon all their property within the state the same as other corporations or individuals. *State ex rel. Breckenridge v. Fleming and Aschen & M. Ins. Co. v. Omaha*, supra. Section 61 provides that all domestic companies shall be taxed in each local political subdivision where the agent conducts the business, upon their gross premium receipts for the preceding year, less premiums on canceled policies and reinsurance; such gross receipts less reinsurance and cancellation to be taken as an item of property of that value and be assessed and taxed on the same percentage of such value as other property. This tax also is a business tax, and each of such domestic companies is also liable to be taxed upon its tangible property the same as any other individual or corporation within the state.

No specific provisions are made for taxation of fraternal beneficiary associations, or mutual assessment companies having no capital stock, making no dividends, and whose scheme of insurance does not contemplate the return of any profits to policy holders. The tangible property of such associations and mutual companies, whether domestic or foreign, is to be taxed the same as the property of other persons and corporations, therefore. It is made compulsory upon domestic corporations carrying on the business of life insurance under the old-line plan to accumulate and keep on hand a fund for the purpose of meeting their outstanding obligations to policy holders, and, although not compulsory in the case of domestic fraternal beneficiary associations or mutual assessment companies, it is a matter of common knowledge that a number of such associations or companies, including the Royal Highlanders, voluntarily have accumulated a fund, variously designated as a mortuary, reserve, or emergency fund, for the purpose of meeting liabilities for their certificate holders as they mature, in order to prevent such frequent assessments as experience has shown may be caused by epidemics of disease or wide-spread calamities. Whether held by old-line companies or associations formed upon the assessment plan, these funds are set apart to meet obliga-

tions of a certain nature. They are not the property of the company or association for general purposes, but are devoted to a specific end. In the case of foreign life insurance companies, these accumulations are held in other states or countries, and are not within the reach of the taxing officers of this state. In this state, such companies, therefore, merely pay 2 per cent upon the gross amount of premiums received during the preceding year, into the state treasury, as a business tax, and are otherwise assessed only upon their tangible property within this state, which may or may not exist, since its existence is not essential to carrying on business. They are relieved from all local taxation, except upon tangible property, unless taxed by local ordinances upon their business. Domestic companies, however, are taxable in each county, town, city, village, and school district where an agent conducts their business upon their gross receipts, less reinsurance and return premiums, on the same percentage of value as other property, and, in addition thereto, are taxed upon their tangible property.

It will be seen, from a comparison of these provisions with reference to the taxation of foreign and domestic life insurance companies, that, if the law is construed so that the special, reserve, or mortuary funds of domestic companies and of domestic fraternal beneficiary associations, accumulated, reserved, and set apart to meet their liability to their policy and certificate holders, are to be taxed as the property of such companies and associations, a heavy burden is placed upon domestic organizations from which foreign are exempt. The business tax which domestic companies are required to pay may be as great, or greater, as that exacted from foreign companies, depending upon local conditions. It is not to be presumed that the legislature intended to impose a heavy burden upon domestic enterprises of this character from which those organized in other states are free. It would be doing violence to common sense to believe that its intention was to make a hostile discrimination against citizens of this state in favor of citizens of other states. It may be said that foreign companies are taxed in the states or countries of their domicile upon such funds, but, as is pointed out in the opinion of my Brother Barnes, in several states where net credits are the subject of taxation the amount of liabilities to policy holders has been held entitled to be properly offset against gross credits in the form of such securities. It may further be said that the methods of taxation of insurance corporations in other states are so various and diverse that it is almost im-

possible to say whether or not such accumulations are subject to any portion of the taxes paid by such companies. Many of the states provide for the taxing of insurance corporations, not by the value of their tangible property, but by franchise, business, or license taxes alone; but, so far as I can determine from an examination of statutes, in the main such funds, if taxed at all, are not taxed directly, as is sought to be done in this case. While, in the case of ordinary business, and if considered without relation to the sections of the revenue law relating to the subject of insurance taxation, it may be questioned whether contingent liabilities are such debts as would be entitled to be offset against credits, yet, considering the subject of insurance taxation as a whole, the conclusion reached by my Brother Barnes seems to me to express the legislative intent.

With respect to the taxation of insurance companies and fraternal beneficiary associations, as well as in many other respects, the provisions of the revenue law of 1903 are far from clear and definite, and may be expected to give rise to many controversies. If the construction now placed upon the law fails to evidence the purpose of the lawmakers, the remedy lies with the legislature. The resources of the English language are vast and rich and flexible enough so that it may express its intention in phrase so clear and plain that an ordinary man may understand, and thus relieve the court from liability to a misconstruction of its meaning, and the taxpayers of the state from unnecessary litigation.

Sedgwick, Ch. J., dissents.

SOUTH CAROLINA SUPREME COURT.

ELIZA M. SKIPPER, Resp't.,

v.

SEABOARD AIR LINE RAILWAY, Appt.

(— S. C. —, 55 S. E. 454.)

Carrier—liability for interstate shipment—validity.

No unconstitutional interference with interstate commerce is effected by statutes requiring a carrier receiving baggage for

transportation into another state over connecting lines, in case of loss, to adjust the loss with the shipper, or inform him of the point where loss occurred, or produce a receipt from the carrier to whom it delivered the property, unless it proves that, by the exercise of due diligence, it has been unable to trace the loss, and holding the initial carrier liable to the shipper, permitting it to recover over against the carrier liable for the loss.

(October 8, 1906.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Lancaster County to review a judgment in plaintiff's favor in an action brought to recover the value of baggage delivered to it for transportation, and not returned to plaintiff. **Affirmed.**

The facts are stated in the opinion.

Messrs. Glenn & McFadden and T. Y. Williams for appellant.

Messrs. Ernest Moore and D. R. Williams for respondent.

Pope, Ch. J., delivered the opinion of the court:

The action here was brought against the defendant for \$382.20, as damages for the loss of certain contents from a trunk which was delivered to the defendant for transportation beginning at Chester, South Carolina, and ending at Englewood, Illinois, said trunk containing the baggage belonging to three persons traveling on tickets issued by the defendant from said Chester, South Carolina, to Englewood, Illinois. The answer of the defendant admitted that, on the 28th of July, 1904, the tickets were bought and paid for by the plaintiff over the defendant's line of railway from Chester, South Carolina, to Atlanta, Georgia, and thence over other connecting lines of railway to Englewood, Illinois. The defendant also admitted receiving the plaintiff's trunk and the delivery to her of a check therefor, and that the contract was that the defendant would transport said trunk from Chester, South Carolina, to Atlanta, Georgia, and deliver the same to its connecting lines over which the plaintiff was traveling. It further admits that said trunk was in apparent good order. As to

Case Note.—State statutes regulating the liability of carriers with respect to shipments over connecting lines as interference with interstate commerce: — In Missouri a statute providing: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues

receipts or bills of lading in this state, the common carrier, railroad or transportation company, issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company, to which such property may be delivered, or over whose line such property may pass;

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what condition it was in when received by the plaintiff at Englewood, Illinois, the defendant had no knowledge or information sufficient to form a belief. The defendant further alleges that said trunk was in good order when delivered by it to the Western & Atlantic Railway Company. The case came on for trial before special Judge O. W. Buchanan, at Lancaster, South Carolina. Both sides introduced testimony. The plaintiff's witnesses testified as to the number and value of the articles abstracted from the trunk, and that the trunk, when delivered at Englewood, Illinois, had the lock broken, and as to the damages which resulted from the loss of such articles. The defendant's witnesses testified to the condition of the contracts evidenced by the

tickets issued to the plaintiff by the defendant, and also to correspondence between the attorneys for plaintiff and railway authorities. After the charge of his Honor, the jury returned the verdict of \$363.85 in favor of plaintiff.

After entry of judgment on said verdict, the defendant appealed on ten grounds, but the appellant confines its argument to certain constitutional questions of law. The points raised by the defendant resolve themselves into an attack upon the constitutionality of §§ 1710 and 2176, vol. 1, Code of Laws of 1902, and of act No. 1 of the Laws of 1903 of this state (24 Stat. at Large, p. 1). The contention of defendant is that each of said sections of the Code and said act of 1903 is unconstitutional, null, and

and the common carrier, railroad or transportation company, issuing any such receipt, or bill of lading, shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury may be sustained,"—was to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage, or injury may be sustained."—was construed in *Dimmitt v. Kansas City St. J. & C. B. R. Co.* 103 Mo. 433, 15 S. W. 761, as prescribing as a definite rule of liability for negligence of a common carrier that such carrier, when he receives a parcel to be transported to a place beyond the terminus of his route, is to be held liable as such to the place of destination, in the absence of a specific contract to carry such parcel only to the terminus of his own route, or limiting his liability to loss or damage occurring on his own route; and, as so construed, was held not to be obnoxious to the provisions of the Federal Constitution vesting in Congress the power to regulate interstate commerce. The court said: "The enactment as thus construed becomes a rule of evidence by which to determine what the contract of the carrier is, in the absence of a specific one in a given case, operates with no undue hardship upon the carrier, and is violative of none of its rights, constitutional or otherwise. By its provisions the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that, by specific agreement, it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be lia-

ble only for loss or damage occurring on its own line."

The foregoing decision was reaffirmed in *Nines v. St. Louis, I. M. & S. R. Co.* 107 Mo. 475, 18 S. W. 26.

It was modified somewhat, however, in *McCann v. Eddy*, 133 Mo. 59, 35 L.R.A. 110, 33 S. W. 71, in which the *dictum* in the *Dimmitt* Case, that an agreement that a carrier shall be liable only for loss or damage occurring on its own line is equivalent to an express contract to carry the property only to the terminus of its own line, was expressly overruled; the court saying that to give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers, would, in effect, operate as a repeal of the vital provisions of the law which declare a conclusive liability in such case. By this decision, therefore, the statute was construed as imposing liability on any carrier who should undertake to transport goods beyond the terminus of its own line, irrespective of any stipulation against liability for the negligence of a connecting carrier. An appeal was taken from this decision to the Supreme Court of the United States, which held, in 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755, that, the restraint imposed by the statute not being a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn, there was not an unlawful regulation of interstate commerce; and that the requirement imposed by the statute as construed by the courts of Missouri as to the form in which the carrier might contract for the limitation of his liability for negligence to his own line was not so unreasonable as to amount in substance to a denial of such right.

The foregoing decisions are reviewed, and the constitutionality of the statute reaffirmed, in *Western Sash & Door Co. v. Chicago, R. I. & P. R. Co.* 177 Mo. 641, 76 S. W.

void, because, when applied to interstate carriers or carriers of baggage such as this, each and all of them impose a burden on interstate commerce, and thus violate the commerce clause of the Federal Constitution. The following are copies of the sections and act referred to:

"Sec. 1710. When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order;' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivery, or terminal road, upon notice of such loss, damage, or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days; and, upon failure to discharge

such duty within forty days after such notice, or to trace such freight or express, and inform the said party so notifying, when, where, and by which carrier the said freight or express was lost, damaged, or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage, or destruction in the same manner and to the same extent as if such loss, damage, or destruction occurred on its lines: Provided, that, if such initial, terminal, or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage, or destruction occurred, it shall thereupon be excused from liability under this section."

"Sec. 2176. In case of the loss of or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the ini-

998, in which it was held that, under the statute, if a railroad company wishes to escape liability for loss or injury occurring beyond its own line, it must not receive freight under an agreement to transport it beyond its own line; and that it cannot relieve itself by contract stipulation from liability for freight agreed to be transported beyond its own line.

In *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335, Affirming 92 Va. 670, 41 L.R.A. 511, 24 S. E. 261, it was held that the statute of Virginia (Va. Code 1887, § 1295) that, "when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent,"—is not a regulation of interstate commerce, and not in conflict with the Constitution of the United States, or void, since it does not attempt substantially to regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line; and that the want of power in the states to burden or forbid interstate commerce does not affect the authority on the part of the states to create rules of evidence governing the form in which such contracts, when entered into within their borders, may be made,—at least, until Congress, by general legislation, has undertaken to govern the subject.

But in *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, Reversing 116 Ga. 863, 60 L.R.A. 817, 43 S. E. 265, it was held that the imposition upon the initial or any connecting carrier, by

Ga. Code 1895, §§ 2317, 2318, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, of "the duty of tracing the freight, and informing the shipper, in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution;" the court saying: "The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give; and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it."

But a statute providing: "When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability,"—was held, in *Kavanaugh v. Southern R. Co.* 120 Ga. 62, 47 S. E. 526, to impose no burden upon the carrier, nor to require the carrier to accept goods upon specific terms, nor to restrict the right of the parties to contract against liability, but simply to establish a rule of evidence prescribing the probative value of a voluntary admission, and hence is not, as applied to shipments from beyond the state, an unlawful regulation of interstate commerce.

tial corporation, or corporations, first receiving the same shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt, in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event the said connecting road or roads shall be severally so liable, but may, in succession and in like manner, discharge themselves respectively therefrom; but, if any such corporation shall wilfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage."

Acts of 1903, 24 Stat. at Large, pp. 1, 2: "An Act to Further Define Connecting Lines of Common Carriers and to Fix Their Liabilities.

"Sec. 1. Be it enacted by the general assembly of the state of South Carolina, That all common carriers over whose transportation lines, or parts thereof, any freight, or baggage, or other property received by either of such carriers on a contract for through carriage recognized, acquiesced in, or acted upon, by such carriers, shall, in this state, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agent of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner, and consignees of such property for the safe and speedy through transportation thereof from one point of shipment to destination; and such contract as to the shipper, owner, or consignee of such property shall be deemed and held to be contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, way-bill, receipt, check, or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage, or other property for such through shipment or transportation, shall continue prima facie evidence of the subsistence of the relations, duties, and liabilities of such carriers as herein defined and described, notwithstanding any stipulation, or attempted stipulations, to the contrary by such carriers, or either of them.

"Sec. 2. For any damages for injury, or damage to, or loss or delay of, any freight, baggage, or other property, sustained any-
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where in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage, or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage, or injury was sustained, together with costs of suit."

The subject is not only intensely interesting in its consideration, but it is of great practical importance, for, as was well said by Mr. Justice Woods in *Willett v. Southern R. Co.* 66 S. C. 477, 479, 45 S. E. 93: "With the immense traffic and the resulting complicated business methods of modern American railroads and the connection of these roads with one another, to impose upon the owner of property passing over connecting lines the burden of making affirmative proof that the loss occurred on a certain one of these lines would be practically relieving of liability railroads handling freight as connecting lines, for the owner could rarely make the required proof, and, when he could make it, in most instances the expense of doing so would be greater than the value of the goods." In considering the power of states to legislate upon the question of interstate commerce, the Supreme Court of the United States has held that an attempt on the part of a state to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines, would be a regulation of interstate commerce, and therefore void, in construing §§ 2317, 2318, of the Georgia Code of 1895 in the case of the *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218. These two sections of the Georgia Code provide that, if the carrier to which application is made "shall fail to trace said freight and give said information in writing within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line." Thus it is seen that the judgment against the initial line was rendered absolute, and must be, therefore, considered as an infringement by the state of Georgia on the commerce clause of Federal Constitution. In the text of this decision, *Central R. Co. v. Murphey*, *supra*, the United States Supreme Court has dis-

tinctly recognized and upheld its two former decisions in *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, and *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335. If the two sections of our Code, and the act of 1903, complained of, are violative of the Constitution of the United States, of course they are void. The appellant here sought to obtain from the circuit judge a decision of the unconstitutionality of these provisions of our law. The circuit judge refused to hold them unconstitutional, and he now appeals to us to reverse the judge's decision.

The case of *Chicago, M. & St. P. R. Co. v. Solan*, supra, was an action to upset a section of the Code of Iowa, which provided: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." The jury found a verdict for \$1,000, which was appealed from, but the judgment was affirmed in 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692. Justice Gray, in delivering the opinion of the United States Supreme Court on an appeal from the Iowa court, said, page 135 of 169 U. S., page 690 of 42 L. ed., and page 290 of 18 Sup. Ct. Rep.: "By the law of this country as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principles on which the law of common carriers was established,—to the securing of the utmost care and diligence in the performance of their important duties to the public." Justice Gray further says in his opinion: "The question of the right of a railway corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions, not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. 7 L.R.A. (N.S.)

But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States. . . . Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a state, to the protection of the state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they had been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. . . . The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa,—which is the only matter presented for decision in this case,—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight.

Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

So in the case of *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* supra, Mr. Justice White, as the organ of the court, in speaking of a contract, says on page 314 of 169 U. S., page 761 of 42 L. ed., page 335 of 18 Sup. Ct. Rep.: "Evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown. . . . It is, of course, elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts, when entered into within their borders, may be made,—at least until Congress, by general legislation, has undertaken to govern the subject. . . . Of course, in a latitudinarian sense, any restriction as to the evidences of a contract relating to interstate commerce may be said to be a limitation of the contract itself. But this remote effect resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." Justice White therein refers to the case we have just quoted from so liberally,—*Chicago, M. & St. P. R. Co. v. Solan*.

It will thus be seen that it is perfectly legitimate for our legislature, in absence of any national legislation, to make such rules and regulations as to it may seem proper, provided it does not destroy or seriously hamper the subjects of interstate commerce. In the body of our statutes it will be observed that great care has been taken to leave the way open for the conduct of interstate commerce. We have only provided rules of evidence, and in doing this the decisions of the United States Supreme Court hold us perfectly justified. We therefore overrule all of these objections to the constitutionality of said statutes.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Jones, J., concurring:

I concur. There is a vital distinction between our statute and the Georgia statute, which was condemned in *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 7 L.R.A. (N.S.)

Sup. Ct. Rep. 218, as an unlawful interference with interstate commerce. The Georgia statute made the initial carrier absolutely liable if it failed within thirty days after application to inform the shipper in writing when, where, how, and by what carrier the freight was lost or damaged, together with the names of witnesses to establish such facts; whereas, our statute, § 1710, provides that the carrier shall be excused from liability upon proof that, by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line and it could not, after due diligence, comply with the requirement of the statute. Section 2176 provides that the carrier may discharge itself from liability by the production of a receipt in writing for the articles from the connecting carrier, and the act of 1903 makes the bill of lading, etc., issued by the carrier for the freight, etc., prima facie evidence of liability for loss or damage to the goods in course of transportation.

The effect of these statutes as applied to interstate shipments is not to regulate interstate commerce, or to burden it or materially interfere therewith, but to afford a reasonable protection to the shipper, in view of the great difficulty in the way of his proving where the loss occurred, and the relative ease and effectiveness with which the carrier might with reasonable diligence ascertain the facts and communicate to him.

Woods, J., concurs in both of the above opinions.

ILLINOIS SUPREME COURT.

THOMAS MURPHY, Exr., etc., of Mary A. Riggs, Appt.,
v.

RUBY BELLE RIGGS NOWAK et al.

(223 Ill. 301, 79 N. E. 112.)

Benefit certificate—designation of beneficiary.

1. sufficient designation of beneficiary is effected where assured, in his application, directs the certificate to be issued in

Case Note.—Effect of beneficiary in a mutual benefit certificate becoming self-supporting: —MURPHY v. NOWAK seems to

favor of his wife, subject to such future disposal as applicant may direct, and upon the back indorses an unsigned direction to make the certificate payable to the wife in trust for a person named, and accepts and recognizes as valid a certificate following such direction.

Same—termination of dependency.

2. The right of one made beneficiary in a mutual benefit certificate as a dependent of assured to receive the proceeds of the certificate ceases upon her marrying and securing means of support other than the assured prior to his death, where by the laws of the order the fund can be paid only to dependents of deceased members.

Same—charter—statute—conflict.

3. The terms of the charter of a mutual benefit society, and not those of the statute under which it was incorporated, and which might have been adopted, will control in determining who may become beneficiaries.

Same—pleading.

4. Proof that a benefit society had adopted a statute limiting the class of its beneficiaries is not necessary in a contest over a fund, if facts showing the applicability of the statute are admitted by the pleadings.

Same—change in rule—effect on beneficiary.

5. The beneficiary in a mutual benefit certificate cannot complain of the application to the contract of a rule adopted after the certificate was issued, if the applicant expressly agreed at the time the certificate was issued that rules subsequently adopted should be applicable.

(October 23, 1906.)

APPEAL by defendant, Murphy, from a decree of the Appellate Court, First District, reversing a decree of the Superior Court for Cook County in his favor in an interpleader proceeding to determine the right to the proceeds of a mutual benefit certificate. Reversed.

Statement by Hand, J.:

The Catholic Order of Foresters, a fraternal insurance society, on the 19th day of April, 1905, filed a bill of interpleader in the superior court of Cook county against Mary A. Riggs, the testatrix of the appellant, and Ruby Belle Riggs Nowak, the appellee, to require said Mary A. Riggs and the appellee to interplead and settle their respective claims to the proceeds of a benefit certificate for \$1,000 issued by said Catholic

Order of Foresters upon the life of John Riggs, who died January 17, 1905. Answers and replications were filed, and upon a hearing the court decreed that the amount of said certificate, less costs and attorneys' fees, be paid to Mary A. Riggs. From that decree an appeal was prosecuted to the appellate court for the first district by Ruby Belle Riggs Nowak, where the decree of the superior court was reversed, and the cause was remanded, with directions to the superior court to enter a decree finding that said Ruby Belle Riggs Nowak was entitled to said fund; and, Mary A. Riggs having departed this life testate while said cause was pending in the appellate court, the appellant, Thomas Murphy, the executor of said Mary A. Riggs, deceased, was substituted as appellee in her stead in the appellate court, and he has prosecuted an appeal to this court.

The case was tried upon a stipulation as to the facts, from which it appears that the Catholic Order of Foresters was incorporated under the laws of the state of Illinois on May 24, 1883. That the object of its incorporation was declared to be "to establish a widows' and orphans' benefit fund for the benefit of dependents of deceased members." That on January 18, 1884, John Riggs, the husband of Mary A. Riggs, made a written application for membership in said order, in which application he directed that in case of his death all benefits to which he might be entitled should be paid to his wife, Mary A. Riggs, subject to such future disposal of the benefits among his dependents as he might direct, in compliance with the laws of the order, and agreed to conform in all respects to the laws, rules, and usages of the order then in force or which might thereafter be adopted. On the back of the application appeared the following unsigned direction: "Pay to Mrs. Mary A. Riggs, my wife, to be held in trust by her for my adopted daughter, Ruby Belle Riggs." That John Riggs was duly admitted to membership in said order, and to All Saints Court No. 9 thereof, on January 27, 1884. That a certificate bearing date December 18, 1884, was issued by said order to John Riggs, which recited it was made in consideration of the statements made by John Riggs in the application and to the medical examiner, and that the member would comply in the future with the laws, rules, and regulations.

be the only case passing upon this question. In the note to 2 L.R.A.(N.S.) 653, many cases are cited on the question, Who are dependents of the insured under rules of a benefit association providing that a person dependent upon him may be a beneficiary? but none of the cases there cited pass upon 7 L.R.A.(N.S.)

the precise point ruled by **MURPHY v. NOWAK** as to the effect of a dependent becoming self-supporting. They decide merely what constitutes a relationship of dependency, without considering the effect of a change in the relation because of the dependents becoming independent.

then governing the order or that might thereafter be enacted, and provided that, upon the compliance with said conditions, the order would pay to "Mary A. Riggs, to be held in trust for his adopted daughter, Ruby Belle Riggs, \$1,000" if said member was in good standing and said certificate should remain in full force at the time of his death, which certificate was accepted in writing by John Riggs, as follows: "I accept this certificate on the conditions named. John Riggs." That the following rules and regulations of the said Catholic Order of Foresters went into effect on January 1, 1904, and were in force at the time of the death of said John Riggs: "(82) Benefits may be made payable to the following classes: Class 1: To the member's (1) wife; (2) children, including children by adoption or children of deceased children, such children taking the share of the deceased parents; (3) grandchildren; (4) parents; (5) brothers and sisters of the whole blood; (6) brothers and sisters of the half blood; (7) grandparents; (8) nieces and nephews; (9) cousins in the first degree; (10) uncles and aunts; (11) next of kin who would be distributees of the personal estate of such member upon his death intestate, in either of which cases no proof of dependency shall be required before issuing the benefit certificate. (83) Class 2: (1) To the member's affianced wife; (2) to any person who is dependent upon the member for maintenance, food, clothing, lodging, and education, in which case written evidence of the dependency, within the requirements of the laws of this order, must be furnished to the satisfaction of the high secretary before the benefit certificate can be issued. . . . (85) No benefit shall be payable to any person or persons of class 2, section 83, unless the dependency therein specified to be shown exists at the time of the member's death, in which case proof of such dependency at such time must be furnished in writing to the satisfaction of the high court before payment of the benefit shall be made. If at the time of the death of a member any such dependency shall have ceased, or shall be found not to have existed, or if the designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class 1 of section eighty-two (82), if living, in the order of precedence as therein enumerated." That John Riggs, at the time of his death, was a member of said order in good standing, and left, him surviving, said Mary A. Riggs as his widow, Mary O'Brien, his sister, Hector Riggs, his brother, John J. Riggs, a nephew, Anna Woods, a niece, and Ambrose Houser, a nephew, his only heirs at law and next of kin. L.R.A. (N.S.)

kin. That the appellee, Ruby Belle Riggs Nowak, was not related by consanguinity or affinity to John Riggs, nor was she his adopted daughter by virtue of a decree of court. That at the age of three years, and in the year 1872, the appellee was taken by John Riggs and Mary A. Riggs from St. Joseph's Orphan Asylum to their home, where she was cared for, educated, and reared, and where she remained until she was about twenty years of age, at which time she went to work, but occasionally returned to the Riggs home up to 1893. That after 1893 she was self-supporting, and so continued to be up to 1904, when she was married. That John Riggs and Mary A. Riggs always treated the appellee as their daughter, held her out to the world as their adopted daughter, and spoke of her as their adopted daughter; and John Riggs often expressed a desire and intention that she should have the benefit, upon his death, of the \$1,000 mentioned in said certificate, which expressions were repeated within a few weeks of his death.

Mr. Thomas J. O'Hare, for appellant:

Where the charter of an order provides for the establishment of a widows' and orphans' fund for the benefit of dependents of deceased members, the designation of a person who is neither related to nor dependent upon a member will not deprive the widow of her right to the fund.

Niblack, Ben. Soc. § 158; Wood v. Supreme Ruling, F. M. C. 212 Ill. 532, 72 N. E. 783; Parke v. Welch, 33 Ill. App. 188; Faxon v. Grand Lodge, B. L. F. 87 Ill. App. 262; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Norwegian Old People's Home Soc. v. Wilson, 176 Ill. 94, 52 N. E. 41; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Supreme Council, L. of H. v. Perry, 140 Mass. 580, 5 N. E. 634; Rindge v. New England Mut. Aid Soc. 146 Mass. 286, 15 N. E. 628; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; Gibson v. Kentucky Grangers' Mut. Ben. Soc. 8 Ky. L. Rep. 520.

It is no answer to say that the statute of the state under which the order was organized was broad enough to permit appellee to take as a stranger.

Norwegian Old People's Home Soc. v. Wilson, supra; Rockhold v. Canton Masonic Mut. Benev. Soc. 129 Ill. 440, 21 N. E. 794; 1 Bacon, Ben. Soc. 3d ed. § 168.

A "dependent" is one who is dependent for support in some way upon the decedent.

1 Bacon, Ben. Soc. 3d ed. § 261; Niblack, Ben. Soc. § 195; Palmer v. Welch and Alexander v. Parker, supra.

The relationship of dependency must be existent at the time of the member's death.

Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; *Order of Railway Conductors v. Koester*, 55 Mo. App. 186; *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360; *Union Mut. Asso. v. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588; *Sargeant v. Supreme Lodge, K. of H.* 158 Mass. 557, 33 N. E. 650.

Where a member of a beneficiary society contracts that he will be bound by the by-laws of the order, which might afterwards be enacted, not only he, but also his beneficiary, is bound thereby.

Supreme Tent, K. of M. v. Hammers, 81 Ill. App. 560; *Supreme Tent, K. of M. v. Stensland*, 105 Ill. App. 267; *Supreme Lodge, K. of P. v. Kutscher*, 179 Ill. 345, 70 Am. St. Rep. 116, 53 N. E. 620; *Peterson v. Gibson*, 191 Ill. 365, 54 L.R.A. 836, 85 Am. St. Rep. 263, 61 N. E. 127.

Mr. Aaron Heims, with Messrs. M. E. Maher and John A. Swanson, for appellees.

Hand, J., delivered the opinion of the court:

It is first contended by the appellant that the appellee was not designated, in the application or otherwise, by John Riggs as the beneficiary to whom the amount of the insurance issued upon his life by the Catholic Order of Foresters should be paid, and for that reason the appellate court wrongfully directed the superior court to enter a decree in favor of appellee. The application signed by John Riggs directed that the benefit fund received upon the certificate upon his death should be paid to Mary A. Riggs, his wife, subject to such future disposal among his dependents as Riggs might thereafter direct; and upon the back of the application was indorsed the unsigned direction, "Pay to Mrs. Mary A. Riggs, my wife, to be held in trust by her for my adopted daughter, Ruby Belle Riggs," and when the order issued to John Riggs the said certificate it made the beneficiary fund therein provided to be paid upon his death payable to "Mary A. Riggs, to be held in trust for his adopted daughter, Ruby Belle Riggs," and when the certificate was delivered to John Riggs he accepted it in writing, over his signature, in the following form: "I accept this certificate on the conditions named." The certificate remained in force from 1884 to 1905, during which time John Riggs paid the assessments thereon without objection as to its form, and repeatedly stated while the certificate was in force that the fund provided to be paid, mentioned therein, upon his death would go to the appellee. In the application, while John Riggs directed that the amount of the certificate

should be paid to his wife, he provided that the designation of his wife as beneficiary should be subject to such future disposal of the benefit fund among his dependents as he might thereafter direct. Had the direction indorsed upon the application been signed by John Riggs, there can be no question but that such would have been a disposition of the beneficiary fund by Riggs within the terms of the application. Although the direction indorsed upon the application was not signed by Riggs, it was followed by the order in making out the certificate, and the certificate was accepted by Riggs in that form, and retained by him for many years, during which time he recognized the certificate as correctly stating the beneficiary to whom he desired the fund paid at his death. In view of all these facts, we think it clearly appears that the appellate court properly held that the appellee was the equitable beneficiary named in the certificate issued upon the life of John Riggs by said order.

It is next contended that the appellee was not, within the meaning of the law, a dependent upon John Riggs, and that she cannot, therefore, take said beneficiary fund. It appears that the appellee was taken by John Riggs and Mary A. Riggs, his wife, from an orphan asylum when she was about three years of age, and that she remained in their home and was treated by them as a daughter until she attained the age of about twenty years, and until she became self-supporting. As we understand the authorities, especially the case of *Alexander v. Parker*, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183, there can be no reasonable contention made that the appellee was not a dependent upon John Riggs, within the meaning of the law, at the time he applied for membership in said order, and for many years thereafter. In the *Alexander Case*, 144 Ill. 366, 19 L.R.A. 193, 33 N. E. 184, it was said: "A dependent, as the term is used in reference to these benevolent associations, is one who is sustained by another, or relies for support upon the aid of another." The appellee for many years after the order issued to John Riggs said certificate was supported and sustained by John Riggs, and, as we think, had the moral right to rely, and did rely, upon him for support. He had taken her when but three years of age into his family, and from that time forward he and his wife had treated her as their daughter. Clearly, the relations between the parties were such that the appellee could not have recovered for services rendered them during the years of her minority; neither could they have recovered from the appellee for the support, clothing, and education which they furnished her during her minority, or so long there-

after as they sustained the relation of parent and child towards each other. During that period she was, we think, a dependent upon John Riggs.

It is urged, however, that, even though it be conceded that the appellee was properly designated as the equitable beneficiary in the application and certificate, and although it appears that she was a dependent upon John Riggs at the time the certificate was issued, and remained such dependent for many years thereafter, she was not a dependent of his at the time of his death, and cannot, by reason of that fact, take such fund. It is the settled law of this state that when the statute under which a benefit society similar to the Catholic Order of Foresters is organized, and its charter, adopted in pursuance of such statute, designates certain classes of persons as those for whom a benefit fund is to be accumulated, a person not belonging to either one of such classes is not entitled to take the fund; that the corporation has no authority to create a fund for other persons than the classes specified, nor can a member direct the fund to be paid to a person outside of such classes. *Alexander v. Parker*, supra; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41. It is also held that the beneficiary named in the certificate of such society acquires no vested right to the benefit to accrue upon the death of the member until such death occurs, and that a member, during his lifetime, may exercise the power to change or substitute a new or different beneficiary from the one named in the certificate at such time and upon such conditions as to him seems proper, subject only to the limitations and restrictions imposed by the organic law of the society, or the rules and regulations adopted in conformity therewith. *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961. It is also held that upon the death of the member, where the person designated as beneficiary is outside of the classes eligible as beneficiaries, as fixed by the statute or charter of the society, the member's heirs at law who are within the classes are entitled to the insurance. *Supreme Lodge, K. & L. of H. v. Menkhause*n, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567. From a consideration of the object for which benefit societies are formed, which is to afford protection to the families and dependents of the members of such societies after the death of the members, we are impressed that a person cannot take as a beneficiary unless he falls within one of the designated classes at the time of the death of the member. This view was taken by the 7 L.R.A.(N.S.)

supreme court of Massachusetts in the case of *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360. The contest in that case over the fund was between a wife, who was named as beneficiary, but who had been divorced by reason of the fault of her husband, and a son of the deceased husband. The court held that the wife having been divorced, she did not fall within the designation of wife at the date of the member's death, and could not take. On page 136 of 145 Mass., and on page 363 of 13 N. E., it was said: "The principal object of the association manifestly is, as its members die from time to time, to provide for those nearest to them whom they leave behind. Each of the several expressions touching the persons to whom the moneys are to be finally paid has reference to the relation of such persons to the member at the time of his death. The language in the agreement of association, 'to the families of deceased members or their heirs,' the proviso limiting payments upon designations to 'heirs or members of the decedent's family,' and the word 'widow' in the next clause, are inconsistent with any other interpretation. Assuming then, but not deciding, that the validity of a designation is to be determined at the outset with reference to the relation then existing between the member and his beneficiary, we think, to make it available after his death, there must then be a relation to the deceased such as is contemplated by the agreement of association and the by-laws relating to payment. . . . At the time of the death of L. E. Tyler, his former wife, Etta A. Tyler, was not a member of his family nor one of his heirs, but her connection with him had been severed by the divorce. We therefore think she had lost her rights under the designation of her former husband, and was not entitled to anything from the defendant association after his death."

In *Order of Railway Conductors v. Koster*, 55 Mo. App. 186, the same view was taken by the court of appeals of the state of Missouri. It was there said: "A benefit certificate of this kind has some of the features of an insurance policy, but it also has its point of difference, and in the particular we are now considering it is testamentary in its character. The rule of the law of insurance, that if one has an insurable interest at the date of the policy, the policy is not vitiated by termination of that interest, does not apply in a case like this. This act is testamentary in its character, in the respect that it speaks at the death of the member. As long as the lady . . . filled the description given in the certificate she was under its protection, but when she ceased to

fill that description her interest in the certificate ceased. On the death of H. H. Koster the certificate, speaking for the first time, called for his wife, and there was none to answer."

In Supreme Lodge, K. & L. of H. v. Menkhäusen, *supra*, the foregoing cases were cited and the doctrine therein announced approved. In that case the husband, who was the beneficiary, had taken the life of his wife, the insured, and it was held by such act he forfeited his right as a beneficiary. The court, on page 283 of 209 Ill., page 511 of 65 L.R.A., page 241 of 101 Am. St. Rep., and on page 568 of 70 N. E., said: "The situation, so far as his rights and those of appellees and appellant are concerned, we think, is precisely the same as though, after the issuance of the certificate, he had been divorced from Elizabeth Menkhäusen, and she had thereafter died without having any alteration made in the certificate. Under such circumstances, he would have no interest in the certificate. But the proceeds thereof would be payable to the heirs of the insured; nothing to the contrary appearing in the certificate, the constitution and by-laws of the order, or the laws of the state under which it operates. *Tyler v. Odd Fellows' Mut. Relief Asso. supra*; *Schonfield v. Turner*, 75 Tex. 324, 7 L.R.A. 189, 12 S. W. 626; *Order of Railway Conductors v. Koster, supra*.

The Catholic Order of Foresters was organized "to establish a widows' and orphans' benefit fund for the benefit of dependents of deceased members." From this language it would seem clear that the fund was only to be paid to "dependents of deceased members;" that is, to a beneficiary who was dependent upon the member at the time of the death of the member. As said in the *Tyler Case*, this language "has reference to the relation of such persons to the member at the time of his death." The contract of insurance was made between the order and the member, and the appellee having no vested interest in the beneficiary fund during the lifetime of the member, no contract obligation between the order and appellee, or between the member and the appellee, would be impaired by requiring the appellee to show she was a dependent at the time of the death of the member.

It is urged, however, the statute under which the Catholic Order of Foresters was organized is broader than the charter of that order, and that the appellee can take the fund in controversy under the designation of "devisee," found in the act of 1883, as that act was construed in *Martin v. Stubbings* and *Delaney v. Delaney, supra*. We do not think this contention can be sustained. In 7 L.R.A.(N.S.)

Norwegian Old People's Home Soc. v. Willson, 176 Ill., on page 96, 52 N. E., on page 42, where the same contention was made, it was said: "There can be no question that the Norwegian Old People's Home Society was incompetent to take under the terms of the certificate of incorporation of the association. It could not in any way be held to be a member of the deceased's immediate family, and only such persons were competent to take. It is no answer to say that the statute of the state under which the association was organized was broad enough to permit such society to take. The incorporators of the association chose to restrict the objects of its benevolence to the immediate family of the member, and the courts must construe the contract as they find it." And again: "The Policemen's Benevolent Association is an Illinois corporation, which has voluntarily chosen to restrict its benevolences to the immediate families of its members, and we must apply the restrictions found in the statement of the object of the association as specified in the certificate of incorporation, and not the statute itself in its broadest scope. It is obvious that there is nothing illegal or against public policy in the action of the association in narrowing the scope of its beneficial action." From what was said in that case, it is clear, in determining the classes who can take as beneficiaries, the court will look alone to the certificate of organization, and not to the statute under which the society is organized, which may be broader in its terms than the certificate of organization of the benefit society organized thereunder. Furthermore, the application signed by John Riggs, and the certificate issued to him by the order, both provided that he would conform in all respects to the laws, rules, and usages of the order then in force or which might thereafter be adopted. The act of 1893 relating to fraternal societies (*Hurd's Rev. Stat. 1905, chap. 73, § 258, p. 1222*) provides: "Payments of death benefits shall only be paid to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member," and the order on January 1, 1904, adopted the by-laws numbered 82, 83, and 85, contained in the statement preceding this opinion, limiting the beneficiaries who might take under its certificates to the persons designated in the act of 1893, and provided by by-law 85 that "no benefit shall be payable to any person or persons of class 2, section 83, unless the dependency therein specified to be shown exists at the time of the member's death." It is not in proof that the Catholic Order of Foresters ever took formal action to bring itself within the

provisions of the act of 1893. It does, however, appear from the averments of the bill and admission of appellee's answer that such was the fact. Upon that subject it is averred in the bill that the Catholic Order of Foresters "is organized and doing business for the purpose of paying death benefits to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, its members," and the answer of the appellee to such averment is that it is admitted "complainant is a fraternal beneficiary society existing under the laws of the state of Illinois; that it is organized and doing business for the purpose of paying death benefits to the families, heirs, blood relations, and to dependents of deceased members." If the act of 1893 and section 85 of the by-laws of the order, passed in 1904, apply to the certificate issued to John Riggs, as we think they do, then by the express provision of said by-laws the appellee is excluded from receiving said benefit, as it is conceded the appellee was not dependent upon John Riggs for support at the time of his death.

It is urged, however, that the act of 1893 and the by-law of 1904 ought not to be applied so as to affect the appellee, as to so apply them would be to give them a retrospective operation. Such would doubtless be the rule if John Riggs had not expressly agreed they should be so applied. This he had the right to do, and, having so agreed, the appellee is not in a position to prevent their application. In *Baldwin v. Begley*, 185 Ill. 180, on page 188, 56 N. E. 1065, on page 1068, it was said: "A party cannot claim the right to have a contract remain unaltered when the contract itself provides that it may be changed. Here, Turner agreed in his application, made in 1885, that he would conform in all respects to the laws, rules, and usages of the order now in force or which may hereafter be adopted by the same." In the certificate issued to him on June 22, 1885, the condition was imposed "that the said member complies in the future with the laws, rules, and regulations now governing the said order, or that may hereafter be enacted by said high court." It thus appears by the terms of Turner's contract with the benefit society that he agreed to comply with such laws, rules, and regulations as might be enacted by the high court of the society in the future. . . . The law or rule of the society which was adopted in August, 1894, and which went into effect on January 1, 1895, and which provided that the payment of death benefits should only be made to the families, blood relations, heirs, affianced wife of, or to persons dependent on, the member, and that

such benefit should not be willed, assigned, or transferred to any other person, comes within the terms of the contract made by Turner, and cannot be otherwise regarded than as one of those future laws or rules with which he agreed to comply."

The right of a beneficiary society to amend its by-laws so as to affect contracts already in force, where its contract with a member contains an express provision reserving to the society the right to amend or change its by-laws, which changes, it is provided, shall be binding upon the member, has been recognized by this court in numerous cases. In *Fullenwider v. Supreme Council R. L. 180 Ill. 621*, on page 625, 72 Am. St. Rep. 239, on page 243, 54 N. E. 485, on page 486, the court said: "The power to enact by-laws for the government of a corporate body is an incident to the existence of a body corporate, and is inherent in it. The power to make such changes as may be deemed advisable is a continuous one. Where the contract contains an express provision reserving the right to amend or change by-laws, it cannot be doubted that the society has the right so to do; and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the council and fund, or that may thereafter be enacted for such government, and those conditions are assented to, and the member accepts the certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws. . . . The contract requiring compliance with any by-laws that might be thereafter enacted, and the certificate being accepted with such a clause therein, there is no vested right of having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to repeal or amend those theretofore made." In *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620, we recently held that a by-law forfeiting a claim for the death of a member of a benefit society, where the death of the member resulted from suicide, binds a member joining the society before the passage of such by-law, when his contract requires compliance with by-laws, "now in force or that may hereafter be enacted." And in *Supreme Lodge K. of P. v. Trebbe*, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730, it was held that the enactment of a law by the supreme lodge of a benefit society, which provides for the forfeiture of an endowment certificate upon the death of a member by suicide, binds the member whose contract requires compliance with all laws "now in

force or that may hereafter be enacted by the supreme lodge."

From an examination of this record and the authorities which have been cited in the briefs of the respective parties, we have reached the conclusion that the appellee is not entitled to receive the beneficiary fund deposited in court by the Catholic Order of Foresters, on the ground that she did not, at the time of the death of John Riggs, fall within any one of the designated classes for which that order was authorized by its charter to accumulate a beneficiary fund; in other words, that the appellee was not a dependent of John Riggs at the time of his death.

The judgment of the Appellate Court will be reversed, and the decree of the Superior Court affirmed.

ILLINOIS SUPREME COURT.

PHILIP KISTNER, Appt.,

v.

HETTIE J. PETERS.

(223 Ill. 607, 79 N. E. 311.)

Note—indorsement as maker—effect.

1. The indorsement upon a note by the payee, of a statement that he acknowledges himself a part maker of the note with one of the parties whose names are signed to the note, is not sufficient to render him a joint maker.

Case Note.—Acknowledgment by payee, in indorsement, of liability as maker: —

A thorough search fails to disclose any authority upon this point. The case approaching nearest to *KISTNER v. PETERS* is *Hosford v. Hotchkiss*, 23 Blatchf. 479, 27 Fed. 285, where the payee of a promissory note, who was also maker's wife, transferred the note with this indorsement: "Pay to the order of Mrs. Louisa P. Peet. For value received I hereby charge my separate estate with payment of the within note." It was held that payee thereby became liable on the note as indorser only, and as such entitled to notice of dishonor; and that she did not, by such indorsement, become a joint maker with her husband. It is there said: "A promise to pay is doubtless to be inferred; but, whether the promise to be inferred is the promise of an indorser or the promise of a maker, is the question to be decided. My opinion is that the promise of an indorser is the promise to be inferred, and for this reason: The note itself shows that the primary relation of the defendant to the note was that of an indorser. She was the payee of the note; an indorsement by her was therefore contemplated. She wrote an indorsement on the note. If her action had been confined to writing this bare indorsement and signing her name, the

Same—change of indorsement.

2. The acknowledgment of liability as maker over the indorsement of a note by the payee may be stricken out as surplusage, and the indorsement treated by a transferee as a blank assignment, over which may be written any words consistent with the contract of indorsement.

(October 23, 1906.)

APPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Effingham County in plaintiff's favor in an action brought to enforce a promissory note. Affirmed.

Statement by Wilkin, J.:

On March 18, 1895, E. N. Rinehart, Philip Kistner, and Ph. Wiwi executed a promissory note to Rosa M. Rinehart in words and figures following:

March 18, 1895.

One year after date we promise to pay to the order of Rosa M. Rinehart one thousand dollars at Effingham, Illinois, value received, with interest at the rate of six per cent per annum.

E. N. Rinehart.
Philip Kistner.
Ph. Wiwi.

On the same date Rosa M. Rinehart made

indorsement would have created no liability whatever on her part, because of the fact that she was a married woman. . . . What she added to the bare indorsement had the effect to deprive her of her personal immunity from liability that would follow [as a married woman] if nothing was added to the bare indorsement; and I find nothing in what she added indicating an intention to do more. In what she added she assumed a liability, but she did not state whether the liability was the liability of a maker, or the liability of an indorser of the note. Her intention in that respect is disclosed by the relation she then bore to the note, which was that of indorser. If she had intended to change her relation to the note from that of indorser to that of maker, something more would have been said. The indorsement she had written would have created a liability to pay in case of nonpayment by the maker, and due notice to her, but for the fact that she was a married woman; and this was the liability intended to be assumed by her as a married woman when she added what she did. From this a promise to pay must be inferred, but the promise must be coextensive with the liability assumed, and that was liability of an indorser, and not the liability of a maker."

the following indorsement on the back of the note:

I hereby acknowledge myself a principal maker of this note with E. N. Rinehart and my liability as such principal jointly with him.
Rose M. Rinehart.

The appellee, Hettie J. Peters, subsequently began a suit in attachment in the circuit court of said Effingham county against appellant Philip Kistner, the only surviving maker of the note. The declaration, after reciting the making of the note, payable to Rosa M. Rinehart, and its delivery to her, and the death of the makers other than the defendant, alleged that on the day and date aforesaid the said Rosa M. Rinehart then and there assigned the said note, by indorsement thereon under her hand, to the plaintiff, Hettie J. Peters, by means whereof the makers, including the defendant, Philip Kistner, then and there became liable to pay her the amount of said note, and, being so liable, made default.

The defendant craved oyer of the note and the indorsement thereon, which was allowed by the court, and he thereupon demurred to the declaration upon the ground that there was a variance between the indorsement and the allegations contained in the declaration. The demurrer was overruled and he elected to stand by it. A default was then entered against him and the court proceeded to assess the damages. The plaintiff offered in evidence the note, and asked leave to write, preceding the above indorsement, the words, "For value received I assign the within note to Hettie J. Peters, and" making the whole indorsement read: "For value received I assign the within note to Hettie J. Peters, and I hereby acknowledge myself a principal maker of this note with E. N. Rinehart and my liability as such principal jointly with him.—March 18, 1895.—Rosa M. Rinehart." The defendant objected to the additional words, but the court overruled the objection and permitted the indorsement to be made. Judgment was then entered by default in favor of the plaintiff for the amount of the note and costs. That judgment has been affirmed by the appellate court, and this further appeal is prosecuted.

Messrs. Jacob Zimmerman and Wright Brothers, for appellant:

The position of the name of a maker of a note is not material.

Lincoln v. Hinzey, 51 Ill. 435; *Palmer v. Grant*, 4 Conn. 400; *Parsons, Notes*, § 468.

The signature of maker or drawer may even be on the back of the instrument.

2 Am. & Eng. Enc. Law, p. 319; *National Pemberton Bank v. Lougee*, 108 Mass. 373, 7 L.R.A.(N.S.)

11 Am. Rep. 367; *Rodocanachi v. Buttrick*, 125 Mass. 134; *Palmer v. Grant*, supra; *Quin v. Sterne*, 26 Ga. 223, 71 Am. Dec. 204; *Schmidt v. Schmaelter*, 45 Mo. 502.

A promissory note, payable to one of the makers, is a nullity, and can never become operative except by indorsement of the payee. Such a note can never have any vitality until the name of the payee appears upon it as an indorser.

Bogue v. Melick, 25 Ill. 91; *Blatchford v. Milliken*, 35 Ill. 434; *Childs v. Davidson*, 38 Ill. 437; *Pahlman v. Taylor*, 75 Ill. 632; *Kayser v. Hall*, 85 Ill. 513, 28 Am. Rep. 624; *Chicago Trust & Sav. Bank v. Nordgren*, 57 Ill. App. 346, Affirmed in 157 Ill. 667, 42 N. E. 148; *Merritt v. Boyden*, 93 Ill. App. 613; *Hately v. Pike*, 162 Ill. 248, 53 Am. St. Rep. 304, 44 N. E. 441.

The method of transfer prescribed by § 4, chap. 98, of the statutes is exclusive.

Everett v. Sullivan, 102 Ill. App. 136.

Messrs. R. C. Harrah and S. F. Gilmore for appellee.

Wilkin, J., delivered the opinion of the court:

The appellant claims that the trial court erred, first, in overruling his demurrer; and, second, in allowing the additional indorsement to be made. As we understand his counsel, his contention is that the allegation of the declaration that the note was assigned to appellee is at variance with the legal effect of the indorsement on the back of the instrument, in that the indorsement was not legally an assignment, but by its terms Rosa M. Rinehart became a joint maker. The decision of this question will turn upon the legal effect, if any, to be given to the writing first indorsed on the note.

It is earnestly contended that by the indorsement Rosa M. Rinehart became a joint maker of the instrument. With this contention we cannot agree. It is undoubtedly true that one may become liable as a joint maker of a promissory note without reference to the position of his signature, whether it be found upon the face or back of the note, if it be shown by satisfactory evidence that the parties signing did so as joint makers. In other words, it is immaterial upon what part of the paper the signature of a party may appear, provided it be shown by satisfactory evidence that in signing it he did so intending to become a joint maker. *Lincoln v. Hinzey*, 51 Ill. 435, goes to this extent, but no farther. Ordinarily the signatures of parties to negotiable instruments have a well-understood position on the paper. The payee is named in the body of the note, the makers sign it upon its face

below the body of the instrument, and the indorser or guarantor signs his or her name upon the back. Under the foregoing rule, however, the position or the names is not of controlling importance if an intention be satisfactorily shown to bind the parties as makers or guarantors. In this case the note was made and signed in conformity with the usual and ordinary custom. It was made payable to Rosa M. Rinehart and signed at the bottom by E. N. Rinehart, Philip Kistner, and Ph. Wiwi. The name of Rosa M. Rinehart was signed upon the back, which made her an indorser in blank unless the words preceding her signature show a different intention, and the person to whom she delivered it, so indorsed, became the legal owner, authorized to maintain an action upon it. Hurd's Rev. Stat. 1903, chap. 98, § 4, p. 1278. "In its most general and literal signification an indorsement is an incidental or subsidiary writing upon the back of a paper or document to the contents of which it relates or pertains." 4 Am. & Eng. Enc. Law, 2d ed. p. 256. It may consist merely of the name, commonly called an indorsement in blank, or it may be limited or specific; but "under the law merchant [its legal effect] includes properly, first, a transfer of the title to the instrument indorsed; and, second [unless otherwise limited], a conditional promise to pay the same." Id. p. 257.

In determining what, if any, legal effect can be given to the words, "I hereby acknowledge myself a principal," etc., it must be borne in mind that Rosa M. Rinehart was at the time of the indorsement the payee of the note, and not a stranger or third party. The contention that she became a joint maker of the note payable to herself, under the well-settled rule, also insisted upon by counsel for appellant, that a note payable to the maker is without legal effect until assigned, renders the whole transaction a nullity, which we cannot presume was intended. An attempt to become the principal maker of a negotiable instrument with one of several makers is an anomaly in the law. Of course, it may be done, but the evidence of that intention must clearly appear, and to give the indorsement in this case that effect would destroy the negotiability of the instrument and do violence to the intention of Mrs. Rinehart. She manifestly intended to assign the note to Hettie J. Peters. What purpose she may have had in the use of the language preceding her signature can only be a matter of conjecture. Probably it was with some idea of enlarging her liability as indorser. But, however this may be, we will not attribute to that language the intention of re-

lieving the makers of all legal liability. The name of the payee upon the back of a negotiable instrument will transfer the legal title to the same, and it makes no difference that there is written about it language enlarging the liability of the indorser, such as a guaranty of the payment of the note. *Heaton v. Hulbert*, 4 Ill. 489; *Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Judson v. Gookwin*, 37 Ill. 286.

Our conclusion is that the language, "I hereby acknowledge myself a principal maker," etc., may be stricken out as surplusage, without legal meaning or effect, and that under the allegations of the declaration the signature of Rosa M. Rinehart makes her an indorser. In other words, the indorsement, unexplained, does not show an intention other than to assign and transfer the legal title of the instrument to the appellee.

As to the correctness of the ruling of the trial court in permitting the indorsement, "for value received," etc., preceding the writing first placed on the note, little need be said. If the indorsement was, in legal effect, in blank, as we think it was, the assignee had the authority to write any words over the signature consistent with the contract of indorsement, and she might do that at any time before or during the trial of the case. *Vansant v. Allmon*, 23 Ill. 30; *Maxwell v. Vansant*, 46 Ill. 58; *Boynton v. Pierce*, 79 Ill. 145. Furthermore, the defendant, having demurred to the declaration and elected to stand by his demurrer, was in no position to object to that indorsement. He was in no way injured by it.

We concur in the judgment of the Appellate Court, and it will accordingly be affirmed.

Farmer, J., having heard this case in the circuit court, took no part in its decision here.

Petition for rehearing denied December 11, 1906.

NEW YORK COURT OF APPEALS.

NORA O'CONNOR, Appt.,

v.

PATRICK HENDRICK, Trustee, etc., et al.,
Respts.

(184 N. Y. 421, 77 N. E. 612.)

Public school—regulation of superintendent—effect.

1. That the teacher is not a party to an appeal to the superintendent of public instruction from the hiring by a school trustee of a teacher wearing a distinctively religious garb does not prevent his decision, which is in fact a regulation of the common

schools within his jurisdiction, from being binding on her, although as a mere decision it would not be because she is not a party to the proceeding.

Same—power to make regulations.

2. The power of a superintendent of public instruction to make regulations for the management of the public schools is implied from a provision in a statute permitting him to remove trustees for disobeying any "decision, order, or regulation."

Same—reasonableness of regulation—religious garb.

3. A regulation of the department of public instruction prohibiting teachers in common schools from wearing a distinctively religious garb while engaged in the work of teaching is not unreasonable.

Contract—regulation affecting unlawful impairment.

4. No unlawful interference with existing contracts is effected by the promulgation of a regulation by the department of public instruction forbidding teachers to wear a distinctively religious garb while in the performance of their duties, since all contracts are impliedly subject to the power of the superintendent to make reasonable regulations as to the management of the schools.

(April 17, 1906.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a trial term for Livingston County denying a portion of her claim for wages alleged to be due her as a teacher in a public school. Affirmed.

Statement by Willard Bartlett, J.:

The plaintiff and Elizabeth E. Dowd, being teachers duly licensed to teach in the common schools of this state, entered into contracts with the board of trustees of school district No. 9, in the town of Lima, county of Livingston, in the autumn of 1902, to teach in the public school of said district for a term of thirty-six consecutive weeks at a specified rate of compensation. While so engaged in teaching they wore the distinctive dress or costume of a religious society connected with the Roman Catholic Church, of which they were members, which society is known as the "Order of the Sisterhood of St. Joseph." On May 28, 1903,

Case Note.—Validity of rule forbidding religious garb in school:—The only case on this subject, except *O'CONNOR v. HENDRICK*, which a careful search has discovered, is *Hyson v. School District*, 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, which is sufficiently set out by the court in its opinion in *O'CONNOR v. HENDRICK*.

7 L.R.A. (N.S.)

the state superintendent of public instruction promulgated a decision made by him upon an appeal under the consolidated school law (Laws 1894, p. 1278, chap. 556, title 14), in which he declared that the wearing of an unusual dress or garb, worn exclusively by members of one religious denomination for the purpose of indicating membership in that denomination, by the teachers in the public schools during school hours while teaching therein, constitutes a sectarian influence and the teaching of a denominational tenet or doctrine, which ought not to be persisted in. The decision further declared it to be the duty of the school authorities to require such teachers to discontinue the wearing of such dress or garb while in the public schoolroom and in the performance of their duties as teachers therein; and it directed Patrick Hendrick, one of the defendants herein, as sole trustee of school district No. 9, in the town of Lima, Livingston county, to notify the plaintiff and Elizabeth E. Dowd forthwith to discontinue, during the school hours of each school day, the wearing of the distinctive dress of the sisterhood to which they belonged, and commanded him to dismiss them if they refused to comply with this requirement. On May 29, 1903, the said Patrick Hendrick notified the plaintiff and Elizabeth E. Dowd of the contents of the decision. Notwithstanding this notification they continued to teach school wearing the prohibited garb up to June 19, 1903, which was the end of the school year. Mr. Hendrick, the school trustee, does not appear to have made any effort to remove or dismiss them. The present action was brought against him by the plaintiff, in her own behalf and as assignee of the claim of Elizabeth E. Dowd, to recover a balance of \$79.20 alleged to be due under their contracts with the school district. Mr. Hendrick defended on the ground that the plaintiff and her assignor had lost all right to recover anything under their contracts by reason of the fact that they had continued to wear the distinctive costume of the religious sisterhood to which they belonged, while engaged in teaching, after they had received notice of the aforesaid decision of the state superintendent of public instruction. The other defendants, who were taxpayers allowed to intervene at their own instance, also interposed an answer setting up a similar defense. The case was tried by consent without a jury before a justice of the supreme court, who held that the plaintiff was entitled to recover \$25.20, being the amount of the compensation of the two teachers which had been earned, but not paid, prior

to the time when they were notified of the superintendent's decision. He held, however, that the plaintiff and her assignor were not entitled to recover for any services rendered during the three weeks in which they continued to teach after the decision of the superintendent had been brought to their attention. From the judgment rendered at the trial term, the plaintiff appealed to the appellate division, where that judgment has been affirmed by a divided court.

Mr. John D. Lynn, with Mr. Timothy J. Nighan, for appellant:

A judgment is not binding upon a third person, who has had no opportunity to make a defense.

Lawrence v. Hunt, 10 Wend. 80, 25 Am. Dec. 539; *Ward v. Boyce*, 152 N. Y. 200, 36 L.R.A. 549, 46 N. E. 180; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959.

Whatever judicial authority is conferred upon the superintendent, it must be exercised within the established rules of law.

Beardslee v. Dolge, 143 N. Y. 160, 42 Am. St. Rep. 707, 38 N. E. 205; *Re Fitch*, 147 N. Y. 334, 41 N. E. 699; *People ex rel. Light v. Skinner*, 159 N. Y. 162, 53 N. E. 806; *Taylor v. Syme*, 162 N. Y. 519, 57 N. E. 83.

The superintendent has no authority, in his judicial capacity, to try or decide matters arising under § 4, art. 9, of the Constitution.

People ex rel. Light v. Skinner, 159 N. Y. 167, 53 N. E. 806.

To give to the order of the superintendent the effect given it by the courts below is depriving the plaintiff of rights guaranteed to her by the national and state Constitutions.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *People ex rel. Witherbee v. Essex County*, 70 N. Y. 234; *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289.

The moment the contract was entered into it became property of the teachers.

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; *Williams v. Connors*, 53 App. Div. 599, 66 N. Y. Supp. 11.

Rights secured under contracts are a most general and valuable species of property.

Dartmouth College v. Woodward, 4 Wheat. 628, 4 L. ed. 657; *Dent v. West Virginia*, 129 U. S. 121, 32 L. ed. 625, 9 Sup. Ct. Rep. 231.
7 L.R.A.(N.S.)

The facts before this court will not sustain the conclusion that the wearing of the apparel worn by these teachers constitutes the teaching of a denominational tenet or doctrine within the prohibition of the Constitution.

Hysong v. School District, 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482.

Mr. Fletcher C. Peck for respondent Hendrick.

Mr. Walter H. Knapp, with Mr. Albert H. Stearns, for other respondents:

The plaintiff is chargeable with the knowledge that neither the school district nor the trustee could make a valid contract with her permitting her to teach in violation of the decisions of the superintendent of public instruction.

Rockefeller v. Taylor, 69 App. Div. 185, 74 N. Y. Supp. 812; *Smith, Modern Law of Mun. Corp.* § 252; *McDonald v. New York*, 68 N. Y. 24, 23 Am. Rep. 144.

The superintendent of public instruction had jurisdiction and authority to make the so-called "garb decisions."

People ex rel. Bowers v. Allen, 19 Misc. 464, 44 N. Y. Supp. 566; *Clarke v. Tunniff*, 38 N. Y. 58; *Ex parte Bennett*, 3 Denio, 177; *People ex rel. Clingan v. Draper*, 63 Hun, 389, 18 N. Y. Supp. 282.

The decision of the superintendent of public instruction is final and conclusive, and is binding upon this court.

People ex rel. Bowers v. Allen and Clarke v. Tunniff, supra; *Ex parte Bennett*, 3 Denio, 175; *People ex rel. Clingan v. Draper*, supra; *Hutchinson v. Skinner*, 21 Misc. 729, 49 N. Y. Supp. 360; *People ex rel. Yale v. Eckler*, 19 Hun, 609; *Steinson v. Board of Education*, 49 App. Div. 148, 63 N. Y. Supp. 128; *Parke v. Independent School Dist. No. 1*, 65 Iowa, 209, 21 N. W. 567; *Wood v. Farmer*, 69 Iowa, 533, 29 N. W. 440; *Thompson v. Board of Education*, 57 N. J. L. 628, 31 Atl. 168.

The decision of the superintendent of public instruction was binding upon the plaintiff, although not made, in name, a party to the appeal.

Buffalo v. New York, L. E. & W. R. Co. 152 N. Y. 276, 46 N. E. 496; *Kittenger v. Buffalo Traction Co.* 160 N. Y. 390, 54 N. E. 1081; *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The regulation contained in the so-called "garb" decisions was a proper one for the superintendent of public instruction to make, and is consistent with the school policy of this state.

People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education, 13 Barb. 411.

No public funds shall be used for sectarian purposes, and no preference shall be given one sect over any other, which is unquestionably done in this case by the payment, through the Sisters of St. Joseph, to that order of the Catholic Church.

Cooley, Const. Lim. 5th ed. 580; State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 385; Cook County v. Chicago Industrial School, 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; Dakota Synod v. State, 2 S. D. 366, 14 L.R.A. 418, 50 N. W. 632.

The state, by virtue of its payment of teachers in public schools, is, in part, an employer, and has a right to say what qualifications shall be required of its employees.

Steinson v. Board of Education, 49 App. Div. 150, 63 N. Y. Supp. 128; Ridenour v. Board of Education, 15 Misc. 423, 37 N. Y. Supp. 109.

The right to teach is not a constitutional right protected by the 14th Amendment.

People ex rel. Dietz v. Easton, 13 Abb. Pr. N. S. 159; Bissell v. Davison, 65 Conn. 184, 29 L.R.A. 251, 32 Atl. 348; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; State v. Knowles, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877.

Willard Bartlett, J., delivered the opinion of the court:

The real question in this case is whether the plaintiff and the plaintiff's assignor lost their right to any further compensation under their contract of service as teachers, by reason of their refusal to comply with a regulation established by the state superintendent of public instruction which in effect prohibited teachers from wearing a distinctive religious garb while engaged in the work of teaching. The order made by the superintendent on the subject was in form the decision of an appeal. The consolidated school law as then in force provided for certain appeals to the state superintendent of public instruction by any person conceiving himself aggrieved in consequence of any decision made by various officers, including a decision by the trustees of any district in paying any teacher. Laws 1894, chap. 556, title 14, § 1, p. 1278. One Alfred K. Bates prosecuted an appeal under the statute to review the action of Patrick Hendrick as school trustee of school district No. 9, in the town of Lima, in employing the plaintiff and Elizabeth E. Dowd as teachers, and allowing them to teach while wearing the dis-

tinctive dress of the Roman Catholic religious order known as the "Sisterhood of St. Joseph," and it was upon this appeal that the superintendent promulgated the order prohibiting teachers from wearing the costume in question while engaged in the actual work of teaching. Neither the plaintiff nor Elizabeth E. Dowd was a party to the proceedings thus brought before the superintendent, nor does it appear that they had any knowledge of it while it was pending. It is plain, therefore, that it could have had no effect upon their rights considered as a judicial decision or prior adjudication. It seems to me, however, that it may be and should be viewed in another light, and, if thus regarded, that it constituted a rule of conduct which the plaintiff and her fellow teacher were bound to obey. Although a decision in form, it was in fact a regulation in regard to the management of the common schools which the superintendent had the right to establish, provided, only, that it was reasonable in its character and not in conflict with the laws of the state or public policy.

While it is true that there is no express grant of authority to the state superintendent of public instruction (now the commissioner of education under unification act [Laws 1904, p. 94, chap. 40]) in the consolidated school law to establish regulations as to the management of the common schools, the existence of a general power of supervision on his part over such schools is clearly implied in many parts of the statute. Among other things, he was required, so far as he could consistently with his other duties, to visit such of the common schools as he saw fit, and inquire into their course of instruction, management, and discipline, and advise and encourage the pupils, teachers, and officers thereof. Consolidated School Law, Laws 1894, chap. 556, title 1, § 8, p. 1186. The statute further prescribed that he should submit to the legislature an annual report containing, among other things, "a statement of the condition of the common schools of the state, and of all other schools and institutions under his supervision, and subject to his visitation as superintendent." Laws 1894, chap. 556, title 1, § 9, subd. 1, p. 1186. It also gave him the power to remove any school commissioner or other school officer whenever it should be proved to his satisfaction that any such school commissioner had been guilty of any wilful violation or neglect of duty under the statute, or of "wilfully disobeying any decision, order, or regulation" of the superintendent. Title 1, § 13.

The authority to remove an officer for the wilful disobedience of a regulation of the

superintendent necessarily implies a power on the part of the superintendent to make regulations; and, as has already been suggested, if the superintendent possessed the power to establish regulations in regard to the management of the common schools, the courts will not pronounce such regulations invalid unless they are unlawful or unreasonable. In arriving at a determination as to its validity a regulation in reference to the management of the common schools established by an officer under statutory authority is to be tested by rules similar to those which would apply in the case of a municipal ordinance, as to which the rule is that "ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state." 1 Dill. Mun. Corp. 4th ed. § 319. The rule which seems to be applicable here was enunciated and applied by the supreme court of Illinois in the case of *Rulison v. Post*, 79 Ill. 567, where the statutory duties of school directors were under consideration, and it was said: "In the performance of their duty in carrying the law into effect, the directors may prescribe proper rules and regulations for the government of the schools of their district, and enforce them. They may, no doubt, classify the scholars, regulate their studies and their deportment, the hours to be taught, besides the performance of other duties necessary to promote the success and secure the well-being of such schools. But all such rules and regulations must be reasonable, and calculated to promote the objects of the law,—the conferring of such an education upon all, free of charge." Another case involving a similar question is *School Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55, where it was held that a regulation by school trustees excluding a pupil from a high school because his father did not wish him to study grammar therein was arbitrary and unreasonable and could not be enforced.

We are thus brought to the question whether in this state a regulation is to be deemed unreasonable which prohibits teachers in the common schools from wearing a distinctively religious garb while engaged in the work of teaching. In my opinion it cannot justly be so regarded. "Neither the state," says the Constitution, "nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious

denomination, or in which any denominational tenet or doctrine is taught." Const. art. 9, § 4. Here we have the plainest possible declaration of the public policy of the state as opposed to the prevalence of sectarian influences in the public schools. The regulation established by the state superintendent of public instruction through the agency of his order in the *Bates* appeal is in accord with the public policy thus evidenced by the fundamental law. There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine. A different view was taken by the supreme court of Pennsylvania in the case of *Hysong v. School District*, 164 Pa. 629, 654, 26 L. R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, where it was held that school districts might employ as teachers sisters of a religious order of the Roman Catholic Church, and permit them while teaching to wear the garb of their order, provided no religious sectarian instruction should be given, nor any religious sectarian exercises engaged in. There was a dissenting opinion in that case, however, strongly reasoned in support of the conclusion that a school conducted similarly to that in the case at bar was in effect dominated by sectarian influence. The teachers, said Mr. Justice Williams in this dissenting opinion, "come into the schools, not as common school-teachers or as civilians, but as the representatives of a particular order in a particular church, whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is, not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies them, for it does not. It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers."

As to the reasonableness of the regulation prohibiting the use of a distinctive religious garb by teachers in the common schools, some other considerations may be mentioned. It must be conceded that some control over the habiliments of teachers is essential to the proper conduct of such

schools. Thus, grotesque vagaries in costume could not be permitted without being destructive of good order and discipline. So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils, as, for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July. It is suggested in the brief of the learned counsel for the appellant that, if the state superintendent could order these teachers to refrain from wearing their distinctive religious costumes, he could just as lawfully direct them to don a dress of any other pattern, or to compel a teacher to remove a gown because it was too plain or too gay, or that he might order the principal to cut off his beard or color his moustache. The obvious answer to these suggestions and others of a similar character is that no regulation would be valid which was manifestly unreasonable, because it would then be unauthorized by law.

The views which have already been expressed substantially dispose of all the points argued in behalf of the appellant, as well as those suggested in the dissenting opinion below, except the proposition that the state superintendent had no right to annul a valid contract between a teacher and the school district by which she was employed. The proposition is correct, but it has no application to the present case, because a contract between the trustees and the teacher of a common school is, by implication, subject to the power of the superintendent to make reasonable regulations as to the management of the school. This being the case, the superintendent does not annul a valid contract by insisting that such reasonable regulations shall be observed, for by entering into the contract the teacher assumes the implied obligation to obey such regulations.

It follows that the judgment appealed from should be affirmed, with costs. In reaching this result, however, I do not wish to be understood as acquiescing in that part of the opinion below in which it is asserted that "these sisters should never be permitted to teach in our public schools." There is no reason, either in morals or in law, why they or any other qualified persons should not be allowed thus to teach, whatever may be their religious convictions, provided that they do not by their acts as teacher promote any denominational doctrine or tenet.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Haight, Vann, and Chase, JJ., concur.
7 L.R.A. (N.S.)

NORTH CAROLINA SUPREME COURT.

D. E. CAMERON et al.

v.

E. F. HICKS et al., Appts.

(141 N. C. 21, 53 S. E. 728.)

Trust—married woman—conveyance.

1. A provision in a deed conveying property to a trustee for the use of a married woman, permitting him to convey upon request of the beneficiary, she joining in the deed, prevents her conveyance without the aid of the trustee.

Same—power to convey—death of trustee.

2. The death of the trustee to whom is conveyed property for a married woman with power to join her in its conveyance without the execution of the power destroys it so that it cannot be subsequently executed.

Same—death of trustee—descent.

3. That the children of a trustee are infants does not prevent the trust estate from descending upon them in case of the death of the trustee charged with the trust.

Trust—same—execution of use.

4. Where an estate is conveyed to a trustee for the use of a married woman for life and to preserve contingent remainders, the statute, upon the death of her husband, does not execute the use in her so as to permit her to convey the estate.

Same—power to convey—real estate.

5. A provision in a deed conveying property to a trustee for the use of a married woman during life with remainder over, that, in case the life tenant should desire any of the property to be conveyed in fee or otherwise, the trustee should have power to convey joining her in the deed, applies to her life estate as well as to the fee, so as to prevent any conveyance by her without joining the trustee.

Same—statute of limitations.

6. Possession taken under a deed by a married woman of property which was conveyed to a trustee for her life and to pre-

Case Note.—Disability of some but not all of the joint tenants as affecting the statute of limitations: —The court in CAMERON v. HICKS, in holding that the running of the statute of limitations against one of several joint tenants will bar an action against all, although the remainder are under disability, bases its decision on the rule that when a joint right of action accrues to several, the right must exist in all at the time when the action is brought, and when the statute begins to run as to one of the parties to such an action, it runs as to all. Many of the authorities dealing with this question are sufficiently set out by the court in CAMERON v. HICKS.

In a case similar to CAMERON v. HICKS, the court held that the fact that some of the

serve remainders, with power to convey by joining the life tenant, sets the statute of limitations in operation against not only the trustee, but the life tenant and the remainder-men.

Same—deed by beneficiary.

7. A deed by a married woman, executed in the manner prescribed by law for the conveyance of her estates, is of no effect against a trustee to whom the property was conveyed for her use by a deed providing that it might be conveyed by the trustee joining her in the deed.

Same—infant trustees.

8. The statute of limitations is, during the minority of the trustees, prevented from running upon possession being taken under a deed of a married woman for whose use property was conveyed to a trustee with power to sell by joining her in the deed, if at the time of the conveyance the trustee is dead and the title has descended to his infant heirs.

Same—joint tenants—bar against one.

9. The running of the statute of limitations against one of several joint tenants will operate as a bar against all, although the remainder are under disability.

(April 3, 1906.)

A PPEAL by defendants from a judgment of the Superior Court for Wayne County in plaintiffs' favor in an action brought to recover possession of certain real estate. Reversed.

Statement by Connor, J.:

Edmund Coor, on the 3d day of May, 1870, executed to E. R. Cox, trustee, and his heirs a deed conveying the land in controversy "to the sole and separate use of Amanda M. Cameron, wife of John Cameron, during her life, and after her death to convey the same to such children and their heirs as she, the said Amanda, may leave her surviving, and to the issue and their heirs of such as may be dead, such issue to represent their an-

cestors and take such part as he or she would have taken if living; and if, during the life of the said Amanda, she should desire any or all of the said property conveyed in fee or otherwise to convey the same according to her wishes, she joining in said conveyance as if she were a *feme sole*, though her husband be living." Said deed was duly recorded in the office of the register of deeds of Wayne county. The said E. R. Cox, trustee, died June 18, 1875, leaving surviving certain children and grandchildren, all of whom were either infants or married women and so remained to the beginning of this action, August 11, 1902, except one daughter, Florence Virginia Cox, who became twenty-one years of age October 24, 1880, and was married to T. J. Newsome, December 9, 1880. On October 28, 1880, John Cameron and his wife, Amanda Cameron, executed a deed for the land in controversy to the defendant E. F. Hicks, sufficient in form to convey said lands in fee simple with full covenants of warranty. There was evidence tending to show that the said Hicks went into possession of said land, described in said deed, immediately after its execution, and that he and the other defendants claiming under him have remained in possession until the beginning of this action. The deed from Cameron and wife to Hicks recited a consideration of \$800. John Cameron died June, 1881. His widow, Amanda, died March, 1901, leaving surviving six children, all of whom, with the exception of A. F. Cameron and J. D. Cameron, the last of whom died since the beginning of this action, are parties plaintiff herein, together with the children of J. D. Cameron. That all the living children and the children of such as are dead of E. R. Cox, trustee, are parties defendant herein, together with the grantees of E. F. Hicks, to whom portions of the said lands were conveyed as aforesaid. The court charged the jury that, if they believed the

tenants were infants or *femes covert* when title to real property accrued to them did not bring their rights within the saving clause of the statute of limitations, where other tenants were under no disability. *Simpson v. Shannon*, 3 A. K. Marsh. 462. And this was held to be true whether plaintiffs claim title as copartners, as joint tenants, or as tenants in common.

And in *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255, which was an action of ejectment, the court declared that in order to claim the benefit of the saving clause of the statute of limitations, joint tenants must all have been under some disability at the time their right accrued.

The common-law doctrine that joint tenants must sue and be sued jointly was held to have been modified by statute in Vir-

ginia, so that the infancy of one joint tenant does not prevent the application of the act of limitations to other joint tenants not under disability. *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630. A similar decision was rendered in *Moore v. Armstrong*, 10 Ohio, 11, 36 Am. Dec. 63, where one joint tenant was under disability by reason of coverture.

But it is held to be well settled in South Carolina that the minority of one cotenant will protect the interests of his adult cotenant from the operation of the statute of limitations, and that the rule extends to tenants in common as well as to joint tenants, and applies whether the infant cotenant is joined in an action to try the title or not. *Hill v. Sanders*, 4 Rich. L. 521, 55 Am. Dec. 696; *Boozar v. Teague*, 27 S. C. 348, 3 S. E. 551.

evidence, they should answer the issues for the plaintiffs, to wit: "That they were each entitled to one-sixth undivided interest of the land in controversy." Defendants excepted, and assigned the said instruction as error. From a judgment upon the verdict, defendants appealed.

Mr. W. C. Munroe, for appellants:
The legal title was in the trustee.

King v. Rhew, 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856.

If the trustees were barred, the *cestuis que trust* were barred.

Ibid.

The trustees not having joined in the deed it was void, and they could have at any time brought an action to restore the possession.

Kirby v. Boyette, 116 N. C. 165, 21 S. E. 697, 118 N. C. 244, 24 S. E. 18; Narron v. Wilmington & W. R. Co. 122 N. C. 856, 40 L.R.A. 415, 29 S. E. 356; Shannon v. Lamb, 126 N. C. 38, 35 S. E. 232; King v. Rhew, 108 N. C. 700, 23 Am. St. Rep. 76, 13 S. E. 174; Southerland v. Hunter, 93 N. C. 310.

Married women, and even infants, may be trustees, and, if trustees, they are, for the purposes of the trust, freed from disabilities pertaining to their nature as individuals.

Tiffany & B. Trusts & Trustees, p. 347.

The heirs of the trustee held their lands as joint tenants.

Wms. Real Prop. p. 142; 3 Ewell, Essentials, p. 1; Washb. Real Prop. § 19, p. 427; N. C. Pub. Laws 1885, chap. 327.

If an action by them to recover the land must have been joint, it follows that if any of the trustees was barred all were barred.

Riden v. Frion, 7 N. C. (3 Murph.) 577; Montgomery v. Wynns, 20 N. C. 667 (4 Dev. & B. L. 527); McRee v. Alexander, 12 N. C. (1 Dev. L.) 322; Fleming v. Barden, 126 N. C. 450, 53 L.R.A. 316, 78 Am. St. Rep. 671, 36 S. E. 17.

Messrs. Dortch & Barham, W. S. O'B. Robinson, and Aycock & Daniels for appellees.

Connor, J., delivered the opinion of the court:

The record, with the exhaustive and well-considered briefs in this appeal, clearly present the questions upon which the rights of the parties depend.

The plaintiffs suggest that it is not necessary for them to combat the principle decided in Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18. They say that the cases may be distinguished. In Kirby's Case the declaration of the trust was for the separate use of the married woman and her heirs, whereas

here it is for "the sole and separate use of Mrs. Cameron for and during her natural life, and at her death to convey to her children, then living, and the issue of such as were dead." This language, it is insisted, brings the case directly within the principle announced in Swann v. Myers, 75 N. C. 585. Chief Justice Pearson was clearly of the opinion, in that case, that "a married woman owning an estate for life, in a trust estate, has *jus disponendi* . . . unless there be a restraint upon the power of alienation." This, he says, "is laid down in all of the books." No authorities are cited. The trust in that case was for "the separate use and behalf" of Mrs. Swann for her life and then over. It is difficult to reconcile this language with that of Manly, J., in Knox v. Jordan, 58 N. C. (5 Jones, Eq.) 175. In that case the English rule is discussed, the cases decided by this court reviewed, resulting in the conclusion that the *feme covert* may alien or encumber her separate estate in execution of powers conferred upon her by the terms of the deed, and if not restricted by the terms may, under the authority of Frazier v. Brownlow, 38 N. C. (3 Ired. Eq.) 237, 42 Am. Dec. 165, charge the income or profits, etc. The question in regard to the wife's power to deal with her separate estate was before the court in Withers v. Sparrow, 66 N. C. 129, where it was held that she could, "with the assent of the trustee," charge it. Light is thrown upon the language of Pearson, Ch. J., in Swann v. Myers by referring to his dissenting opinion in Harris v. Harris, 42 N. C. (7 Ired. Eq.) 120, 53 Am. Dec. 393, wherein it was held that a *feme covert* entitled to a separate personal estate, in the absence of any restraint in the deed, could dispose of it as a *feme sole*, whether there was or was not a trustee. In that case a slave had been conveyed to a trustee for the separate use of a married woman during her life, with remainder over, etc. The court, by Ruffin, Ch. J., held that, in the absence of any restraint upon her right of alienation, she could sell the slave. The decision is put upon the English authorities, citing, also, Newlin v. Freeman, 39 N. C. (4 Ired. Eq.) 312, and Dick v. Pitchford, 21 N. C. (1 Dev. & B. Eq.) 480. Judge Pearson vigorously dissented from the doctrine of "implied power" in the wife, etc. He says: "As the *feme* had only a separate use for life in a negro woman . . . of no annual profit, and as, for her maintenance, she had a right to dispose of the profits, and a life estate is only, in fact, a right to the profits, I should have been willing to put this case upon the ground that, in disposing of her life estate, she disposed of the profits only." He sets

forth at length his dissent from the doctrine that, in the absence of any express power to sell the separate estate, the wife may do so as a *feme sole*. Ruffin, J., in *Hardy v. Holly*, 84 N. C. 661, referring to the question of division of opinion in *Harris v. Harris*, says: "When the question next arose, in the case of *Knox v. Jordan*, the court, as then constituted, without division, and without any sort of reservation, repudiated the doctrine of the English courts, and adopted that which prevailed in most of the courts of the states; and, whether this was wisely done or not, that case has been too often approved and doubtless too often acted upon in matters intimately connected with the interest and comfort of families to admit of its correctness being now called into question." Although the learned judge writing the opinion gave to the question, and the authorities, as was his custom, a most careful investigation, the case of *Swann v. Myers* is not cited, nor do we find that the learned counsel who argued the case for the plaintiff in their exhaustive brief called it to the attention of the court. In *Hardy v. Holly*, supra, a mode was prescribed in the deed for the disposition of the property.

We have carefully and anxiously examined the authorities, and are unable to find any recognition in those courts, which reject the English doctrine, of a distinction between the power of a *feme covert* to convey her "equitable life estate" and her equitable estate in fee. Professor Pomeroy says that the American courts, in regard to this question, may be divided into two classes. "In the first class, the courts have accepted the principle of the English doctrine. They regard the wife's *jus disponendi* as resulting from the fact of an equitable separate estate over which she is, partially at least, a *feme sole*, and not as resulting from the permissive provisions of the instrument creating such separate estate. It follows, therefore, where the instrument creating the separate estate imposes no express restrictions, that the wife has a general power of disposing or charging it, even though no such authority is, in terms, conferred. This power of disposition, however, does not generally extend to the corpus of the land held for her separate use in fee; it is confined to personal property, the rents and profits of the land, and perhaps to her life estates in lands. In the states composing the second class, the courts have widely departed from the principle of the English doctrine. They regard the wife's power over her separate estate as resulting, not from the existence of an equitable separate estate itself, but from the permissive provisions of the instrument creating such estate. They have

accordingly adopted the general rule that a married woman has only those powers of disposing or charging her separate property which are expressly, or by necessary construction, conferred upon her in the instrument conveying the property or creating the trust, and that, in determining the extent of these powers, the terms of the instrument are to be strictly construed." 3 Pom. Eq. Jur. 3d ed. 1105; Bispham, Eq. § 103. Both these writers place North Carolina in the second class. The dissenting opinion of Judge Pearson in *Harris v. Harris*, supra, strongly maintains this doctrine. As we have seen, this dissenting opinion was adopted in *Knox v. Jordan*, and it is upon that decision the doctrine of *Hardy v. Holly* is based. In none of the cases following *Hardy v. Holly* is there any reference to *Swann v. Myers* or suggestion that, as to the equitable life estate, the *feme covert* may convey without the intervention of her trustee, when the deed requires his co-operation. It is not improbable that, in writing the opinion in *Swann v. Myers*, the chief justice had in mind the English doctrine by which the *feme covert* was permitted to charge the anticipated income, when not restrained, from her separate equitable estate, which he construes in his dissenting opinion in *Harris v. Harris* as enabling her to dispose of the entire life estate. However it may be, it would seem clear that, in this state, the distinction cannot be sustained. It will be observed that when the trust is declared "for the sole and separate use," or words equivalent thereto, of a married woman, the courts have uniformly held that, because of the presumed intention of the maker of the instrument the trust is active and the statute does not execute the use. When, as in *McKenzie v. Sumner*, 114 N. C. 425, 19 S. E. 375, there is a simple declaration of a trust, as pointed out by Shepherd, Ch. J., "there is no reason why the legal title is not vested in the plaintiff by the statute of uses." Whether the rule should have been modified, by reason of our constitutional provision, in regard to the status of married women, as suggested in *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541, it is useless to discuss. However this may be, the trust declared by the deed from Coor to Cox is active, and the necessity for the separation of the legal from the equitable estate manifest. There were contingent remainders to be preserved and powers to be executed. This question is discussed and so decided, in accordance with all of the authorities, in *Swann v. Myers*, 75 N. C. 585. It may be that the correct doctrine is to be found by reading the language of Ruffin, J., in *Hardy v. Holly*, supra, in the

light of what is said by Smith, Ch. J., in *Norris v. Luther*, 101 N. C. 196, 8 S. E. 95, and *Clayton v. Rose*, 87 N. C. 106. This would seem to lead to the conclusion that, in the absence of any permissive provisions in the deed, the wife could not convey her equitable separate estate, either for life or in fee, as a *feme sole*, but could do so in the manner prescribed for the conveyance of her statutory separate estate, by joining with her husband and privy examination. However this may be, we are not called upon at this time to enter upon this debatable ground.

There is another view of this case which we think conclusive upon the power of Mrs. Cameron to convey any interest in the land. After declaring the trusts, the grantor directs the trustee "if during the life of the said Amanda she should desire any or all of said property conveyed in fee or otherwise, to convey the same according to her wishes, she joining in said conveyance as if she were a *feme sole*, though her husband may be living." In *Swann v. Myers*, supra, the will gave to the trustees the power, and directed them, "in the soundness of their discretion," to join with the *cestuis que trust* in making any conveyance of the above property." Judge Pearson, writing for the court, construed this language to be a restraint upon the power of alienation as to the fee. This ruling, so far as it refers to the fee, is in harmony with all of our decisions and those of other states, which hold that, when a mode of alienation is prescribed in the instrument, it must be followed. *Hardy v. Holly* and *Norris v. Luther*, supra; *Towles v. Fisher*, 77 N. C. 437; *Mayo v. Farrar*, 112 N. C. 66, 16 S. E. 910; *Monroe v. Trenholm*, 112 N. C. 634, 17 S. E. 439. This is the only logical conclusion from the premise stated in the cases in this court, at which it is possible to arrive. It will be observed that, in our case, the mode is expressly prescribed and applies to conveyances "in fee or otherwise." We therefore do not depart from the principle announced in *Swann v. Myers* in that respect, in holding that there is to be found in the deed of settlement an express mode prescribed for disposing of either the life estate or the fee. That such was the intention of the maker of the deed is, we think, seen in the fact that the husband is not required to join in the conveyance, but the wife is to act in that respect as if she were "a *feme sole*, though her husband may be living." It was the manifest purpose of Mr. Coor to remove Mrs. Cameron, in respect to the sale of this property, from both the influence and protection of her husband, and vest in

the trustee the sole power to convey "in fee or otherwise, according to her wishes, she joining in said conveyance." To permit her and her husband to convey the land thus secured to her, without the intervention of the trustee, would be doing violence to the express language and manifest intention of the maker of the deed of settlement. If the land had been conveyed directly to Mrs. Cameron, the Constitution imposed upon her power of alienation the necessity for the assent of her husband. The deed under which she acquires her equitable estate—the right to the sole and separate use of the land—substitutes the trustee for the husband in respect to the conveyance. *Pippen v. Weston*, 74 N. C. 437; *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694.

It is well settled that, upon the death of the trustee, the legal title descended to his heirs with the trust impressed upon it. *Clayton v. Rose*, supra; *Perry*, Tr. 341. It seems equally well settled that if the trustee, being clothed with a power as in this case of conveying the legal title by direction and appointment of the *cestuis que trust*, dies before its execution, the power is gone and cannot be executed. *Sugden, Powers*, 319. In *Barber v. Cary*, 11 N. Y. 397, it is said: "But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz., by and with the consent of Hannah Cary and George A. Cary. The first question is whether the death of Hannah Cary, which occurred before the execution of the power, was fatal to the conveyance. The rule of law is well settled that when the consent of third persons is required to the execution of a power, that, like every other condition, must be strictly complied with. . . . If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God." 22 Am. & Eng. Enc. Law, p. 1122. It would seem, therefore, that, upon the death of the trustee, the condition upon which Mrs. Cameron could execute the power to direct the conveyance was gone. It may be that as no discretion was vested in the trustee but that he was directed to convey "in fee or otherwise according to her wishes," Mrs. Cameron may have had, either by the clerk under the statute, or by a civil action in the nature of a bill in equity, another trustee appointed, with power to convey as she directed. This was not done, and her deed cannot operate as the exercise of her power of appointment. *Towles v. Fisher*, supra.

The suggestion that because the heirs of Mr. Cox were infants the legal estate did not descend to them charged with the trusts

is met by what is said in *Clayton v. Rose*, supra: "After the death of the original trustee, and when the legal estate had descended, clothed with the trust, to his infant children," etc. It is suggested that upon the death of Mr. Cameron the statute of uses operated by "legal chemistry" or "parliamentary magic," to execute the use and unite the legal and equitable estates in Mrs. Cameron for life, leaving to the trustee or his heirs the remainder in fee for the purpose of preserving the contingent remainders, and conveying to those who might be entitled upon Mrs. Cameron's death. It is well settled that when there is a conveyance to trustees for the sole and separate use of a married woman and her heirs, and she becomes discovered, the necessity for preserving the separate estate being at an end, the statute executes the use, and she becomes the absolute owner. *Monroe v. Trenholm*, supra; *Stacy v. Rice*, 27 Pa. 75, 67 Am. Dec. 447; *Perry*, Tr. 653. It is equally true that, where an estate is conveyed to trustees to preserve contingent remainders, the statute will not execute the use. The legal title must remain in the trustee, because, as in this record, no one in existence could call for the legal title. It was uncertain who would be entitled upon the death of Mrs. Cameron, and this uncertainty continued until the moment of her death. *Latham v. Roanoke R. & Lumber Co.* 139 N. C. 9, 51 S. E. 780. In *Battle v. Petway*, 27 N. C. (5 Ired. L.) 576, 44 Am. Dec. 59, *Ruffin*, Ch. J., says: "Beyond doubt, equity would not compel nor allow the trustee to convey the legal estate to the tenant for life, but require him to retain it for the security of the remainder-man. And so, in any case of a contingent limitation over, it would be the duty of the trustee to retain the title and the control over the possession of the trust property, and the court of equity will not take it from him." We therefore conclude that the trust declared in the deed from Coor to Cox was active, and that the legal title upon the trusts declared vested in Cox in fee; that the mode of conveying or appointing the legal title, prescribed in the deed, applied to both the life estate and the fee; and that Mrs. Cameron was restricted to that mode, and could not otherwise divest herself of her equitable estate for life or appoint the fee.

The deed executed by Mrs. Cameron and her husband to Hicks was therefore a nullity; conveyed no estate, either legal or equitable. Hicks's entrance upon the land was therefore an ouster of the trustee and put the statute of limitations in operation. At the expiration of the statutory period his possession would have ripened into a per-

fect title, both as against Cox, if living, and his *cestui que trust* and her infant children. This rule of law is too well established and has been too often enforced with its variant results to be now called into question. *Smith*, Ch. J., in *Clayton v. Rose*, 87 N. C. 106, applying the principle, where it was sought to bar the *cestui que trust*, said: "Nor do we think the defendants can protect themselves under a seven years' adverse possession with color of title. It is conceded that where the right of entry is barred and the right of action lost by the trustee, or person holding the legal estate, through an adverse occupation, the *cestui que trust* is also concluded from asserting a claim to the land, . . . and the correlative must be accepted that when the trustee is not barred, neither can the *cestui que trust* be, since as against strangers they are identified in interest. The alleged hostile possession by the defendant began after the death of the original trustee, and when the legal estate had descended clothed with the trust to his infant children; and this disability prevents the statute from starting to run to their prejudice." In some cases it operates to destroy, and in others to preserve, title. Courts may not shrink from enforcing it and thereby introduce confusion on account of hard cases. *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856; *King v. Rhew*, 108 N. C. 698, 23 Am. St. Rep. 76, 13 S. E. 174. The doctrine is clearly stated and treated as settled in the opinion from which the plaintiffs seek safety, in *Swann v. Myers*, 75 N. C. 585.

The resourceful and learned counsel for plaintiffs say that the rule does not militate against their contention in this case, because in *King v. Rhew* the wife was not, as construed by this court, a party to the deed, while here she was a party, executed it, and submitted to a private examination as provided by the statute. The counsel call to our attention the language of the court in that case: "The deed then can only be regarded as that of the husband, and, as he had no interest which he could have conveyed, the trustee could have maintained an action at any time against the defendants for the possession of the property." The difficulty in the argument, based upon this language, is found in the fact that a deed made by a married woman otherwise than as she is empowered by the law is as much a nullity as if she had not signed at all, or as if she had signed a piece of blank paper. *Askew v. Daniel*, 40 N. C. (5 Ired. Eq.) 321. *Ruffin*, J., in *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694, speaking of the deed of a married woman without compliance with the provisions of the statute,

says: "It prescribes the terms, and without their strict observance the act stands as it would at common law,—absolutely null and void." In *Green v. Branton*, 16 N. C. (1 Dev. Eq.) 500, it is said that her deed, not executed as the law requires, is an absolute nullity under which no equity whatever can be set up. *Towles v. Fisher*, 77 N. C. 438; *Jones v. Cohen*, 82 N. C. 75. If the trustee had sued Hicks for the possession, it is manifest that the deed of Mrs. Cameron could not have been used to bar his action. This is the test by which to ascertain the character of Hicks's possession as against the trustee and, thus tested, we are of the opinion that such possession was adverse to the trustee, and the statute of limitations was put into operation against the trustee. The reasoning of the court in *Swann v. Myers*, as to the effect of the deed made by Mrs. Swann upon the right of the trustee to recover possession, is based upon the theory that her deed conveyed the equitable life estate and is therefore not applicable here. The plaintiffs say that, Cox having died in 1875, the legal title descended to his heirs who were at that time infants and were unable to execute the trusts, convey the legal estate, or protect the possession. This is true, and, as said in *Clayton v. Rose*, supra, the statute did not run against them; their disability inured to the benefit of the *cestuis que trust* and protected their estates against the adverse possession of Hicks. The rights of Mrs. Cameron and her children were absolutely secured by the infancy of the trustees, and no act, either of themselves or persons claiming under them, could destroy or affect their estate. Conceding that the power to convey the estate was suspended by the death of Cox during the minority of his heirs, and that no ouster under color or otherwise could ripen into title against them, the plaintiffs have no cause to complain of the law which secured their estate from harm by acts of themselves or strangers.

We are thus brought to a consideration of the last question presented by the exceptions. Are the trustees, heirs at law of Cox, barred of their right of entry? At the date of Hicks's entry, October 28, 1880, they were all, except Florence, under disability, and have so continued until the date of the summons August 11, 1902. Florence reached her majority October 24, 1880, and married December 9, 1880. Hence, for one month and eleven days she was under no disability. The statute ran against her, and it is elementary learning that when the statute begins to run no subsequent disability interferes with it. Hicks and those under him have, therefore, been in the adverse posses-

sion twenty-one years and a few months prior to the beginning of this action. If the heirs of Cox, trustee, held the legal estate as tenants in common, they would recover in respect to their separate interests. The defendants insist that they held as joint tenants, and not as tenants in common. This is not controverted by plaintiff, and seems to be sustained by the authorities. "Trust property is generally limited to trustees as joint tenants. . . . Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor. If he has made no disposition of the estate by will or otherwise, it devolves upon his heirs, if real estate, and upon his executors or administrators, if it is personal estate." Perry, Tr. 343; 17 Am. & Eng. Enc. Law, p. 659; Revisal 1905, § 1580. It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the cotenants, as in case of joint tenancy and coparcenary, is joint, the action must also be joint; and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be distinctly and separately pursued. 'Joint tenants being seised *per mie et per tout* and deriving but one and the same title, must jointly implead and be impleaded.' If twenty joint tenants be, and they be disseised, they shall have, in all their names, but one assize because they have but one joint title." Cotenancy, 320. To the same effect is *Sedgwick & W.*, Trial of Title to Land, § 302. It was at one time held in this state that two tenants in common could not join in one demise, because there was no unity of title,—one might recover and the other fail. It was afterwards held, for the reason set out by Ruffin, J., in *Doe ex dem. Hoyle v. Stowe*, 13 N. C. (2 Dev. L.) 318, that they could join in one demise. He says: "It is a universal rule that the title must be [truly] stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title, the plaintiff must fail." He says that this is "common learning." An examination of the opinion shows the ground upon which tenants in common are permitted to make a joint demise and recover in respect to their interests. *Allred v. Smith*, 135 N. C. 443, 65 L.R.A. 924, 47 S. E. 597. The difference is in this: Joint tenants must join in one demise because of the essential unities; tenants in common may join, or, if they prefer, may sue separately because there is no unity of title.

It would seem to follow that joint tenants must recover in respect to their title, and, if they fail in that, they cannot recover at all. This is the doctrine of this court. *Riden v. Frion*, 7 N. C. (3 Murph.) 577, was an action by three joint owners of a slave. Two of the plaintiffs were barred, the third under disabilities. Taylor, Ch. J., said: "Wherever the statute of limitations is a bar to the recovery of one of the parties, in such action, it operates against the whole, because the disability of one does not save the rights of the others." The case was approved in *McRee v. Alexander*, 12 N. C. (1 Dev. L.) 321, Henderson, J., saying: "In a joint action brought by several when the defendant avails himself of the bar given to such action by the statute of limitations, all the plaintiffs must bring themselves within some of the savings of the statute; otherwise the bar is not avoided. . . . The decisions on this point are uniform, as far as I know, and I shall not now inquire whether they are founded on the technical reason that the action being joint all or none of the plaintiffs must recover, otherwise the judgment does not pursue the writ and declaration, or whether on the very words of the statute." The learned justice severely criticizes the rule. In that case the lessors of the plaintiffs were tenants in common, and the rule so justly criticized, as applied to tenants in common, no longer obtains, although a joint demise be laid, or, under our Code practice, the several interests be shown, either in the complaint or the evidence, the plaintiffs recover accordingly. This cannot be so when the plaintiffs are joint tenants; they must all recover or none can do so. *Montgomery v. Wynns*, 20 N. C. 667 (4 Dev. & B. L. 527). In *Weare v. Burge*, 32 N. C. (10 Ired. L.) 169, the same rule is recognized. The statute (Revisal 1905, § 374) changes the rule in regard to personality. See Clark's Code, § 173. It does not affect the law as to real property. *Expressio unius est exclusio alterius*. When we go beyond our own reports we find the same principle enforced. *Marsteller v. McClean*, 7 Cranch, 156, 3 L. ed. 300, was an action of trespass. Judge Story held, for the court, that, if one of the plaintiffs was barred, all were. That, if they were compelled to join in the action, that result necessarily followed. 1 Rose's Notes, 156. In *Hardeman v. Sims*, 3 Ala. 747, it is said: "It was contended in argument that the exception in the statute in favor of infants would take the case out of the statute, notwithstanding one of the complainants was barred by the statute. We understand it to be the settled rule that when a joint right

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of action accrues to several, the right must exist in all at the time of the action brought. When the statute begins to run as to one of several parties to a joint action it runs as to all." The law was so ruled in *Perry v. Jackson*, 4 T. R. 516. It is true that the contrary doctrine is laid down in 19 Am. & Eng. Enc. Law, p. 182. It will be found that the North Carolina cases cited do not sustain the text as construed by plaintiffs' counsel. In *Caldwell v. Black*, 27 N. C. (5 Ired. L.) 463, the plaintiffs were tenants in common; and while, under the rule prevailing in this state, they might join in one action, yet when thus joined they recovered in accordance with their several rights. In *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4 the plaintiffs were tenants in common.

We have given to this subject a most careful consideration, examining the authorities and decided cases from other courts. They are not uniform. In several states it is held that where there is a joint action by tenants in common, if one is barred, the action fails as to all. The true rule would seem to be that, except where the necessity for all parties in interest to join "is founded upon the nature of the interest in the particular property," the plaintiffs recover in accordance with their rights as developed upon the trial; in other cases they must all show a right to recover when the action is brought. Statutes have been enacted in many of the states, permitting any one or more joint tenants and tenants in common to sue. Pom. Code Remedies, 137, note; 11 Enc. Pl. & Pr. p. 771. The possession of Hicks and those defendants claiming under him has continued for more than twenty-one years, during all of which time the statute has been in operation against Florence Cox, now Mrs. Newsome. She is clearly barred, and the conclusion must follow that her cotrustees are also barred. We think the statute well pleaded. The claim of both plaintiff and defendant is based upon what may be termed "technical rules of the law." If we should adopt the plaintiffs' contention that, in respect to this property, Mrs. Cameron should be treated as a *feme sole*, there would seem to be no very good reason why we should not find in her deed to Hicks a clear intention to execute the power conferred upon her to convey in fee, and aid its defective execution by adjudging the holders of the legal title trustees for the benefit of the defendants, who appear to be purchasers for value. The plaintiffs were objects of Mr. Coor's bounty, contingent upon Mrs. Cameron's failure to exercise the power of appointment. There is much force in the facts shown by the defendants to

sustain an equitable estoppel upon the plaintiffs.

The case is fraught with perplexities. Many of the principles of the common law regarding titles to real property are difficult to sustain upon the "reason of the thing." We find wisdom in the language of Earl, J., in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. To the suggestion that the reason upon which a common-rule law was founded had ceased to exist, he said: "It is impossible now to determine how the rule in the remote past obtained a footing, or upon what reason it was based; and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist or is not discernible; and yet on that account courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate." When men undertake to place their property out of the usual and fixed channels of alienation and descent, it frequently happens that their best considered plans fail to be accomplished, or, if accomplished, bring about the results not anticipated. There has been no more prolific source of litigation, with difficult questions to be solved, than the creation of trusts for the benefit of married women, and attempting to control the passing of the property into the possession of posterity.

To the end that the rights of the parties may be adjudged upon the principles herein laid down, there must be a new trial.

PENNSYLVANIA SUPREME COURT.

FRANK BURNS

v.

FRANK ROSS

and

HARRY J. MAKIVER, Appt.

(215 Pa. 293, 64 Atl. 526.)

Judgment—record—index—name.

The record of a judgment against one whose Christian name is Francis, if indexed

under the name of Frank, charges a prospective purchaser from the judgment debtor's heirs with notice of the existence of the judgment.

(May 14, 1906.)

APPPEAL by the terre-tenant from a judgment of the Court of Common Pleas No. 2, for Philadelphia County in plaintiff's favor in a suit brought to revive a judgment. **Affirmed.**

The facts are stated in the opinion.

Mr. James W. Laws, for appellant:

A purchaser is not bound to take notice of judgments or liens except those entered in the exact name in which his vendor holds title to the land in question.

•Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; Zimmerman v. Briggans, 5 Watts, 186; Wood v. Reynolds, 7 Watts & S. 406; Heil's Appeal, 40 Pa. 453, 80 Am. Dec. 590; Hutchinson's Appeal, 92 Pa. 186; Delaney v. Becker, 14 Pa. Super. Ct. 392; Rusterholtz v. Brown, 10 Pa. Dist. R. 21; Work v. Darby, 13 Pa. Co. Ct. 269.

Mr. James Alcorn for appellee.

Brown, J., delivered the opinion of the court:

On February 1, 1887, the firm of Thomas Carrick & Company, of which the appellee is the surviving member, entered a judgment against Frank Ross. The note on which it was entered had been given by Francis Ross, who signed his name to it "Frank Ross." At the time the judgment was entered Ross was the owner of the property purchased by the appellant from his heirs on March 14, 1904. He had acquired title to it on February 21, 1868, from Thomas Hodgson, by a deed in which as the grantee he was named "Francis Ross." He died September 23, 1899, on which date the judgment held by the appellee was revived. When the appellant took title from the heirs of Francis Ross, among whom was a son, Frank Ross, he had a search made for liens against the property. This search was for the liens of judgment against the heirs entered after they had acquired title under the interstate laws, and for those which had attached in the lifetime of Francis Ross. From September 23, 1899, to March 14, 1904, search was made for judgments and mortgages given by

Case Note.—Certainty and accuracy necessary in respect to Christian names or initials in record or index relied on as imparting constructive notice: — A rule which has found considerable favor as to the degree of certainty and accuracy necessary 7 L.R.A.(N.S.)

with respect to Christian names or initials, in order that the record or indices may be sufficient to impart constructive notice, holds the record to be sufficient if it contains enough to lead the inquirer to the information designed to be imparted by it;

Frank Ross, one of the sons, and for five years prior to the death of the father the search was only for mortgages and judgments indexed against Francis Ross; no attention having been paid to the name "Frank Ross." Upon the report of the searcher that there was but one judgment indexed against Francis Ross, the decedent, which was not a lien against the property, and that there were no liens against Frank Ross, the son, the appellant took the title. In June, 1904, the firm of the appellee issued a sci. fa. to revive the judgment against Frank Ross, with notice to the appellant as terre-tenant. He resisted the attempt to revive it against him as the owner of the property, but a verdict was directed against him, upon which judgment was subsequently entered. On this appeal we are asked to say that, as the judgment of Thomas Carrick & Company was indexed against Frank Ross,

the appellant had no notice of it as a lien upon the property belonging to Francis Ross when he purchased it from the heirs.

It is undoubtedly true that the first or Christian name of a defendant in a judgment must appear in the judgment index for the protection of an innocent purchaser, who is not bound to look beyond it for judgment liens against his vendor; but this rule must have a reasonable construction. In *Crouse v. Murphy*, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358, the case upon which the appellant seems to place his chief reliance, we held that, under the particular circumstances surrounding that case, a judgment given by Daniel J. Murphy, but signed by him "Daniel Murphy" and so indexed, was not a lien upon property owned and sold by him as "Daniel J. Murphy," as against a purchaser who looked for liens only against "Daniel J.

and for this purpose the inquirer's extraneous knowledge, and every fact which inquiry suggested by the records would have led up to, are taken into consideration.

Thus, in *Work v. Darby*, 13 Pa. Co. Ct. 269, one who received land as Jane T. sold it as Sarah Jane T. to one who knew that she was generally known as Jane T., and who executed to her a purchase-money mortgage. Judgment had previously been entered against her as Jane T., and it was held that the record of the judgment was notice to the purchaser, but not to a subsequent assignee of the mortgage who did not know that she was known by that name. And in *Jenny v. Zehnder*, 101 Pa. 296, a judgment indexed against F. Zehnter was held to be sufficient notice of a lien on land standing in the name of John Jacob Frederick Zehnder, where the proof shows that he was generally known as Mr. Zehnder, and, when called by his first name, which was very seldom, he was called Fred, and that he generally signed his name Frederick Zehnder or Fr. Zehnder, but that, in executing legal documents, he signed John Jacob Frederick Zehnder, or J. J. Zehnder, or simply Frederick Zehnder. The substitution of "t" for "d" in the surname was considered not to be a fatal error. So, in *Gillespie v. Rogers*, 146 Mass. 612, 16 N. E. 711, the record of a deed from J. M. H., in the name of J. H., by which latter name he was as well known as by the former, was held to be sufficient constructive notice to a subsequent purchaser. This case is, however, founded in part on the Massachusetts doctrine that mistakes in the record fall on the purchaser, and it makes no difference if the constructive notice provided by law proves insufficient.

The following authorities also hold that the record was sufficient to impart constructive notice to a subsequent purchaser or encumbrancer: *Huston v. Seeley*, 27 Iowa, 183, in which a conveyance, executed in the

name of J. A. Stringham, was indexed as by A. J. Stringham, and the caption to the instrument as recorded showed it to be from Almira J. Stringham; *Miltonvale State Bank v. Kuhnle*, 50 Kan. 420, 34 Am. St. Rep. 129, 31 Pac. 1057, where a mortgage by S. M. J. was recorded as by Samuel M. J.; *Fincher v. Hanegan*, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821, in which a mistake was made in the initial letter of the name of a mortgagor; *Green v. Meyers*, 98 Mo. App. 438, 72 S. W. 128, in which a judgment against Eleanor G. was abstracted by the initials of the Christian name, E. G.; *Piney v. Russell & Co.* 52 Minn. 443, 54 N. W. 484, in which a judgment was recorded against one whose Christian name was indicated only by initial letters; *B. F. Avery & Sons v. Texas Loan Agency* (Tex. Civ. App.) 62 S. W. 793, in which an abstract of judgment in favor of B. F. Avery & Sons, a corporation, was indexed under the letter A; *Hibberd v. Smith*, 50 Cal. 511, in which a judgment was entered omitting the Christian name of the judgment debtor altogether. But, contrary to the last proposition, it was held in *Smith's Appeal*, 47 Pa. 128, that the entry of a judgment against a partnership, omitting the Christian names of the partners, is ineffectual to impart constructive notice.

But the rule which is applied in *BURNS v. Ross*, to the effect that, where two names are derived from the same source, or where one is an abbreviation or a corruption of the other, but both are taken by common use to be the same though differing in sound, the use of one for the other is not a misnomer, was held to be inapplicable to a judgment indexed against one by the Christian name of Ellen, so as to be notice to one who purchased land of a person of the Christian name of Helen. *Thomas v. Desney*, 57 Iowa, 58, 10 N. W. 315. And a judgment against Jacob B. was held not to be notice

Murphy." The member of the court who wrote the opinion stated that he had looked into the city directory and found the name of "Daniel Murphy," with various middle letters and without any, occurring twenty times, and that to exhaust the possibilities as to "D. Murphy" would have required searches running into the hundreds. The purchaser was protected because he found no lien indexed "against 'Daniel J. Murphy,' or 'D. J. Murphy.'" By this it was clearly intimated that if a judgment had been indexed "D. J. Murphy," it would have been notice to the purchaser that it might be a lien against property owned by Daniel J. Murphy.

What was reasonably required of this appellant? In answering this we disregard the contention of the appellee, that he ought to have been put on notice by the indexing of other judgments and mortgages in the name

of "Frank Ross" given by Francis Ross, who was, according to the testimony produced by the appellee, commonly known to others than the appellant as "Frank Ross." We pass only upon the simple question whether a purchaser from the heirs of Francis Ross was bound to look for liens indexed in his lifetime against "Frank Ross." In Jones's Estate, 27 Pa. 336, the court below was reversed for holding that a judgment docketed against "A. Jones" did not give the holders of it priority of lien over those holding judgments subsequently docketed against "Abel Jones," as whose property the real estate was sold by the sheriff; and, in awarding the fund to those lien creditors whose judgments had been docketed against "A. Jones," it was said by Woodward, J.: "A description of persons by the name by which they are commonly known as sufficient in pleading, either criminal or civil, and as much, I

when recorded against John B. Zimmerman v. Briggans, 5 Watts, 186.

The record was held to be insufficient to impart constructive notice, in *Bankers' Loan & Invest. Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914, 39 S. E. 231, in which a judgment against May M. Simmons was docketed and indexed in the name of Mrs. T. Frank Simmons; in *Aultman v. Ward*, 50 Neb. 442, 69 N. W. 935, in which a judgment against J. T. Ward was entered against S. T. Ward; and in *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392, in which a chattel mortgage executed by J. W. Dixon was entered in the name of A. W. Dixon.

A record of a general judgment against William M. is not constructive notice as to one against H. W. M., so as to render it a lien upon real estate after it has come into the possession of a remote grantee who purchased for value without notice, further than that furnished by the record that H. W. M. and William M. were one and the same person. *Johnson v. Hess*, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445.

Nor is the docketing of a judgment against Edward Davis constructive notice that there is an encumbrance against either E. A. Davis or Edward Davis, and does not affect the rights of a person who has no notice of the actual identity of Edward Davis, the judgment debtor. *Davis v. Steeps*, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769. A Wisconsin statute requires an entry to be made of "the name at length of each judgment debtor."

And land conveyed to Mary Allely is not, as against subsequent purchasers, bound by a judgment recorded as against May Alley. *Phillips v. McKaig*, 36 Neb. 853, 55 N. W. 259.

The Pennsylvania cases have abrogated the common-law rule which holds the middle letter or initial to be no part of a person's name. Thus, it was said in *Wood v. Reynolds*, 7 Watts & S. 406, that "it is certain 7 L.R.A. (N.S.)

that an initial standing with a name of baptism is no part of it in pleading, but it follows not that an omission of it is to be disregarded as an index of notice to purchasers. Persons of the same name are individuated by various additions; sometimes by title, profession, residence, or seniority; sometimes by numerals; sometimes by color of the complexion or hair; and sometimes by an initial. The absence of the badge in this instance misled a purchaser;" if a judgment creditor permits the omission from his record of the initial which distinguishes his debtor from others of the same name, he must bear the loss. This case was followed in *Hutchinson's Appeal*, 92 Pa. 186, in *Stott v. Irwin*, 2 Chester Co. Rep. 137, and in *Crouse v. Murphy*, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358, in which similar decisions were rendered. The *Wood Case* and *Hutchinson's Appeal*, were, however, distinguished in *Jenny v. Zehnder*, supra, on the ground that the mistakes made in those cases altogether destroyed the identity of the person.

A rule much in harmony with the recording acts, and which would be simple and uniform in all cases of real-estate records, has been adopted in Illinois. In *Grundies v. Reid*, 107 Ill. 304, it was held that the law protected the purchaser of property by the title which appeared of record, unless there was notice of something to the contrary. Therefore, one who made a loan in reliance on the record title was protected against a prior judgment against the owner by another name, although he was as well known by the latter as by the former.

Some confusion has arisen among the authorities as to whether the rule of *idem sonans* applies to records. It is said that the law of notice by record is addressed to the eye, and not to the ear, and therefore the rule cannot apply to records. The cases in which this rule is generally sought to be applied are those involving surnames only.

presume, as the act of assembly, prescribing judgment dockets, meant to require. The use of names is to describe the individual of whom we speak, so as to distinguish him from all other persons. They are like definitions in mathematics, though less exact. Where two names, said Judge Washington, in *Gordon v. Holiday*, 1 Wash. C. C. 289, Fed. Cas. No. 5,610, have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer. If in common use the names be the same, the person cannot be misnamed if either be used. In *Fenton v. Perkins*, 3 Mo. 144, it was held that courts take judicial notice of the abbreviation of a man's Christian name, though a doubt was made about an abbreviation of the family name." Under the authority of this case a judgment indexed "F. Ross" might have been notice to a purchaser looking for liens against "Francis Ross."

The indexing of the name of the defendant in a judgment as he is commonly known is not, as a general rule, sufficient to meet the requirements of the act of April 22, 1856 (P. L. 332), relating to the indexing of judgments; but its requirements are met when the first or Christian name of a defendant is so indexed that a prospective purchaser examining the index ought to know from it of the existence of a lien against the property which he is about to purchase. When it is commonly known that certain first or Christian names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same and giving the same sound and substance to each, the judgment index must be searched for each. In the absence of a statutory requirement that the Christian name of a defendant in a judgment must be indexed exactly as it is written in the deed under which he holds title, any other rule would offend reason. When the appellant, as a prospective purchaser of the Ross property, was looking for liens against Francis Ross, why should he not have looked for those indexed against "Frank?" The two names are the same, and are used, as is universally known, as being the same. *Standard Dictionary in English*, vol. 2, p. 2138; *Webster's International Dictionary*, p. 1902. When looking for liens against "Jacob" a searcher must know that the world knows no difference between "Jacob" and "Jake," and that a judgment indexed against "Jake" may be a lien on the property of "Jacob." As a rule "Mike" is used for the more dignified "Michael," and the bearer

of the latter name as the grantee of a title to him is generally known, not only to himself, but to the community in which he lives, as plain "Mike;" and so a stronger illustration is the name "Frank" given to "Francis." It is a matter of common knowledge that seldom is one bearing the Christian name of "Francis" known by any other name than "Frank." These illustrations need be pursued no further. When the appellant was looking for the title to be free from encumbrances cast upon it by Francis Ross, it was his duty to see that the owner had not encumbered it in the name of "Frank Ross."

The assignments of error are overruled, and the judgment is affirmed.

VERMONT SUPREME COURT.

EDMUND C. MOWER, Trustee, etc., of Arthur McCarthy, Bankrupt,

v.
J. D. McCARTHY et al.

(— Vt. —, 64 Atl. 578.)

Parol mortgage—validity.

1. A parol mortgage to secure a loan for the purchase of a stock of goods, which is to attach not only to the goods already in stock, but to such as might be added thereafter, is valid as between the parties.

Same—rights of creditors.

2. A parol mortgage to one loaning money to purchase a stock of goods upon the stock, and additions to it, is valid; and possession taken under it by the mortgagee will relate to the date of the agreement, so as to preclude creditors of the purchaser from sharing in the proceeds of their sale..

Case Note.—Validity of verbal chattel mortgage:—At common law a mere oral agreement to give and accept a chattel as security for a debt was recognized as valid, and, except for the statute of frauds or a statute requiring the filing of the instrument, a verbal mortgage is still held to be valid, as shown by the following authorities. In most states, however, at present, there are statutes which require chattel mortgages to be filed in order to make them effective as against creditors and bona fide purchasers, unless the property is turned over to the mortgagee. Consequently, when the subject of the validity of a chattel mortgage comes before the court, it generally arises in some contention between the parties to the agreement.

As between the parties themselves, the following cases sustain the validity of a verbal chattel mortgage without change of possession: *Morrow v. Turney*, 35 Atl. 131; *Brooks v. Ruff*, 37 Ala. 371; *Gafford v. Stearns*, 51 Ala. 434; *McKeithen v. Pratt*,

Evidence—statements to show fraud—admissibility.

3. Statements of a mortgagor tending to show intent on his part to defraud his creditors, with which the mortgagee is in no wise connected, are not admissible in an action to recover property from the mortgagee after he has taken possession of it under his mortgage.

Same—mortgagor and mortgagee—privity.

4. The mere relation of mortgagor and mortgagee does not create such a privity of estate as to render the declarations of one with regard to the property admissible in evidence against the other.

Same—declarations against interest.

5. Evidence of a statement by a mortgagor that the mortgagee had loaned him money and had a right to take possession

of the property at any time is admissible in an action on behalf of creditors to recover possession of the property from the mortgagee after he has taken possession of it under his mortgage.

(August 14, 1906.)

EXCEPTIONS by plaintiff to rulings of the Chittenden County Court made during the trial of an action brought to recover property alleged to have been transferred in fraud of creditors, which resulted in a judgment in defendants' favor. Overruled.

The facts are stated in the opinion.

Messrs. E. C. Mower and Powell & Powell, for plaintiff:

One cannot convey by mortgage or other-

53 Ala. 116; Bickley v. Keenan, 60 Ala. 293; Glover v. McGilvray, 63 Ala. 508; Burns v. Campbell, 71 Ala. 271; Bates v. Wiggin, 37 Kan. 44, 1 Am. St. Rep. 234, 14 Pac. 442; Weil v. Ryus, 39 Kan. 564, 18 Pac. 524; Carroll Exch. Bank v. First Nat. Bank, 50 Mo. App. 92; Reynolds v. Fitzpatrick, 23 Mont. 52, 57 Pac. 452; Reiss v. Argubright, 3 Neb. (Unof.) 756, 92 N. W. 988; Conchman v. Wright, 8 Neb. 1; Bank of Rochester v. Jones, 4 N. Y. 498, 55 Am. Dec. 290; McCoy v. Lassiter, 95 N. C. 88; Moore v. Brady, 125 N. C. 35, 34 S. E. 72; Davis v. Childers, 45 S. C. 133, 55 Am. St. Rep. 757, 22 S. E. 784.

It has also been held to be valid as to third parties with notice. Sparks v. Wilson, 22 Neb. 112, 34 N. W. 111; First Nat. Bank v. Taylor, 69 Kan. 28, 76 Pac. 425.

But not as to creditors and subsequent purchasers in good faith. Sparks v. Wilson; Conchman v. Wright; and Reiss v. Argubright,—supra; Ceas v. Bramley, 18 Hun, 187.

A verbal mortgage, without change of possession, was held, in Jackson v. Rutherford, 73 Ala. 155, to create only an equitable lien in the mortgagee, which will not support an action of detinue.

The same decision was rendered in Rees v. Coats, 65 Ala. 256, in which a similar mortgage was given, covering a crop of cotton not yet planted. The court declared erroneous a *dictum* to the contrary in Brown v. Coats, 56 Ala. 439, in which the same contract was involved.

To be valid, the oral chattel mortgage must contain all the essential elements and features of a written instrument; if there is no agreement that the property, or the title thereto, shall be held until the claim is paid, such a mortgage is invalid. Bank of Highland v. Evans-Snider-Buell Co. 9 Kan. App. 80, 57 Pac. 1046.

A bill of sale, absolute on its face, but accompanied by a verbal defeasance, was held, in Omaha Book Co. v. Sutherland, 10 Neb. 334, 6 N. W. 367, to be a valid chattel mortgage as between the parties thereto, and as to the others with actual notice; and 7 L.R.A. (N.S.)

a sale of the mortgaged chattels by the mortgagor to third persons conveyed notice.

The lien of a mortgagee under a verbal mortgage, who had possession of the mortgaged chattels, was held in Gafford v. Stearns, supra, not to be affected by a subsequent written mortgage executed by the owner of the property.

A verbal mortgage, by which a shipper agreed that, if a certain bank would honor his checks to pay for a shipment of stock, the stock would be considered as the property of the bank, and he would deposit with the bank the proceeds as soon as the sale could be effected, was held to be valid in Carroll Exch. Bank v. First Nat. Bank, supra; and the bank was held to be entitled to maintain an action to recover such proceeds from another bank in which they were deposited, notwithstanding a statute which declares that no mortgage on personal property shall be valid against any other person than the party benefited, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be executed, acknowledged, filed, and recorded; since, in this case, the defendant bank received the fund with full knowledge of the oral agreement, and there was no evidence that the defendant had any interest in the funds whatever.

But an agreement between a surety on a note given for the purchase price of a team and the purchaser of the team, that the former shall retain a lien on, or title to, the property until the note is paid, was held to be void in Oyler v. Renfro, 86 Mo. App. 321, even as to a purchaser with notice, under the statute of 1899, § 3401, requiring all such agreements to be in writing and to be recorded.

A verbal mortgage covering a crop to be grown, to secure the rent of land, the hire of a mule, and for future advances, was held to be valid in Thrash v. Bennett, 57 Ala. 156, and entitled the mortgagee to maintain an action against the mortgagor to recover possession of the crop.

wise property which is not in existence at the time of the conveyance.

Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; *Peabody v. Landon*, 61 Vt. 328, 15 Am. St. Rep. 903, 17 Atl. 781; *Matthews v. Hardt*, 9 Am. Bankr. Rep. 376; *Re Hunt*, 14 Am. Bankr. Rep. 424.

Chattel mortgages covering after-acquired property, where the mortgagor retains possession, sells the goods, and handles the funds as his own, are void.

Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; *Means v. Dowd*, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65; *Peabody v. Landon*, supra; *Re Hull*, 8 Am. Bankr. Rep. 302; *Johnston v. Huff, A. & M. Co.* 13 Am. Bankr. Rep. 287; *Coolidge v. Melvin*, 42 N. H. 510; *Putnam v. Osgood*, 51 N. H. 192; *Wilson v. Wallace*, 67 Vt. 646, 32 Atl. 501; *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547.

Under the bankruptcy act, as amended February 5, 1903, a preference is not created until notice thereof is given to the other creditors, either by recording or registering the instrument of transfer, or by taking actual or open possession of the property.

Wilson Bros. v. Nelson, 7 Am. Bankr. Rep. 142; *Re Klingaman*, 4 Am. Bankr. Rep. 258.

As to what constitutes a preference, the state courts are bound by the bankruptcy act.

Wilson Bros. v. Nelson, supra; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; *Babbitt v. Kelley*, 96 Mo.

App. 529, 9 Am. Bankr. Rep. 335, 70 S. W. 384.

This agreement between father and son was of such a character as required record.

Meyer Bros. Drug Co. v. Pipkin Drug Co. 14 Am. Bankr. Rep. 477; *Re Hunt*, 14 Am. Bankr. Rep. 416.

The mortgagee had reasonable cause to believe that a preference was intended under § 60b of the bankruptcy act.

Wilson Bros. v. Nelson, supra; *Benedict v. Deshel*, 11 Am. Bankr. Rep. 20; *Sebring v. Wellington*, 6 Am. Bankr. Rep. 671; *Western Tie & Timber Co. v. Brown*, 13 Am. Bankr. Rep. 447; *Hackney v. Raymond Bros.* *Clarke Co.* 10 Am. Bankr. Rep. 214; *Johnson v. Wald*, 2 Am. Bankr. Rep. 84, 35 C. C. A. 522, 93 Fed. 640; *Christopherson v. Oleson* (S. D.) 102 N. W. 685; *Pepperdine v. National Exch. Bank*, 84 Mo. App. 234, 2 N. B. N. Rep. 675; *Upson v. Mt. Morris Bank*, 14 Am. Bankr. Rep. 9; *Brownell v. Russell*, 76 Vt. 331, 57 Atl. 103; *Western Tie & Timber Co. v. Brown*, 12 Am. Bankr. Rep. 116; *Re Eggert*, 4 Am. Bankr. Rep. 467.

Messrs. V. A. Bullard and R. E. Brown, for defendants:

There was a valid mortgage.

Rice v. Hulett, 63 Vt. 321, 22 Atl. 75; *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *McLoud v. Wakefield*, 70 Vt. 558, 43 Atl. 179; *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11.

Under this mortgage, the defendant Mc-

The validity of an oral mortgage of a crop to be planted was also sustained in *Stearns v. Gafford*, 56 Ala. 544.

But § 1731 of the Alabama Code now declares verbal chattel mortgages to be void. *Hill v. Nelms*, 86 Ala. 442, 5 So. 796; *Winslow v. Jones*, 88 Ala. 496, 7 So. 262.

Parties cannot, by parol, substitute personal property not embraced in a written mortgage for property included in the mortgage, so as to transfer the lien upon the substituted property and release the mortgaged property, under a statute requiring that mortgages of personal property should be in writing and signed by the mortgagor. *Bloch v. Edwards*, 116 Ala. 90, 22 So. 600.

The delivery of mortgaged chattels to the mortgagee was held, in *Bardwell v. Roberts*, 66 Barb. 433, to render a verbal chattel mortgage valid under the statute of frauds, and entitled the mortgagee to recover the value of the chattels taken from his possession by the mortgagor and sold to a third person. In this case it appeared that such third person had knowledge of the arrangement between the mortgagee and mortgagor.

In Texas a verbal reservation by the vendor of the title to goods sold and delivered 7 L.R.A. (N.S.)

as security for the purchase price is void. *Hastings v. Kellogg* (Tex. Civ. App.) 36 S. W. 821; *Harrold v. Barwise*, 10 Tex. Civ. App. 138, 30 S. W. 498; *Dixon v. Sanderson*, 72 Tex. 359, 13 Am. St. Rep. 801, 10 S. W. 535.

A parol renewal of a written chattel mortgage was declared to be invalid in *Willows v. Rosenstien*, 5 Idaho, 305, 48 Pac. 1067, under a statute providing that "a mortgage can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property."

A verbal mortgage of exempt personal property was held, in *Knox v. Wilson*, 77 Ala. 309, to be invalid, and inoperative under statute to waive the right of exemption.

Where statutes provide that a mortgage of chattels shall be void unless the mortgage is filed or there is an actual and continued change of possession in the property, it is essential to the validity of a verbal chattel mortgage that the provision with reference to an actual and continued change of possession be complied with. *Buckstaff Bros. Mfg. Co. v. Snyder*, 54 Neb. 538, 74 N. W. 863; *McTaggart v. Rose*, 14 Ind. 230.

Carthy was entitled to the possession of the property as against the bankrupt, and might take possession at any time.

Longey v. Leach, 57 Vt. 377; McLoud v. Wakefield, *supra*.

The taking of possession by the mortgagee relates back to the time of the first giving of the mortgage in determining the rights of the mortgagee and trustee.

Rice v. Hulett and McLoud v. Wakefield, *supra*; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542; Peabody v. Landon, *supra*; Chase v. Denny, 130 Mass. 566; Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563; Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

Tyler, J., delivered the opinion of the court:

On August 15, 1901, defendant McCarthy loaned his son Arthur \$5,000 with which to purchase stock of goods and establish a clothing business in Burlington, and afterwards loaned him \$2,000 and \$1,000 for the same purpose and took his promissory notes for the several sums. When the \$5,000 was furnished Arthur gave the defendant a verbal mortgage upon the stock that was then to be purchased as security for the repayment of that loan and of all future loans that should be made; and it was understood between them that the mortgage should include the fixtures in the store and all goods that should be subsequently purchased to replenish or increase original stock, and that the defendant might, at any time, take possession of the store and goods under his mortgage. Arthur had no capital; he carried on the business with the money loaned him by the defendant from August, 1901, till April, 1903. The defendant and his wife held a lease of the store during the continuance of the business. Arthur paid most of the rent and managed the business in all respects as if it were his own. On April 3, 1903, the defendant, by Brodie, a deputy sheriff, took possession of the store, fixtures, and goods by virtue of his mortgage and upon a writ that he sued out against his son. All the notes were then due, and nothing had been paid upon them but \$321.82 on the \$1,000 note. The defendant claimed that he took possession for the purpose of completing his mortgage, and that the property was rightfully in his possession by virtue thereof at the time it was taken from him by the plaintiff in this suit. The plaintiff claimed that the two McCarthys conspired to defraud the merchandise creditors and to obtain all the property for

the defendant and thereby for their mutual benefit. A petition in bankruptcy was filed against Arthur on May 15, 1903, and he was adjudged a bankrupt on June 6th following. He was insolvent at the time of the adjudication, and his liabilities were far in excess of his assets. The present action is replevin, in which the plaintiff, as the trustee, in bankruptcy of the estate of Arthur, seeks to recover the property described in the writ as belonging to the estate, while the defendant claims it by virtue of his verbal mortgage. Neither of the McCarthys ever informed any of Arthur's creditors of the verbal mortgage, nor of the existence of any lien upon the goods. The creditors had been pressing Arthur for payment before the defendant took possession, and the evidence tended to show that some steps had been taken towards making a sale of the bankrupt's stock and of a *pro rata* division of the proceeds among the creditors, and that this was with the defendant's knowledge and sanction. Special verdicts were submitted, and the jury found, in substance, as above stated, that by the agreement relative to the verbal mortgage the defendant was to be secured on the goods, furniture, and fixtures for the money advanced by him, also upon all goods that might be added to the stock until the advancements were repaid; that he was to have a right to take possession of the mortgaged property whenever he saw fit; that he took possession under his mortgage by his agent, Brodie, April 3, 1903; that he was in possession of the mortgaged property when the writ in this suit was served; that \$1,000 worth of the original stock was then on hand; that when the defendant took possession he had reasonable cause to believe that his son was insolvent, but that he did not have reasonable cause to believe that his thus taking possession was intended by his son to give him a preference over other creditors.

1. The agreement made by the McCarthys constituted a common-law mortgage, which is defined to be an absolute sale of the property by the mortgagor to the mortgagee, subject to be redeemed according to the terms of the contract. *Hutchins v. King*, 1 Wall. 53, 17 L. ed. 544; *Wood v. Dudley*, 8 Vt. 430; *Blodgett v. Blodgett*, 48 Vt. 32. So it was held in *Rice v. Hulett*, 63 Vt. 321, 22 Atl. 75, that the giving of security upon chattels, without delivery, is, in effect, a mortgage at common law, and may be valid between the parties, though not in writing. *Jones, Chat. Mortg.* § 2. An unrecorded mortgage is valid between the parties. *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542. It is also held that where, as in the present case, it is stipulated that the mortgagor may,

from time to time, sell portions of the mortgaged property and replace it with other property of similar kind and value, and the mortgagee takes possession of it, it is brought under the operation of the mortgage as of the date thereof. *Peabody v. Landon*, 61 Vt. 318 15 Am. St. Rep. 903, 17 Atl. 781. And in *McLoud v. Wakefield*, 70 Vt. 559, 43 Atl. 179, it is held that, if there is no stipulation to the contrary, the mortgagee may, at any time, take possession of the mortgaged property; and that, having taken possession of the goods covered by the mortgage but purchased after its execution and delivery, such goods come under its cover and operation as of its date. *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11, goes to the extent of holding that a chattel mortgage on after-acquired property, under which the mortgagee has taken possession of such property with the mortgagor's consent, is valid against the mortgagor's trustee in bankruptcy, in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. This judgment was affirmed in 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. This was the holding in *Chase v. Denny*, 130 Mass. 566. These decisions go upon the ground that the mortgagee's title to the after-acquired property relates to the date of the mortgage, and that his taking possession is not the acceptance of a preference, but the assertion of a previously acquired right. After the condition of this mortgage had been broken and the mortgagee had taken possession of the mortgaged property, the mortgagor had no interest in the property other than a right to redeem it, and the trustee in bankruptcy had no greater interest therein than the mortgagor. It must therefore be held that, unless the present case is distinguishable from the recent cases decided by this court, the judgment of the trial court must be affirmed.

The rule of law that one cannot convey property that is not in existence at the time of the conveyance, like fish to be caught in the sea (*Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357), does not apply here. The findings of the jury were that it was understood between the father and son that the former was to be secured on the goods for the money advanced by him, and that this included whatever goods were in the store at the time of the \$5 000 loan and all goods that might thereafter be added to the stock; so 7 L.R.A.(N.S.)

it is not made clear whether or not all or any part of the original purchase had then arrived. But, assuming that none had arrived when the first loan was made, it was the intent of the parties that the mortgage should attach to the goods when they were placed in the store, and in this respect the goods originally and subsequently purchased stood precisely alike as being subject to the mortgage. It was held in *Bryan v. Lewis*, *Ryan & M.* 386, that a sale of goods to be delivered at a future day, when the seller has not the goods nor any contract for them, but expects to go into the market and buy them, is not a valid contract. But this has been overruled in England, and in this country it is the rule that a person may sell chattels of which he is not, at the time, possessor. 2 Kent, Com. 13th ed. 468; 24 Am. & Eng. Enc. Law, p. 1043, and notes. A chattel that has ceased to exist, or that never had an existence, is not the subject of a sale, though an article that has a potential existence, like the natural product or expected increase of property belonging to the seller, may be the subject of an executory contract of sale. But no question is raised in the present case as to the nonexistence of the goods at the time the mortgage was given, for the reason that the mortgagee, by virtue of the agreement and the nonpayment of the notes, took actual possession of the property and was in possession thereof when the petition in bankruptcy was filed. *Peabody v. Landon*, 61 Vt. 329, 15 Am. St. Rep. 903, 17 Atl. 781; *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. Rep. 28, and note, 112 Ga. 199, 37 S. E. 485. *Mathews v. Hardt*, 79 App. Div. 570, 9 Am. Bankr. Rep. 373, 80 N. Y. Supp. 462, is not an authority for the plaintiff, for in that case there was nothing but an agreement to give a lien on the property, the parties so treated the transaction, and the lien was not to be enforced until advances to a certain amount had been made. See *Re Hunt*, 14 Am. Bankr. Rep. 416, 139 Fed. 238. The plaintiff argues that there is nothing in the case to indicate that Arthur could not have sold the entire stock at any time if he had so chosen, and that the case is therefore brought within the rule recognized in *Wilson v. Wallace*, 67 Vt. 646, 32 Atl. 501, that an absolute right in the mortgagor to dispose of the property in one transaction for his own benefit vitiates the mortgage. The exceptions do not show such an agreement between the parties to this mortgage, and from what does appear we think the fair inference is that they intended that Arthur should begin and carry on a retail business in the usual manner, keeping up the stock; and he did so conduct the busi-

ness for a year and a half from August 3, 1901.

2. The plaintiff further contends that, notwithstanding the finding by the jury, that the defendant did not have reasonable cause to believe that his taking possession was intended by his son to give him a preference over the other creditors, the transaction was voidable under the bankruptcy act. *Peabody v. Landon* is reported in 15 Am. St. Rep. 908, with full notes by Mr. Freeman, wherein he speaks of the wide difference in judicial opinions upon this subject, and gives his own opinion that the weight of reason is with those who maintain that such a mortgage as the one here under consideration, with like agreements contemporaneously made, is fraudulent and void as to subsequent purchasers or creditors of the mortgagor; but he says that it is for each state to adopt that line of decisions which best accords with its own views of public policy and seems to its judges to be best sustained by reason and authority. See *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567, 184 Mass. 361, 63 L.R.A. 738, 100 Am. St. Rep. 562, 68 N. E. 844. The writer cites numerous authorities in support of his view, and a "respectable number" which decide that it cannot be held, as matter of law, by the court that such a mortgage is fraudulent and void, but that it is for the jury to determine as a question of fact. He cites, among other cases, *Lister v. Simpson*, 38 N. J. Eq. 438, where the court closed an able opinion by saying that the mere fact that a mortgagor retains possession and uses the mortgaged chattels has never been accepted in that state as conclusive and unanswerable evidence of fraud. The plaintiff cites many cases from the American Bankruptcy Reports, which hold that, where a debtor is insolvent within the meaning of the bankruptcy act, and the creditor has knowledge of the insolvency, or has such information as would put a prudent person upon inquiry, and receives a payment, it follows, as a necessary inference, that he had reasonable cause to believe that it was intended as a preference. *Pepperdine v. National Exch. Bank*, 84 Mo. App. 234, 2 N. B. N. Rep. 675, Missouri court of appeals, which states this rule with much force. The New Hampshire cases cited by the plaintiff disfavor such agreements, calling them secret trusts. *Tatman v. Humphrey*, 184 Mass. 361, 63 L.R.A. 738, 100 Am. St. Rep. 562, 68 N. E. 844, is an authority for the plaintiff, for it is there held that the preference created by a mortgagee taking possession of the mortgaged property under an unrecorded mortgage, within the four-months period, dates from the ac-

quisition of possession under the mortgage. *Knowlton*, Ch. J., remarked in his opinion that "the reason for the enactment, as it is interpreted, is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies that there was no encumbrance on his stock or fixtures,—a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning, if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property, and leave nothing for the other creditors who had trusted him because of his possessions." *Clayton v. Exchange Bank*, 10 Am. Bankr. Rep. 183, 57 C. C. A. 656, 121 Fed. 630, is like the Massachusetts case in its facts and in the statement of the law by the court. But *Humphrey v. Tatman* was reversed in 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

3. The plaintiff also contends that the case falls within the amendment of 1905 to § 60a (act Feb. 5, 1903, chap. 487, § 13, 32 Stat. at L. 799, U. S. Comp. Stat. Supp. 1905, p. 689), which is: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required;" but this obviously relates to written chattel mortgages, which are required by law to be recorded; therefore the amendment does not control here. In this case, upon the findings of the jury, there was no actual fraud. All the money that went into the purchase of these goods was the defendant's. Upon the failure of his son to repay the loans, the defendant had the right to take possession of the goods and preclude the creditors from sharing in the proceeds of their sale, and his taking possession related to the time of the agreement. This has been the holding of this court in former cases, and we find no occasion to depart from it, although the courts in many of the states maintain a different doctrine, as has been shown.

4. The plaintiff contends that there was error in the admission and exclusion of evidence. The plaintiff claimed in the court below, and claims here, that the original agreement between the McCarthys was fraudulent; that they conspired to defraud the jobbers, who sold goods to Arthur, by obtaining them for the mutual benefit of the father and son. The conceded facts show that the agreement was, in effect, a common-law mortgage, yet the plaintiff might show by competent evidence that the

business was carried by Arthur with a purpose to obtain all the goods he could without paying for them and then have his father take possession of them upon his mortgage. It was in this view that the false statements made by Arthur to his creditors were offered. Those statements, and the fact that Arthur, after his father took possession, removed \$2,500 worth of goods from the store in the nighttime and stored them in another town, show his intention to defraud his creditors. If the action were against him, these statements would have been admissible in proof of his fraud; but the action is against his father, and there was no evidence offered that tended to connect the defendant with these statements. Indeed, the court said, in ruling them out, that, if any evidence should afterwards be offered tending to connect the defendant with them, the offer of them in evidence might be renewed. As such evidence was not produced, the statements could not have affected the defendant's liability any more than the evidence of Arthur's removing a part of the goods from the store without the defendant's knowledge. It is also a well-settled rule, where an attempt is made to show conspiracy, that a foundation must first be laid by proof sufficient in the opinion of the trial court to establish *prima facie* the fact of the conspiracy between the parties, or proper to be laid before the jury, as tending to establish such conspiracy, before admissions of an alleged coconspirator can be admitted. 1 Greenl. Ev. § 111. The exceptions show that the necessary foundation was not laid in this case.

5. The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud the creditors of the former, did not create such a privity of estate as entitled the plaintiff to use the declarations of one against the other. There was nothing suspicious or unusual in the conduct of the defendant. He had loaned his son \$8,000 upon his notes secured by what we hold was a valid mortgage. He learned that his son was in debt and insolvent, and, by virtue of the agreement, he took possession of the goods and fixtures. He does not claim under a right acquired subsequent to his son's declarations, but under a prior right, and, when he exercised that right by taking possession, his title dated back to the time of making the mortgage. It must be seen that, if the statements had been received in evidence, the jury could have made no legitimate use of them as affecting the defendant's liability, for no relation was shown to exist between him and his son that made the declarations of the latter evidence against him.

7 L.R.A. (N.S.)

6. The testimony of Donlin was that he was told by Arthur, soon after the business was undertaken, that the defendant had loaned him \$5,000 or \$6,000 to go into business with, and that the defendant was to have the right, at any time, to take possession of the property. This evidence was admissible for the reason that the plaintiff, as trustee, was successor to all rights of property that Arthur possessed, and that he must recover through Arthur's title. It was held, in *Alger v. Andrews*, 47 Vt. 238, that the declarations of one against his title to property, made while in his possession and before he assigned it to the defendants, were admissible against the defendants. See *Bucklin v. Beals*, 38 Vt. 653; *Davis v. Windsor Sav. Bank*, 48 Vt. 532. This admission stands upon opposite ground from that upon which Arthur's statements to his creditors were offered in evidence. They were in support of the plaintiff's claim of title, while this admission makes against that claim and against the plaintiff's interest.

There was no error in the rulings. Judgment affirmed.

WASHINGTON SUPREME COURT.

JOHN C. HAYES, Resp't.,

v.

CITY OF SEATTLE, Impleaded, etc., Appt.

(— Wash. —, 86 Pac. 852.)

Municipal corporation—unsafe sidewalk—liability.

A municipal corporation which permits the maintenance in a prominent thoroughfare in constant use by pedestrians of an aperture covered with iron doors of such character that one may be opened without any guard to protect the hole is liable for an injury caused to a pedestrian who fell

Case Note.—Liability of municipal corporation for injury from opening maintained in sidewalk by abutting owner:—From a review of the authorities bearing upon this question in the note in 61 L.R.A. 583, the conclusion was there drawn that municipalities are liable for injuries to travelers caused by such openings, when, with actual or constructive notice to the city, they are permitted to be constructed, maintained, or used in a defective, negligent, or unsafe manner. This conclusion finds support in the subsequent cases.

Thus, in *Drake v. Kansas City*, 190 Mo. 370, 109 Am. St. Rep. 759, 88 S. W. 689, it was held that coal holes maintained in sidewalks by abutting owners call for greater care and closer inspection by the city and its officers than ordinary sidewalks demand where no such conditions exist. It was also held that a defect in the

through an opening left by the raising of one door, although it had no actual knowledge of the negligent use being made of the opening at the time of the accident, and the cover had been raised only a few minutes, so that it was not chargeable with notice.

(August 27, 1906.)

A PPEAL by the defendant city from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Messrs. Scott Calhoun, Elmer E. Todd, and F. R. Conway, for appellant:

The city is not liable in the absence of knowledge on its part that the street is being used negligently.

Copeland v. Seattle, 33 Wash. 415, 65 L.R.

cover to a coal hole is not latent, so as to relieve the city from liability to a pedestrian, where it could be discovered from an examination or inspection made from the surface of the sidewalk.

In *Parks v. New York*, 111 App. Div. 836, 98 N. Y. Supp. 94, it was held that, where the city issued a permit to the owner of land abutting upon the street to excavate beneath the sidewalk, which necessitated the removal of the sidewalk itself and the erection of a temporary bridge in place thereof, an absolute duty was imposed upon the city to see to it that the portion of the street interfered with by reason of the permit was kept reasonably safe, or that the person using it was seasonably warned that he could not rely upon the presumption that it was safe for use.

In *Link v. New York*, 82 App. Div. 486, 81 N. Y. Supp. 577, the plaintiff was injured by a fall into an open cellar way, over a coping which was not of sufficient height to guard the cellar way. The cellar projected onto the sidewalk over 4 feet, and had been maintained in the same condition for twenty-three years. The city was held liable for the accident.

In *Payne v. Cleveland*, 25 Ohio C. C. 457, it was held that the city was liable for its failure to repair a coal hole in the sidewalk, constructed and maintained by the abutting owner under permission granted by the city, when, prior to the accident, knowledge of its dangerous condition was brought home to a policeman, whose duty it was, by rule of the police department, to communicate such knowledge to the officers having authority to remedy the matter; and evidence was admissible to show these facts, and also to show that the owner then told the policeman that he could not fasten or secure the cover to the hole because the fastening was broken.

In *Parks v. New York*, supra, it was held that notice to a policeman of a defect in a 7 L.R.A. (N.S.)

A. 333, 74 Pac. 582; *Whitty v. Oshkosh*, 106 Wis. 87, 81 N. W. 992; *Morrison v. McAvoy* (Cal.) 70 Pac. 626; *Tubensing v. Buffalo*, 51 App. Div. 14, 64 N. Y. Supp. 399.

It does not rest with any municipal corporation to deny to the owner of property abutting on a street his right to make and use an excavation under the sidewalk on such street, and to gain access to such excavation through an opening in such sidewalk.

2 Dill. Mun. Corp. 4th ed. § 656b; *Gordon v. Peltzer*, 56 Mo. App. 599; *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Lafayette v. Blood*, 40 Ind. 62; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

Messrs. McCafferty & Bell for respondent.

Per Curiam:

The respondent fell into an opening in a

temporary bridge over an excavation under the sidewalk was notice to the city.

In *Drake v. Kansas City*, supra, it was held that, if the construction of a coal hole, put in by permission of a city, was such that it was improper and unsafe, and the cover was liable to be displaced, the city was not entitled to actual notice, for it had constructive notice from the beginning.

In *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912, it was held that the granting of a permit to repair the sidewalk, in which there was a trap door, and therein limiting the time for doing the work to fifteen days, was notice to the city that the work was in progress, and charged the city with the duty to see that it was properly conducted.

In *Earl v. Cedar Rapids*, 126 Iowa, 361, 106 Am. St. Rep. 361, 102 N. W. 140, it appeared that a cellar or area way 3 feet wide and 6 feet long extended into the sidewalk at least 1 foot; that the trap door, when closed, was on a level with the street; that, when opened, it rested against the side of the building; that there were no barriers or railings around the areaway, and nothing to warn travelers of the danger of falling into the opening; and that the trap door for a considerable period had been open at least once, and sometimes twice, a day. It was held to be immaterial that plaintiff did not approach the opening or cellar way in the sidewalk from the street, but from abutting property; that when he got upon the street, or what from the nature of the construction appeared to be part of the street, he was entitled to the protecting care of the city; and that whether or not the city was negligent was a question for the jury.

In *McClammy v. Spokane*, supra, it was held that the court should not decide, as a matter of law, that no negligence appeared on the part of the city, where there was a dispute as to whether any or sufficient barriers were maintained.

sidewalk on one of the streets of the city of Seattle and was injured. He brought this action to recover damages for his injuries, and was awarded a judgment in the sum of \$755 from which the city appeals.

The opening in question was in a sidewalk on one of the principal streets of Seattle, along which a large number of people were constantly passing. It was some 5 feet long by 4 feet wide, and, when not being used, was covered with iron doors laid lengthwise of the opening. These doors were hinged to the side, and raised up from the middle. When open they formed a kind of barrier which guarded the main opening from the approach of pedestrians. At the time of the accident to the respondent but one of the doors was open. He approached from the opposite way and walked over the first door, and into the opening without discovering that the second had been raised up. How long the door had been open the evidence does not make very clear, but it could have been only a few moments at the longest, and it is probable that it had been open only an instant before the accident. The city contends that it is not negligence in itself to permit an opening to be made in a sidewalk and used for the purposes for which this opening was used, and that, because it is not such negligence, it is not liable for any negligent use made of the opening unless it has knowledge, in time to correct it, of the fact that it is being negligently used; further contending that in this case there is no evidence that it had such knowledge. But we think these contentions inapplicable to the facts as shown in the record. This opening was upon a prominent thoroughfare, in constant use by pedestrians. The opening was not guarded in any way, and to open it at all was a menace to every person who happened at that time to be passing. These facts the city knew or ought to have known, and we think the court rightly held it responsible for the injury.

The judgment is affirmed.

SOUTH CAROLINA SUPREME COURT.

HENRY STRICKLAND, Resp.,

v.

CAPITAL CITY MILLS, Appt.

(74 S. C. 16, 54 S. E. 220.)

Master—safe machine—question for jury.

1. The question whether or not a master has furnished his servant a reasonably safe machine when he has left an uncovered cogwheel at a point to which the servant's duties may call him is for the jury.
7 L.R.A.(N.S.)

Evidence—privileged communications—contract.

2. Evidence as to the contract between attorney and client for compensation, and the assignment of an interest in the judgment to secure the same, is not within the rule excluding evidence of privileged communications.

Attorney and client—notice of bankruptcy proceedings.

3. Notice to an attorney who has received an assignment of a portion of a judgment to secure his compensation of bankruptcy proceedings against the judgment debtor is not notice to the judgment creditor, so as to bind him by the bankruptcy proceedings.

Bankruptcy—notice to attorney.

4. Notice of the pendency of bankruptcy proceedings to an attorney who is employed to prosecute a claim against the bankrupt in the state courts is not notice to a duly authorized attorney, within the meaning of the bankruptcy law, so as to bind the creditor by the bankruptcy proceedings in which his claim was not scheduled, where the attorney has no authority to represent the creditor in the bankruptcy proceedings.

(April 4, 1906.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Richland County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. R. W. Shand, for appellant:

A master is not negligent toward his employee in leaving exposed that which common experience teaches us is dangerous.

Owings v. Moneynick Oil Mill, 55 S. C. 483, 33 S. E. 511; Wifford v. Clifton Cotton Mills, 72 S. C. 346, 51 S. E. 918; Green v. Southern R. Co. 72 S. C. 398, 52 S. E.

Case Note.—Communications between attorney and client affecting their respective rights or interests as privileged communications:—A well-recognized exception to the rule prohibiting the disclosure by an attorney of the confidential communications of his client is where their exclusion would operate injuriously upon the attorney's interests. In litigation between attorney and client, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. Weeks, Attorneys at Law, § 152; 3 Jones, Ev. § 272; 1 Elliott, Ev. § 623; Mechem, Agency, § 887; Greenl. Ev. 15th ed. § 242; 23 Am. & Eng. Enc. Law, 2d ed. p. 76; Hageman, Privileged Communications, §§ 2, 87.

In Mitchell v. Bromberger, 2 Nev. 345, 90

45; Jennings v. Edgefield Mfg. Co. 72 S. C. 411, 52 S. E. 113.

The contract between attorney and client as to compensation is not privileged.

Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385; Foeter v. Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton v. Robinson, 14 Pick. 422, 25 Am. Dec. 415; Granger v. Warrington, 8 Ill. 308; Satterlee v. Bliss, 36 Cal. 490; Smithwick v. Evans, 24 Ga. 463; Williams v. Young, 46 Iowa, 140; Jeanes v. Fridenberg, 3 Clark (Pa.) 199; Shangnessy v. Fogg, 15 La. Ann. 330; Riggs v. Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 147; 23 Am. & Eng. Enc. Law, 2d ed. pp. 53, 56, 62, 67, 74; Eastman v. Kelly, 16 N. Y. S. R. 894, 1 N. Y. Supp. 867; Lombard v. Hendrix, 54 S. C. 481, 32 S. E. 511; Brazel

v. Fair, 26 S. C. 370, 2 S. E. 293; Greer v. Latimer, 47 S. C. 176, 25 S. E. 136; Weeks, Attorneys at Law, §§ 151, 168.

The assignment of an interest in the judgment to Mr. Tompkins made him equally interested in this judgment; he thereby became a part owner of it. As such, he was a joint judgment creditor with Strickland, and had notice; and joint creditors occupy the same relation toward each other that joint debtors do.

1 Beach, Modern Law of Contr. § 668; 21 Am. & Eng. Enc. Law, 2d ed. p. 587; Whitcomb v. Whiting, 2 Dougl. K. B. 652; Dickson v. Gourdin, 26 S. C. 399, 2 S. E. 303; Hall v. Woodward, 26 S. C. 560, 2 S. E. 401; Willson v. Winn, 2 Bay, 517; Neil v. Cheves, 1 Bail. L. 537; Heard v. Lodge,

Am. Dec. 550, an action by attorneys against a client to recover for legal services, it was held that the former might testify fully as to their employment by, the nature of the services rendered for, and the counsel given to, the latter. The court referred to the general rule excluding confidential communications between attorney and client, saying: "But the claims of justice dictate some exceptions to this rule. It would be a manifest injustice to allow the client to take advantage of it to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is therefore held that in such cases he is exempted from the obligations of secrecy. . . . He should not, however, disclose more than is necessary for his own protection."

In Keck v. Bode, 23 Ohio C. C. 413, an action by an attorney against a client to recover for professional services, it was held that the attorney could testify as to confidential communications between himself and client. The court said: The client cannot use the protection "thus guaranteed to him as a means of defrauding the attorney. When a controversy arises between client and attorney the facts of which are evidenced by communications between them, the very necessities of the case require an exception to the general rule. . . . In states where the privilege protecting communications with attorneys is still regulated by the common law, as well as in those where it is prescribed by statute, the weight of authority favors the competency of an attorney as a witness to such communications when the suit is between himself and client. . . . It will be observed, however, that the same necessity which creates the exception limits also its scope and effect, and, if the communication is not essential to preserve the rights of the attorney, it continues to be privileged."

In Nave v. Baird, 12 Ind. 318, which was an action by an attorney on a promissory note given by a client for professional services, where the client, by counterclaim,

sought to recover damages for the attorney's alleged mismanagement of the suit and disobedience of the client's instructions, it was held that the attorney could testify fully as to consultations with the client, in which it was alleged certain instructions were given which were disobeyed by the attorney, as such communications ceased to be privileged when the client charged the attorney with such misconduct.

In Minard v. Stillman, 31 Or. 164, 65 Am. St. Rep. 815, 49 Pac. 976, where an attorney was sued by a client for money collected by him, which the attorney claimed to have paid to different persons by plaintiff's direction, it was held that the attorney could divulge the names of the persons to whom he made payments, that not being a privileged communication. The court said: "In a controversy between one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy; and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong, and has like application as between one of the parties and the attorney."

In Rochester City Bank v. Suydam, 5 How. Pr. 254, an action against attorney and client as indorsers of negotiable paper, it was held that communications between them were not privileged and might be disclosed by the attorney. The court said: "Where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy. . . . Here the attorney has a large amount of property in his hands, which has accumulated during a seven years' employment, the nature and extent of which is shown by his correspondence with his clients. Under these circumstances, he is induced by them to assume heavy responsibilities upon the faith and security of this property. Is he to be deprived of what may very likely be his only means of showing in what this property consists, by producing his clients' letters in

20 Pick. 59, 32 Am. Dec. 197; *Bank of United States v. Davis*, 2 Hill, 461; *Jacaud v. French*, 12 East, 323; *Bignold v. Waterhouse*, 1 Maule & S. 259.

Notice to Tompkins was notice to plaintiff.

Moulton v. Bowker, 115 Mass. 40, 15 Am. Rep. 72; *Annely v. DeSaussure*, 12 S. C. 509; *Bank of United States v. Davis and Heard v. Lodge*, supra; *Re Beerman*, 112 Fed. 662; *The Distilled Spirits (Harrington v. United States)* 11 Wall. 367, 20 L. ed. 171; 3 Am. & Eng. Enc. Law, 2d ed. pp. 320, 321; 21 Am. & Eng. Enc. Law, 2d ed. p. 587.

Mr. Frank G. Tompkins for respondent.

Jones, J., delivered the opinion of the court:

The plaintiff brought this action March 8, 1902, to recover damages for injuries received by him while working as an employee on a picker machine in defendant's mills, on November 15, 1901, as the result of defendant's alleged negligence in providing unsafe machinery without adequate guards over exposed cogwheels, and in not warning plaintiff of the danger of the machine, of which he was ignorant. The defendant, by

amended answer, pleaded general denial, assumption of risk, and contributory negligence. Plaintiff recovered judgment on verdict for \$1,500, entered November 21, 1903, but, on appeal therefrom by defendant, judgment was reversed and new trial granted; the remittitur from this court being filed December 16, 1904. 70 S. C. 211, 49 S. E. 478. In the meantime, in April, 1904, pending said appeal in this court, defendant was adjudged a bankrupt by the United States district court for South Carolina, under the bankrupt act of Congress, and on June 6, 1904, was discharged, the creditors having agreed upon a composition. By supplemental answer this discharge was set up in bar on the second trial. The plaintiff again recovered a verdict for \$1,500, and from the judgment thereon comes this appeal.

1. The first question raised is whether the court erred in refusing to grant a nonsuit; it being contended by appellant that the evidence for plaintiff failed to show any negligence on the part of defendant, and having shown that the injury was due solely to the negligence of plaintiff in not avoiding a manifest danger. The plaintiff, while adjusting a lap on the picker machine, had his sleeve caught by the cogwheel and his

relation to it? I think no such construction has ever been put upon the rule in question. His clients, by giving him a direct interest in the facts from time to time communicated to him, and by dealing with him upon the footing of those facts, have, as it strikes me, voluntarily waived their right to concealment as between themselves and the attorney."

In *Re Postlethwaite*, L. R. 35 Ch. Div. 722, an action for accounting, to which the solicitor was a party, charging fraud on his part, it was held that communications by letter between the solicitor, who was a trustee of certain property, and his cotrustee, were not privileged, even though it was claimed that such communications were made to the solicitor as the personal adviser of his cotrustee, because the solicitor and his client were here charged with fraud.

But in *Chant v. Brown*, 7 Hare, 79, it was held that confidential communications between solicitor and client do not cease to be privileged where the solicitor subsequently becomes interested in the property, as a devisee, to the title of which such communications related.

On the point that an agreement between an attorney and client, by which the attorney is to receive a portion of the sum recovered, is not a privileged communication, the authorities are in harmony with *STRICKLAND V. CAPITAL CITY MILLS*, although the question has more frequently arisen as bearing on the attorney's bias, credibility, or interest in the result of the litigation when a witness for his client. In *Moats v. Ry-*

mer, 18 W. Va. 642, 41 Am. Rep. 703, a trial for malicious prosecution, plaintiff's attorney submitted himself as a witness for his client, and it was held that he could not refuse to disclose a written contract between himself and client whereby he was to have half the recovery in the case, such matters not falling within the protection of privileged communications. Also in *Smithwick v. Evans*, 24 Ga. 461, where an attorney was a witness to a will, it was held that he could be questioned as to the amount of his fee and terms of payment. The court said: "It was not a matter of confidential communication from his client that he was interrogated to; nor was it as to a matter or thing which he acquired from his client, or during the existence or by reason of the relationship of client and attorney. It was in regard to a matter which must have been necessarily agreed upon before the relation of client and attorney could exist. It was, *prima facie*, relevant to the matter in issue." In *Eastman v. Kelly*, 49 Hun, 607, 16 N. Y. S. R. 894, 1 N. Y. Supp. 866, it was also held that, where plaintiff's attorney offers himself as a witness for his client, he must divulge whether he is interested in the result of the action to the extent of a share of the proceeds of the recovery; such a disclosure not divulging any confidential communication between attorney and client.

In *Williams v. Young*, 46 Iowa, 140, a garnishment proceeding against an attorney, it was held that the attorney must disclose

arm pulled under the cogs, lacerated, and injured. The cogwheel was unguarded, and there was some testimony in behalf of plaintiff that in cotton-mill machinery the general rule with the best manufacturers is to have all parts with which an operative will come in contact covered with casing, including cogwheels. The plaintiff testified that he had only been operating a picker machine for two days previous to the day he was injured; that he had received no caution or warning concerning the danger of operating the machine, of which he was ignorant; that, while he could have seen the cogwheels if he had looked, as a matter of fact he had not noticed them. It appears from the testimony offered in behalf of the defendant, which may be considered in determining whether there should be a reversal of nonsuit, that the cogwheel is located on the side of the picker machine, is about 2 inches in diameter, its cogs meshing in with the cogs of a larger covered wheel below, and thus driving it; that it is located behind the gear casing, is not in a position of danger to a person in the usual position of feeding the machine, but, according to the testimony of E. W. Thomas, general manager of the Granby and Olympia Mills at Columbia,

South Carolina (at folio 235), and the testimony of W. P. Hamrick, superintendent of the Capital City Mills (at folio 251), the duty of the operative would at times require him to go all around the machine. Moreover, it appears that, on motion of appellant's counsel and with consent of plaintiff's counsel, the jury were permitted to view the premises and inspect the machinery in question. We cannot say as a matter of law that there should be a reversal in this case for failure to nonsuit. It was for the jury to say whether the defendant discharged its duty to supply its operatives with reasonably safe machinery. If the defendant was negligent in not properly guarding the machinery with which the operative would probably come in contact in the discharge of his duties, and in not warning him in his inexperience, then whether the plaintiff, after knowledge, voluntarily assumed the risk in this case, or whether by his own want of care he proximately contributed to bring about his injury, were, we think, under the circumstances of this case, properly referred to the jury. This case is distinguishable from the case of *Wofford v. Clifton Cotton Mills*, 72 S. C. 346, 51 S. E. 918. In that case plain-

with whom he had deposited the client's money and the conditions upon which it was to be paid out, such disclosure not violating any confidential communication. Also in *Jeanes v. Fridenberg*, 3 Clark (Pa.) 199, in a similar proceeding, it was held that an attorney could not refuse to divulge whether he had received a certain sum of money from his client in trust to pay a certain percentage thereof to such of the client's creditors as would receive the same in full satisfaction of their claims. The court refers to the general rule excluding confidential communication between attorney and client, and holds that this case falls within the exception to the rule, saying: "But there is a class which stands upon higher, and still clearer and more unequivocal ground, where the line is distinctly and broadly marked, and that is where the attorney is himself a party to the transaction or agreement which he is called upon to disclose. . . . If the privilege were suffered to be applied to such cases, a wide door would be opened for the successful perpetration of fraud and crime." This case involves a simple trust only, and not a privileged communication between attorney and client. Also in *Shanghnessy v. Fogg*, 15 La. Ann. 330, the same rule was applied.

In *Olmstead v. Webb*, 5 App. D. C. 38, in an action to which an attorney was not a party, where his former client charged him with shameful misconduct and treachery, which, if undenied, would tend greatly to prejudice appellant's case, it was held that the attorney might testify in denial

thereof. The court said: "The object of the rule" of confidential communications "ceases, and the attorney is no longer bound by his obligation, when the client or his representatives charge him, either directly or indirectly, with fraud or other improper or unprofessional conduct."

In *State v. Madigan*, 66 Minn. 10, 68 N. W. 179, respondent in a criminal case, in his moving papers for a new trial, charged his attorney with fraud practised upon the trial court and upon respondent. It was held that the attorney's counter affidavit, denying these charges, was admissible, not being a violation of confidential communications between attorney and client. The court said: "This privilege [of confidential communication] may be waived either by the conduct or consent of the client. Such communications are not privileged to the extent of depriving the attorney of the means of obtaining or defending his right. . . . And, . . . if the client voluntarily breaks the seal of privileged silence by a vicious and defamatory attack upon his attorney upon matters otherwise privileged, and makes them a part of the public judicial records of the state, the court, in the interest of justice, ought to permit the opposite party the use of the attorney's denial by counter affidavit. If the client does not wish a repulse, he should not attack."

And see note in 6 L.R.A. 481, for a collection of cases upon the general rule, but not this exception, of privileged communications between attorney and client.

tiff received injury by having his hand caught in the cogwheel of a speeder frame while cleaning the floor beneath. The cogwheels were covered on top, but this covering did not extend to the floor. The plaintiff in that case had been working in the mill two years, saw the machine put up, and it was his duty and habit to take the covering off and clean the cogs. The court considered that the evidence admitted of no other conclusion than that the plaintiff in that case not only knew the nature of the machine, but fully comprehended the danger of putting his hands under the moving cogs to clean the floor.

2. The next question is raised by the second and third exceptions, which assign error in refusing to allow F. G. Tompkins, Esq., attorney of record for plaintiff, to testify whether he had any assignment, contract, or agreement, whereby he owned an interest in the claim of Henry Strickland against Capital City Mills between April 1, 1904, and July 1, 1904, and in ruling out as a privileged communication a written paper, signed by plaintiff and produced by F. G. Tompkins, assigning to said F. G. Tompkins an interest in the judgment in this case entered November 5, 1903. The written instrument in question was dated November 5, 1903, was signed by Henry Strickland, and purported to assign to Frank G. Tompkins a specified per cent of Strickland's interest in the judgment against Capital City Mills for legal services rendered therein. The court ruled this evidence out as a privileged communication between attorney and client. This, we think, would be error in a case where such testimony is material to some issue therein. The general rule excludes from evidence all confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege. This is based upon a wise public policy which considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional adviser, under the pledge of the law that such confidence shall not be abused by permitting a disclosure of such communications. This rule, however, is subject to limitations, and should not be extended beyond its legitimate scope and purposes. We see no reason why the contract between the client and attorney as to the fee to be paid for professional services, and the assignment of an interest in a judgment recovered in payment of services rendered, should fall within the rule of privileged communications. This is knowledge which is not communicated by the client to the attorney, but

is knowledge of the attorney derived from his own act in creating the fact sought to be disclosed, and not from a revelation of any secret of the client. The fee contract, whether regarded as made preliminary to the relation of attorney and client, or at the close of such relation in compensation for services rendered, or whether made during the existence of such relation, is really collateral to the professional relation, is not strictly a part of it, and has no bearing upon the merits of the matter, upon which professional aid was invoked. As to such a contract the parties ordinarily stand in adversary relation. In 23 Am. & Eng. Enc. Law, p. 74, the doctrine is stated that there is no privilege as to the amount of the attorney's fee or the terms of payment, citing *Smithwick v. Evans*, 24 Ga. 462; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703; and, at page 76, this same work states that there is no privilege where the attorney is himself a party to the transaction or agreement which he is called upon to disclose. See also note in *O'Brien v. Spalding* (Ga.) 66 Am. St. Rep. 213, for a comprehensive statement of the general rule on this subject and its limitations, and especially on pages 231 and 232. Then, in this case, the nature of the fact sought to be disclosed must be considered. The assignment was of an interest in a matter of record, which necessarily involved the right of the assignee to place it with the judgment record as a protection to his interest therein, and this must be deemed to have been within the contemplation of the client. Furthermore, the assignment was made in the presence of a witness, A. F. Spigner. It appears that Mr. Spigner was also an attorney in the case associated with Mr. Tompkins. The fact that one of the attorneys was a witness to the instrument would undoubtedly render such attorney competent to testify as to its execution, consideration, and the circumstances attending its execution in his presence. *Moffatt v. Hardin*, 22 S. C. 26; *Brazel v. Fair*, 26 S. C. 385, 2 S. E. 293; *Monaghan Bay Co. v. Dickson*, 39 S. C. 148, 39 Am. St. Rep. 704, 17 S. E. 696. The same reason would render admissible the testimony of the attorney to whom and in whose presence the instrument was executed. In the case of *Stoney v. McNeil*, Harp. L. 557, 18 Am. Dec. 666, an attorney was compelled to answer as to facts falling within his own knowledge derived from the acts of the client in his presence. The testimony sought to be excluded as a privileged communication in that case was that the bond in suit was delivered by the client to the attorney for suit indorsed in blank, and that such blank indorsement was filled out in the

presence and by the advice of the attorney with an assignment from Henry to Stoney, the plaintiff. The issue was as to whether the bond was assigned to Stoney, plaintiff, by Henry, or whether Henry had assigned the bond to Brown, who had discharged the defendant. But, granting that the testimony could not be regarded as being a privileged communication, the court's ruling could not be deemed reversible error, unless it appears that the testimony was relevant and material to some issue in the case. The object of defendant in seeking to introduce such testimony was to show that the attorney was part owner of the judgment, and that notice to him of the bankruptcy proceedings would be notice to the plaintiff, joint owner of the judgment, so as to make the discharge in bankruptcy a bar to plaintiff's action. It is admitted as a fact that F. G. Tompkins had actual knowledge of the bankruptcy proceedings, but the evidence was that Henry Strickland had no notice or actual knowledge thereof. Our inquiry for the present does not involve the question whether notice to Tompkins as attorney was notice to the plaintiff, his client; but the question is whether notice to Tompkins as owner of an interest in the judgment was notice to the plaintiff as co-owner. We do not think it was. The relation between the parties as owners of the judgment was not like that of partners, joint contractors, and the like, wherein notice to one may be deemed notice to the associates on the principle of agency. "In the absence of proof of partnership or agency, it appears to be a settled rule that notice to one of several purchasers taking title as joint tenants or tenants in common will not, by mere force of their relationship, operate as notice to the others." 23 Am. & Eng. Enc. Law, 2d ed. p. 516; 21 Am. & Eng. Enc. Law, 2d ed. p. 587; *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Babcock v. Wells*, 25 R. I. 23, 105 Am. St. Rep. 853, 54 Atl. 596. This last case holds that notice to one of two mortgagees that the title of a mortgagor is subject to an outstanding equity is not notice to the other. Under this view, the testimony was not material.

3. The remaining exceptions to the charge and refusals to charge raise the question whether notice to F. G. Tompkins, attorney of record for the plaintiff throughout the litigation, of the adjudication in bankruptcy, was notice to plaintiff. Notwithstanding the fact that the original suit in this case was upon an unliquidated claim for damages for tort by negligence, and that the judgment rendered on the former trial was set aside and the claim restored to its original status on the appeal and motion of the

bankrupt, made presumably with approval of the Federal court, it is conceded for the purposes of this appeal that plaintiff's former judgment in this case was provable in bankruptcy. The question then is whether the defendant's discharge in bankruptcy is a bar to the present claim, assuming that the claim was a "provable debt." Section 17 of the United States bankruptcy statute of July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3428, provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, [or for alimony due, or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation]; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." The controversy is upon the question whether the case falls within the third exception above stated. It is an undisputed fact that plaintiff's claim was intentionally omitted from the schedule, under the belief that it was not a fixed liability, and that no notice was ever served upon Henry Strickland, and that he had no actual knowledge of the bankruptcy proceedings until after the bankrupt's discharge. It appears, however, that F. G. Tompkins, who acted as Strickland's attorney throughout the litigation, was informed of the bankruptcy proceedings and was present at the first meeting of the bankrupt creditors. Mr. Tompkins, however, testified that he was present merely as a spectator, did not in any way participate in the meeting, and had no authority to represent Henry Strickland in the bankruptcy court. Henry Strickland also testified that he had not employed Mr. Tompkins to represent him in the bankruptcy proceedings. No power of attorney was ever made or filed authorizing Mr. Tompkins to represent Mr. Strickland in this matter, as is the usual procedure in Federal courts, and it does not even appear that Mr. Tompkins is authorized to practise in the Federal circuit or district courts. Rule 4, adopted by the Supreme Court of the United States as

a general order in bankruptcy proceedings, provides: "Every party may appear and conduct the proceedings by attorney who shall be an attorney or counselor authorized to practise in the circuit or district court. The name of the attorney or counselor with his place of business shall be entered upon the docket with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not by the act or by these general orders required to be served on the party personally may be served upon his attorney." Section 1 of said bankruptcy act (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), giving the meaning of terms used therein, declares that "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy. We conclude from the foregoing that an attorney at law cannot represent a creditor in bankruptcy proceedings, unless he is duly authorized so to do; and there was no evidence that Mr. Tompkins had or assumed to exercise any such authority.

Then it remains to consider whether an attorney employed to represent the creditor in a suit on a claim in the state court, by virtue of that relation, so represents the creditor with respect to that claim as that notice to him of the bankruptcy proceedings is notice to a duly authorized attorney in the sense of the bankruptcy statute so as to bind the creditor. We think not. Ordinarily the authority of the attorney ends when judgment is obtained, and he can do no more than receive the money and acknowledge satisfaction. *The Treasurers v. M'Dowell*, 1 Hill, L. 184, 26 Am. Dec. 166. He cannot after judgment, without special authority, compromise his client's claim and enter into composition with the judgment debtor. Tompkins's employment to represent Strickland in the appeal taken by the defendant company authorized him to do anything necessary or incidental to the conduct of said appeal in the state court; but such employment gave Tompkins no authority to represent Strickland in the bankruptcy proceedings in the Federal court. There is no doubt that the general rule is that notice to the attorney is notice to the client, but the knowledge of the attorney must be acquired while acting for the principal, and the information must relate to a matter within the scope of his agency; the theory of the law being that the agent is presumed to have communicated to his principal knowledge which it was his duty to have communicated and which it is reasonable to

suppose he did actually communicate. *Akers v. Rowan*, 33 S. C. 453, 10 L.R.A. 706, 12 S. E. 165; *Rapley v. Klugh*, 40 S. C. 137, 18 S. E. 680; *Knobelock v. Germania Sav. Bank*, 50 S. C. 290, 27 S. E. 902; *Peebles v. Warren*, 51 S. C. 561, 29 S. C. 659; *Steinmeyer v. Steinmeyer*, 55 S. C. 29, 33 S. E. 15. It cannot be said that the bankruptcy proceedings were within the scope of Tompkins's agency, nor can it be said that it was the duty of Tompkins to inform Strickland of such proceedings, especially when it appears that the attorney for the petitioning creditors and the referee in bankruptcy, with knowledge of the pending appeal from the former judgment in this case, took no steps to have Strickland's name placed upon the schedule of creditors, or to give him the notice which § 58 of the bankrupt act (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3444) requires to be given to creditors. But, furthermore, we construe the provision in the act under consideration as including only cases where there was personal notice or actual knowledge of the bankruptcy proceedings on the part of the creditor, as distinguished from mere imputed or constructive notice or knowledge. It is not denied that, if Tompkins had been duly authorized to represent Strickland in the bankruptcy proceedings, notice to Tompkins would be notice to Strickland, since by the terms of the statute a duly authorized attorney or proxy represents the creditor. But it is different when actual notice or actual knowledge is sought to be imputed to the creditor merely because of the knowledge of an attorney who represents the creditor's claim in another court. What the statute requires is actual notice or actual knowledge either by the creditor or his duly authorized agent in the bankruptcy proceedings. *Collier, Bankruptcy*, 172. Neither of these conditions exists in this case, as it is conceded that Strickland had no actual knowledge of the bankruptcy proceedings, and the finding of the jury under the charge given establishes that Tompkins had no authority to prove or collect the claim in question in the bankruptcy court. In *Birkett v. Columbia Bank*, 195 U. S. 345, 350, 49 L. ed. 231, 232, 25 Sup. Ct. Rep. 38, 40, the court said: "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law,—in time to give him an equal opportunity with other creditors,—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends."

The exceptions are overruled, and the judgment of the Circuit Court is affirmed.

SOUTH CAROLINA SUPREME COURT.

JAMES H. McCREARY et al., Respts.,
v.

A. C. COGGESHALL et al., Appts.

(74 S. C. 42, 53 S. E. 978.)

Will—contingent remainder—aspect.

1. A contingent remainder with a double aspect, and not an executory devise, is created by a devise to one for life and then to the issue of her body then living, their heirs and assigns, but, in case of want of issue, then to another, his heirs and assigns forever.

Remainder—life estate—merger.

2. The acquisition of the life estate by the reversioner will merge the fee in him

and cut out an intermediate contingent remainder, unless an intention that it shall not do so appears.

Vested rights—impairment.

3. The rights of a reversioner who has cut out an intermediate contingent remainder by the purchase of the life estate cannot be affected by a subsequent statute enacted to preserve the rights of remaindermen.

Merger—particular fee.

4. Merger will not take place, even at law, upon the uniting of a particular estate and the fee in the same person, if opposed to the intention of the parties affirmatively appearing or to be implied from the fact that merger would be opposed to the interest of the party in whom the different estates or interests become united.

Case Note.—Effect of union of life estate and remote remainder or reversion in the same person upon intermediate contingent remainder: —The small number of decisions bearing upon the question of the extinguishment of a contingent remainder by the merger of the particular estate upon which it was limited is attributable to two things, first, the invention of the scheme of introducing trustees to preserve contingent remainders, whose legal estate would support the remainder irrespective of any acts of the tenant of the particular estate, and, second, the enactment of statutes, both in England and in most, if not all, of the United States, expressly or in effect providing that a contingent remainder shall not be defeated or barred by any destruction of the precedent estate by disseisin, forfeiture, surrender, merger, or otherwise.

The rule, however, that destruction of the particular estate by merger with a greater estate, or otherwise, would also destroy the remainder, originating in feudal polity, was indisputably established as a part of the common law, and as such has been recognized by the courts of this country.

The union of the particular estate with the remainder or reversion may obviously be effected in several ways, either by the life tenant's acquisition of the ultimate fee by devise or descent directly or mediately, or by purchase, or by the acquisition of the particular estate by the reversioner or remainderman, or by the acquisition by purchase of both estates by a third party. The modes thus enumerated, being each somewhat affected by particular considerations, will be hereinafter discussed separately.

Where the particular estate and the remainder or reversion are created by the same instrument and vest in the same person, or are devised to the same person, or are acquired by immediate descent from the creator of the particular estate, there is no merger of the particular in the greater estate which will destroy a contingent remainder dependent thereon, since to permit

such a result would be to make the instrument or devise defeat itself.

In *Archer's Case*, 1 Coke, 66b, it was held that, where a devisee of a life estate, with contingent remainder to his heirs, at the same time inherited the reversion, the estate for life was not merged in the descent of the reversion.

And in *Plunkett v. Holmes*, 1 Lev. 11, T. Raym. 28, Sid. pt. 1, p. 47, it was held that, where testator devised lands to his eldest son for life, and, if such son should die without issue living at his death, then to another of testator's sons in fee, but, if the eldest son should have issue living at his death, then to the right heirs of such son forever, the eldest son took an estate for life with remainder to his heirs, not executed, and, though he himself inherit the reversion from the testator, "that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening . . . for the interposing of the remainders."

In *Egerton v. Massey*, 3 C. B. N. S. 338, where lands were devised to a person for life with remainder to her children, and in default of children to another person in fee, and the life tenant was also the residuary devisee, it was held that the reversion passed by the residuary devise, but that there was no merger of the life estate in the reversion while the property was owned by the devisee.

In *Bowles's Case*, 11 Coke, 80a, a case of a settlement upon a husband and wife which had the effect to vest in them both a life estate and the reversion, with a contingent remainder to their issue, it was held that until issue were born the husband and wife was seised of an estate tail executed *sub modo*, namely, until the birth of issue, when by operation of law the life estate and reversion were divided.

The rule that there is no merger where the particular estate and the reversion are created by the same instrument is also recognized as law in the leading case of *Purefoy v. Rogers*, 2 Wms.' Saund. 386, and in

Adverse possession—agent.

5. When one is shown to have taken possession of land as agent of another, his subsequent holding will be regarded as permissive in the absence of proof to the contrary.

Merger—life estate—adverse possession.

6. An intermediate remainder will not be cut out by the acquisition by the ultimate remainder-man of the life estate under adverse possession claimed against the life tenant alone, with the admission that the intermediate remainder is unclaimed and unaffected.

Adverse possession—married woman.

7. Title by adverse possession cannot be acquired against a married woman pending coverture.

Evidence—ancient document.

8. A letter seventy years old, found in

proper custody, is an ancient document which proves itself.

Same—documents for comparison.

9. Upon the question of the genuineness of a letter seventy years old, the public records kept by the alleged writer as the incumbent of the office to which they belonged are admissible in evidence.

Evidence—record—probate.

10. The record of a deed is not inadmissible in evidence because the letters U. Q., following the name of the one taking the probate, did not indicate any officer authorized to take a probate, where it appears that the person designated was clerk of the court, of which fact the court could take judicial notice, and *ex officio* one of the quorum who by statute had authority to take probates, so that the letters doubtless signified *unum quorum*.

Craig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381.

In *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480, and *Bennett v. Morris*, 5 Rawle, 9, it is held that, where a fee descends upon the life tenant from the same person by whose will the life estate was created, there is no merger of the life estate in the fee which will destroy an intervening contingent remainder.

In *Dennett v. Dennett*, 40 N. H. 498, it was held that though, by virtue of the rule in *Shelley's Case*, the devisee of a life estate might be considered the owner of the fee, yet, where a contingent remainder is interposed between the life estate and the limitation to the heirs of the life tenant, there is no merger of the life estate which will destroy the contingent remainder.

Although there is no merger of the particular estate while the two estates are united in the ways above mentioned in the life tenant, there is such a merger where the estates are conveyed to a third party, and the contingent remainder is thereby destroyed. *Egerton v. Massey* and *Craig v. Warner*, *supra*.

So, also, in *Bennett v. Morris*, *supra*, it was held that, though a life estate devised was not merged in the reversion inherited by the devisee from the testator, so as to destroy a contingent remainder, yet that such merger and destruction of the remainder would take place upon a conveyance to a third party; the court saying that, notwithstanding the distinction made where the reversion is inherited by the life tenant may be right in order to give effect to the will according to the intention of the testator, it does not change the nature of the particular estate limited by the will, nor render it in any respect different from what it would have been had it been created by any other means, but that it remains liable, in the same manner, to the operation of all acts of the tenant for life at least, if not to all future accidents by which such an estate is generally destroyed, such as forfeiture, merger, etc. Continuing, the court

says: "I do not consider it a sufficient objection to this conclusion that the intention of the testator, as regards the contingent remainder, may be thus indirectly frustrated by it; because it must be presumed that he was acquainted with the law on this subject, as he was bound to know it; and that, unless he introduced trustees into his will for the purpose of preserving the contingent remainder, he left it in the power of the devisee of the particular estate to defeat the contingent remainder by destroying the particular estate."

It does not satisfactorily appear from the foregoing cases that the destruction of the contingent remainder should be attributed wholly to the merger of the particular estate in the reversion, as the same result may be reached by regarding the particular estate as having been destroyed by the conveyance of the life tenant, which, under the common law, was a result of any conveyance made by a life tenant except under the statute of uses. Some support is given to this theory by the case of *Dennett v. Dennett*, *supra*, in which it was held that, though the life tenant was also vested with the ultimate fee, a contingent remainder for life to his youngest son surviving him being interposed, a conveyance by him which had simply the effect to convey only what he might rightfully convey would not operate to destroy the contingent remainder.

The foregoing exception to the rule that, where a greater and a lesser estate are united in the same person, no vested estate intervening, the lesser estate will be merged in the greater so as to destroy intervening contingent remainders, is discussed in *Fearne on Contingent Remainders*, vol. 1, p. 343, as follows: "Wherever a testator limits a contingent remainder, it is agreed that the inheritance descends to the heir only till the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The will does not operate till the testator's death; the descent takes effect at the same

Ejectment—recovery—unlitigated title.

11. Permitting a recovery in ejectment against one of the defendants who was not shown to be connected with the main title in the controversy is not erroneous where such title was good against all except plaintiff, by reason of adverse possession.

(March 15, 1906.)

A PPEAL by defendants from a judgment of the Common Pleas Circuit Court for Darlington County in plaintiffs' favor in an action brought to recover possession of certain real estate. Affirmed.

A decision was reached and an opinion handed down in this case on October 21, 1905, but, a petition for rehearing having been filed, the following order was entered November 2, 1905:

time; so that, under such a construction, the particular estate given to the heir by the will arises and is destroyed in one and the same instant. And how is it destroyed? By the descent which that very same will permitted. This would be making a will and no will at the same time, and would, in effect, be saying that a limitation of a particular estate in a will to a testator's heir at law, with a contingent remainder over, without any ulterior vested remainder, must be void in its creation. For it is evident that, under such a construction, the particular estate never can take effect at all, its existence and destruction commencing together; and that, being destroyed, the contingent remainder over is also gone, before it has even a moment's chance for existence. Now this would be making the will, in this respect, *ipso facto*, void."

It is suggested in *Craig v. Warner*, 5 Mackey, 460, 60 Am. Rep. 381, that this exception is not by judicial legislation reaching after a reasonable result, but is required by the statute of wills. "The legislature itself, by that act, abolished so much of the common law as stood in the way of a disposition of lands by will, and of course excluded, *pari ratione*, any application of the still remaining common-law rule of merger which would have the effect of nullifying the devising power by making a will inoperative *ab initio*. The result is necessarily the very doctrine which has been settled in the cases of immediate descent. The reversion descends to the life tenant as heir, but shall not unite with his life estate so as to make the will no will."

But the rule is otherwise where the life tenant acquires the reversion other than by direct descent or the same will or instrument.

In *Fearne on Contingent Remainders*, vol. 1, p. 345, it is further said: "But where the descent of the inheritance on the particular estate is only mediate from the person whose will created the particular estate and remainder; or where the descent of the inheritance is otherwise clear

PER CURIAM:

Since the hearing and decision in this cause, Mr. Justice Woods has recalled the fact, which he had entirely overlooked, that the question of the effect of § 109 of the Code of Civil Procedure of 1902 on the rights of remainder-men was involved in a cause pending in the court of common pleas in which he had been one of counsel. The views of the court on this point are not questioned in the petition for rehearing, but, at the request of Mr. Justice Woods, made for the reason above stated, the cause is opened so that argument on this point may be heard by the court without his participation. As the cause is to be reopened, counsel will be heard, also, on the issues referred to in the petition for rehearing.

It is therefore ordered that the cause be

of the first-mentioned circumstances,—there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for in all such cases the particular estate is created, and takes effect, with a capacity of being afterwards destroyed by those accidents to which the nature of such an estate is generally subject, such as forfeiture, merger, etc.; its immediate destruction is not necessarily involved in the mode of its creation, as it must be in the former case under the same construction. There can be no necessity, therefore, to exempt the particular estate, in these cases, from the operation of merger by the descent, in order to give such particular estate any existence, as there is in the former case. In the first case we observed the limitations could never possibly take effect, if the descent of the inheritance were allowed to merge the particular estate; in the latter cases they may take effect, though the descent of the fee be allowed its full force and operation; and when the particular estate has once taken effect there is no more reason why it should be exempt from those accidental modes of destruction to which the law subjects estates of the same nature in general than there is in any other case, where the particular estate is merged, and a contingent remainder destroyed, by the accession of the inheritance. Therefore in the latter cases the descent may well be allowed its full and usual operation."

And in *Crump ex dem. Woolley v. Norwood*, 7 Taunt. 362, it was held that, where a testator gave a life estate to his three nephews, followed by a contingent remainder, and the ultimate remainder to testator's right heirs, one of whom was the father of the life tenants, from whom, upon his decease, they inherited a moiety of the reversion, the intervening contingent remainder was destroyed *pro tanto* by the merger of the life estates in the reversion.

Next in order of consideration are the cases where the reversion has been acquired by the life tenant in some other way than by descent, or by the same will or instru-

set down for rehearing at the November term, 1905, of this court, upon the call of the fourth circuit.

At the reargument the question upon which Mr. Justice Woods deemed himself incompetent to sit was withdrawn from consideration, and, upon request of all counsel in the case, he retained his seat upon the bench.

The facts are stated in the opinion.

Messrs. Dargan & Coggeshall, for appellants:

At common law contingent remainders were defeated by any destruction or determination of the particular estate upon which

they depended before the contingency happened whereby they became vested.

1 Fearn, Contingent Remainders, 316; 24 Am. & Eng. Enc. Law, p. 410; 2 Washb. Real Prop. *638; Purefoy v. Rogers, 2 Wms' Saund. 380; 2 Bl. Com. 171; Williams, Real Prop. 233; Bouknight v. Brown, 16 S. C. 170; People's Loan & Exch. Bank v. Garlington, 54 S. C. 426, 71 Am. St. Rep. 800, 32 S. E. 513.

Contingent remainders may be destroyed by the particular estate and the inheritance becoming united by conveyance or act of the parties.

Adams v. Chaplin, 1 Hill, Eq. 271; 4 Kent, Com. 250; Plunket v. Holmes, T.

ment by which the life estate was created, among which is the much-cited case of Purefoy v. Rogers, 2 Wms' Saund. 380, in which it was held that, where the reversion of property in which a wife had a life interest was purchased by the husband and wife, there was a merger of the life estate in the reversion which would destroy the contingent remainder limited thereon.

In Craig v. Warner, supra, it was held that, where property was devised to a mother and son for life as joint tenants, with contingent remainder in fee to the descendants of the son in being at the death of the survivor of the life tenants, but, in default of such descendants, then to testator's right heirs, who were the mother and her sister, so that the son upon the death of his mother became possessed of the entire life estate and of a moiety of the reversion by inheritance from her, and acquired the other moiety by purchase from the other reversioner, there was a merger of the life estate which would defeat the contingent remainder.

And in Jordan v. McClure, 85 Pa. 495, it was held that, where a life estate was created by a deed of conveyance, with a contingent remainder to grantees' children for life, with reversion to grantor's lawful heirs, and the grantor thereafter devised the reversion to the grantees, the life estate thereupon merged in the reversion, and the contingent remainder was destroyed.

But in Stewart v. Neely, 139 Pa. 309, 20 Atl. 1002, it was held that, where property was devised for life, remainder in fee to such child or children as the life tenant may leave surviving her, and, if the life tenant should die without leaving any children surviving, then to testator's brother; and the tenant for life purchased and had conveyed to her by deed the contingent interest of the brother,—there was no merger of the life estate which would destroy the intermediate contingent remainders, although at the time the life tenant purchased the contingent interest she had no children. The decision in the lower court appears to be grounded upon an unwillingness to give effect to a rule originating in feudal tenure for the purpose of defeating a valid contin-

gent interest, and in the brief *per curiam* opinion rendered by the supreme court it was merely said: "The idea of a life estate being merged into a contingent remainder is a novel proposition. Aside from this, a contingent remainder can only be conveyed by a devise; a deed purporting to convey it operates only as an estoppel, unless the conveyance is after the contingency happens."

And in Moore v. Tate, 102 Ala. 320, 14 So. 635, it was held in equity, that where a father created by deed a life interest in certain property for a son, remainder to the child, children, or issue of such son, and, in default thereof, the property to revert to the grantor and his right heirs; and the son, by agreement with the grantor's heirs, acquired the reversionary interest in the property,—the remainder created by the deed in favor of the son's child, children, or issue continued wholly unaffected by the agreement, and the deed of the father to a third party carried only a life-estate interest coupled with a reversionary interest, subject to be defeated by his death leaving a child, children, or issue.

MCCREARY v. COGGESHALL seems to be the only instance, in the United States at least, in which the effect of the acquisition of the life estate by the version on an intervening contingent remainder has been considered. It should be noted that the decision is harmonized with the case of Stewart v. Neely, supra, by the fact that the remote contingent remainder-man was, by virtue of the residuary devise, also the owner of the reversion, while in the Pennsylvania case the remote remainder-man had no reversionary interest. Another element in the case is the effect of the deed of the life tenant to destroy the particular estate on which the contingent remainder was limited, irrespective of any question of merger.

The effect of the acquisition of the life estate and the reversion by a third party was considered in Archer v. Jacobs, 125 Iowa, 467, 101 N. W. 195, in which it was held that, where the life estate, the remainder, and the reversion were united in a common grantee, contingent remainders limited to persons not in being were merged and destroyed.

Raym. 28; Purefoy v. Rogers, supra; Carter v. Barnadiston, 1 P. Wms. 516; 24 Am. & Eng. Enc. Law, 2d ed. p. 409; Peterson v. Jackson, 196 Ill. 40, 63 N. E. 643; Dehon v. Redfern, Dud. Eq. 118, Rice, L. 459; Williams v. Kibler, 10 S. C. N. S. 428; Hopkins v. Mazyck, Rich. Eq. Cas. 263.

In this case the life estate merged in the fee and destroyed the intermediate remainder.

Adams v. Chaplin, 1 Hill, Eq. 270; Mangum v. Piester, 16 S. C. 316; Boykin v. Ancrum, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305; 1 Cruise, Real Prop. 92; 1 Washb. Real Prop. *80.

On rehearing.

The rules governing merger at law and in equity are entirely different. The rule at law is that, when a greater and lesser estate meet in the same person, the lesser is immediately merged in the greater by operation of law, it matters not what the intention of the parties might have been.

15 Am. & Eng. Enc. Law, pp. 314, 315; Michalson v. Myrick, 47 S. C. 297, 25 S. E. 162; Lipscomb v. Goode, 57 S. C. 182, 35 S. E. 493; Powell v. Patrick, 64 S. C. 193, 41 S. E. 894; 16 Cyc. Law & Proc. p. 665; 20 Am. & Eng. Enc. Law, 2d ed. p. 588; Mangum v. Piester, 16 S. C. 330; Boykin v. Ancrum, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305; St. Philip's Church v. Zion Presby. Church, 23 S. C. 315; Blekeley v. Branyan, 26 S. C. 429, 2 S. E. 319, 28 S. C. 445, 6 S. E. 291; Agnew v. Renwick, 27 S. C. 563, 4 S. E. 223; Parker v. Parker, 52 S. C. 385, 29 S. E. 805; Navassa Guano Co. v. Richardson, 26 S. C. 414, 2 S. E. 307.

Mr. E. O. Woods, also for appellants:

The issue of Mary Ann Coleman were contingent remainder-men.

Faber v. Police, 10 S. C. N. S. 389; McElwee v. Wheeler, 10 S. C. N. S. 392; 16 Cyc. Law & Proc. p. 650; 24 Am. & Eng. Enc. Law, p. 417.

A contingent remainder must have a particular estate to support it.

16 Cyc. Law & Proc. pp. 648, 655; Dehon v. Redfern, Dud. Eq. 120, Rice, L. 459; Lyle v. Richards, 9 Serg. & R. 361; Tiedeman, Real Prop. 419-421; 2 Washb. Real Prop. 638; 24 Am. & Eng. Enc. Law, pp. 401, 410-413; Bouknight v. Brown, 16 S. C. 170; Snelling v. Lamar, 32 S. C. 72, 17 Am. St. Rep. 839, 10 S. E. 825; Craig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381.

Merger is a familiar method by which contingent remainders are destroyed.

Tiedeman, Real Prop. 421; 1 Fearne, Contingent Remainders, 340, 341; 4 Kent, Com. 254; 1 Washb. Real Prop. 155; Purefoy v. Rogers, 2 Wms' Saund. 380; Dehon v. Redfern, Dud. Eq. 115, Rice, L. 459; Craig v. 7 L.R.A. (N.S.)

Warner, supra; Mangum v. Piester, 16 S. C. 316; Boykin v. Ancrum, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305.

Morris W. Hunter, immediately on the death of the testator, Thomas W. Hunter, took the inheritance in these lands until the contingency should happen.

Hopkins v. Mazyck, Rich. Eq. Cas. 274; Williams v. Kibler, 10 S. C. N. S. 428; Craig v. Warner, supra.

Where the preceding particular estate and the next vested estate of inheritance meet in the same person the remainder will be defeated *pro tanto*.

16 Cyc. Law & Proc. pp. 656, 668; Purefoy v. Rogers and Craig v. Warner, supra; Wiscot's Case, 2 Coke, 61a; Mayhew, Merger, 70, 71; Crump ex dem. Woolley v. Norwood, 7 Taunt. 362.

On rehearing.

Nothing short of a covenant or agreement between the parties will suffice to prevent a merger where a lesser and a greater estate meet in the same person.

Agnew v. Charlotte, C. & A. R. Co. 24 S. C. 18, 58 Am. Rep. 237; Blekeley v. Branyan, 26 S. C. 429, 2 S. E. 319; Navassa Guano Co. v. Richardson, 26 S. C. 401, 2 S. E. 307; Parker v. Parker, 52 S. C. 385, 29 S. E. 805; Glenn v. Rudd, 68 S. C. 102, 102 Am. St. Rep. 659, 46 S. E. 555.

Mr. Hunter H. McClelland, for respondents:

An intervening contingent remainder prevents merger. Attempts to defeat contingent remainders were viewed with disfavor.

Faber v. Police, 10 S. C. N. S. 391; McElwee v. Wheeler, 10 S. C. N. S. 376; Bouknight v. Brown, 16 S. C. 155; Boykin v. Ancrum, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305; Dunwoodie v. Reed, 3 Serg. & R. 435; Moore v. Luce, 29 Pa. 260, 72 Am. Dec. 629; Johnson v. Johnson, 7 Allen, 196, 83 Am. Dec. 676.

If the ultimate fee vested in Morris Hunter on the death of the testator, by virtue of the residuary clause of the will, the plaintiffs were not contingent remaindermen, but executory devisees.

2 Bl. Com. 175; Dennett v. Dennett, 40 N. H. 504; 24 Am. & Eng. Enc. Law, p. 384; Nicholson v. Coursar, 50 S. C. 213, 27 S. E. 628; 1 Fearne, Contingent Remainders, 224; Buist v. Dawes, 4 Strobh. Eq. 37.

A fee cannot, at common law, be mounted on a fee. The limitation over would be good by way of executory devise.

Allen v. Folger, 6 Rich. L. 54; 24 Am. & Eng. Enc. Law, p. 380.

Merger will not take place where a contrary intention is manifested.

Adams v. Chaplin, 1 Hill, Eq. 278; Fish-

er v. Edington, 12 Lea, 189; Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290.

Mr. E. C. Dennis also for respondents.

Woods, J., delivered the opinion of the court:

A judgment was recovered by the plaintiffs for the possession of a tract of land containing 630 acres, and defendants appeal.

As it is necessary at every point of the discussion to have in view the precise terms of certain portions of the will of Thomas Hunter, under which both parties claim title, they are here set out in full:

"Item. I lend to my granddaughter, Mary Ann Coleman, for and during the term of her natural life and no longer, all my lands situate, lying and being on Belly Ache, including George King's old place, and also Henry King's supposed to contain nine hundred acres, and also four negroes, Carolina, Sarah and her two children, and the future issue and increase of the females. It is my will and desire that my executors retain and manage the said land and negroes for the benefit of my granddaughter until she arrives at the age of twenty-one or marriage, and then to be delivered over to her; and in case my said granddaughter, Mary Ann Coleman, should die leaving issue of her body then living, then to him or her, or them so living, and to their heirs and assigns forever; but in case the said Mary Ann Coleman should die leaving no issue of her body living at the time of her death, then I give, devise and bequeath all the aforesaid land and negroes to my son, Morris W. Hunter, his heirs and assigns forever.

"Item. I give, devise, and bequeath unto my son, Morris W. Hunter, his heirs and assigns forever, all the rest and residue of my real and personal estate of what kind or nature soever, and wheresoever situate or being, and also, after the death of my wife, Margaret Hunter, I give, devise and bequeath all the real and personal estate hereinbefore loaned to her, to him the said M. W. Hunter, his heirs and assigns forever.

"Lastly. I do hereby nominate my son, Morris W. Hunter, and my friends, Samuel Bacot and James R. Ervin, executors of this my last will and testament."

2. We have italicized the portions requiring special attention. Thomas Hunter died about 1831, leaving surviving him his children, William Morris, and Rachael, and his grandchild, Mary Ann Coleman. Mary Ann Coleman married Samuel McCreary, and died in 1902, at the age of ninety years, leaving surviving her children, the plaintiffs, J. H. McCreary, J. A. McCreary, Susan

Hawthorne, Mary McClelland, and Mattie Massey, who now claim the land in dispute as "issue of her body living" at the time of her death, under the second item of the will. We first consider the case on the assumption that there was evidence to the effect that Morris W. Hunter, one of the heirs and the residuary devisee of Thomas Hunter, acquired title to the life estate of Mary Ann McCreary, *née* Coleman, and that the defendants, or at least one of them, derived title of the land and possession of it through him. The defendants, taking the position that the plaintiffs took under the will a remainder contingent on surviving their mother, the life tenant, the fee being in Morris W. Hunter, the residuary devisee, pending the contingency upon which plaintiffs should take, contended, if Morris W. Hunter, owner of the fee, did acquire the life estate of Mary Ann Coleman, it became immediately merged in the fee, which he already held, and the contingent remainder, being thus left without any particular estate to support it, would be defeated. The circuit judge refused to so charge, but, on the contrary, instructed the jury the contingent remainder intervening between the life estate and the fee prevented a merger.

There can be no doubt that the limitation to the issue of Mary Ann Coleman, and, in default of such issue, to Morris W. Hunter, created a contingent remainder with a double aspect, and not an executory devise. It is said in *Fearne on Contingent Remainders*, vol. 1, 393-395: "Lord Mansfield, in the voice of the court, said it was perfectly clear and settled that, where an estate can take effect as a remainder, it shall never be construed an executory devise or springing use. . . . And Lord Kenyon, chief justice, in delivering the opinion of the court, said, if ever there existed a rule respecting executory devises which had uniformly prevailed without any exception to the contrary, it was that which was laid down by Lord Hale, in the case of *Purefoy v. Rogers*, 2 Wms' Saund. 380. that, where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.

. . . From the last-noticed case, and that of *Hopkins v. Hopkins*, Cas. t. Talb. 44, therein referred to, it appears that where the contingent estate may, in the nature of its original limitation, take effect during, or by the time of the determination of, the particular estate (supposing that particular estate to take place), the possibility or probability of its not doing so, in the common course of

things, or from its relation to other limitations, interposed by the testator, will not take it out of the general rule that denies the construction of an executory devise to a limitation that may take effect as a remainder." This is conclusive against the contention of the respondent. A reading of the will shows that the limitation of the children of Mary Ann Coleman who survived her, would take effect, if at all, at her death. Mary Ann Coleman's life estate was the particular estate to support the remainder, which could take effect immediately on its determination. Hence, under the rule stated by Mr. Fearne, it could not be an executory devise. *McElwee v. Wheeler*, 10 S. C. N. S. 392; *Faber v. Police*, 10 S. C. N. S. 376; *Fearne, Contingent Remainders*, 373; 2 Washb. Real Prop. 625. The residuary devise to Morris W. Hunter vested in him the fee after the life estate, with the contingent remainders limited thereon. *Hopkins v. Mazyck*, Rich. Eq. Cas. 263; *Williams v. Kibler*, 10 S. C. N. S. 414.

The general rule that a life estate is drowned or merged in the fee, when acquired by the owner of the fee, to the destruction of an intervening contingent remainder, is too deeply imbedded in the common law to be now judicially questioned. Whenever this application of the doctrine of merger has been under discussion by writers on the common law the leading case of *Purefoy v. Rogers*, decided in 1672, and reported in 2 Wms' Saund. 380, in which the doctrine is laid down, has been followed. The rule is thus comprehensively stated in 2 Washburn on Real Property, 6th ed. p. 552, § 1597: "At common law there were various ways in which a contingent remainder might be defeated, by destroying the particular estate on which the remainder depended before it vested. It might be done by a feoffment or forfeiture, . . . or by the inheritance descending upon the tenant and merging his particular estate in itself, or by the particular estate and the inheritance becoming united by conveyance or act of the parties, since the outstanding of a contingent remainder would not prevent the merging of the two, it not being an intervening estate." It is remarkable that a somewhat careful search has disclosed very few cases in American courts in which the precise point was involved. In a text-book of high rank our own case of *Mangum v. Piester*, 16 S. C. 316, is cited as authority for the proposition that "where the particular estate merges in inheritance either by the act of the particular tenant or by the descent to him of the inheritance after the particular estate has taken effect, intermediate contingent remainders are destroyed." 7 L.R.A. (N.S.)

It is true the court held in that case a life estate became merged in the remainder when it was purchased by the remainderman, but the remainder there under discussion was held to be vested, and the limitation over an executory devise, and not a contingent remainder. The subject of the barring of intervening contingent remainders by merger could not therefore arise, and was neither discussed nor decided. Nor was the precise point here under consideration necessarily involved in *Bouknigh v. Brown*, 16 S. C. 155, 170, as will be found on examination of the facts of the case; but in the course of the discussion the court uses this language: "A contingent remainder may be destroyed at common law by fine or recovery, by merger of the particular estate, or by any displacement thereof, and this is the great and essential difference between a contingent remainder and executory devise." *Redfern v. Middleton, Rice*, L. 459, decided that alienation by the life tenant by deed of feoffment with livery of seisin operated as a forfeiture of the life estate, resulting in the destruction of the contingent remainder depending upon the life estate as the particular estate supporting it. To the same effect are *Faber v. Police* and *McElwee v. Wheeler*, supra; and *Snelling v. Lamar*, 32 S. C. 72, 17 Am. St. Rep. 835, 10 S. E. 825. While the possibility of destroying contingent remainders by merger was not involved in those cases, yet forfeiture by deed of feoffment, with livery of seisin, and merger, have equal common-law sanction as methods of barring contingent remainders, and the remarks of Chief Justice McIver, in *People's Loan & Exch. Bank v. Garlington*, 54 S. C. 413, 426, 71 Am. St. Rep. 800, 32 S. E. 513, as to the former, apply also to the latter: "There is no doubt that, under the common law of England, a tenant for life could bar contingent remainders by executing a deed of feoffment, with livery of seisin, and there is as little doubt that this portion of the common law became a part of the law of this state by virtue of the act of 1712, incorporated in Gen. Stat. 1882, § 2738." The act of 1883 (18 Stat. at L. p. 430; 1 Civ. Code 1902, § 2465) provides that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seisin." However unfortunate it may be regarded that our statute was not modeled after the English statute 8 & 9 Vict. chap. 106, and thus made comprehensive enough to prevent the unjust destruction of the rights of contingent remaindermen by merger and other artificial means, the court cannot extend the statute beyond its plain meaning. But, even if the

statute had expressly provided against the destruction of contingent remainders by merger, it could have no effect to defeat a right acquired by merger before the enactment of the statute. Here, if Morris W. Hunter acquired the preceding life estate and thus defeated the contingent remainder, this was accomplished, and his rights and the rights of those claiming under him were vested, long before the act was passed. The possibility of defeating it might have been taken away by statute, but after it had been actually destroyed, and the entire unlimited title acquired by Hunter, his title could not be altered by statute. *People's Loan & Exch. Bank v. Garlington*, 54 S. C. 429, 71 Am. St. Rep. 800, 32 S. E. 513. The circuit judge was therefore in error in saying to the jury that the life estate could not merge in the fee because of the intervening contingent remainder, but the unsoundness of the reason given manifestly could not avail appellants, if merger was prevented by any other circumstance appearing from the undisputed evidence. This brings us to the difficult inquiry as to the effect of the intention of the parties.

Inasmuch as there seems to be considerable doubt as to the state of the law on this subject in South Carolina, a statement of the rule obtaining elsewhere and a brief review of our decisions seems desirable. The view generally held is that merger is not favored in the courts of law or equity, and in equity, at least, it will not take place if opposed to the intention of the parties either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united. This doctrine is sustained by an unbroken current of authority in the other states of the Union and in England. *Forbes v. Moffatt*, 18 Ves. Jr. 384; *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; *Welch v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Jackson v. Relf*, 26 Fla. 465, 8 So. 184; *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Westheimer v. Thompson*, 3 Idaho, 560, 32 Pac. 205; *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; *Thomas v. Simmons*, 103 Ind. 538, 2 N. E. 204, 3 N. E. 381; *Shiner v. Hammond*, 51 Iowa, 401, 1 N. W. 656; *Ann Arbor Sav. Bank v. Webb*, 56 Mich. 377, 23 N. W. 51; *Horton v. Maffitt*, 14 Minn. 289, 100 Am. Dec. 222, Gil. 216; *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107; *Mathews v. Jones*, 47 Neb. 616, 66 N. W. 622; *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696; *Gore v. Brian* (N. J. Eq.) 35 Atl. 897; *Gardner v. Astor*, 3 Johns. Ch. 53, 8 Am. Dec. 465; *Watson v. Dundee Mortg. & Trust Invest. Co.* 12 Or. 474, 8 Pac. 7 L.R.A. (N.S.)

548; *Bryar's Appeal*, 111 Pa. 81, 2 Atl. 344; *Dodge v. Hogan*, 19 R. I. 4, 31 Atl. 268, 1059; *C. M. Hapgood Shoe Co. v. First Nat. Bank*, 23 Tex. Civ. App. 506, 56 S. W. 995; *Carpenter v. Gleason*, 58 Vt. 244, 4 Atl. 706; *Rorer v. Ferguson*, 96 Va. 411, 31 S. E. 817; *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 314. It is argued, however, that the rule is different in this state, and that something more than even actual proof of the intention, as a part of the principal contract from which merger would usually result, is necessary to prevent it; that an express contract separate and distinct must be proved. It cannot be denied our cases are in some confusion, and it is therefore desirable to reconcile them as far as possible and state the true rule.

In none of our earlier cases on the subject of merger is the effect of intention considered, and we therefore commence with the case of *Agnew v. Charlotte, C. & A. R. Co.* 24 S. C. 18, 58 Am. Rep. 237. In this case it was not necessary to go further than to hold that an express separate agreement incorporated in the deed made to the mortgagee that the mortgage should remain open for his protection prevented merger; but effect was given to this paper, not because it was incorporated in the deed or was in writing, but as the expression of an intention that the mortgage should not merge. The court says, quoting from 2 Pom. Eq. Jur. § 791: "If this intention has been expressed, it controls," etc. In his dissenting opinion Mr. Justice McIver says: "But, in addition to this, the fact that the intention which, according to the authorities relied on, determines the question of merger, is expressed in writing, cannot be decisive. It may facilitate proof of its existence, but it cannot give it an effect which it would not otherwise have. According to those authorities, if the intention that there shall be no merger is ascertained, whether by express proof or implied from the circumstances, it controls. I do not see how it is possible that the mode in which it is ascertained can affect its nature or effects. It is true that there are some things which are required to be in writing, as, for example, a contract for the sale of land, which have no efficacy unless so expressed; but this is not of that class." In *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307, the mortgage was held to be merged by the acceptance of the mortgagee of the mortgagor's interest, on the ground that there was not only no proof of an express agreement against merger, as in *Agnew v. Charlotte, C. & A. R. Co.* supra, but not a word of evidence tending to show any intention against it.

While in this case the statement of the

controlling influence of intention, quoted from Jones on Mortgages and Pomeroy's Equity Jurisprudence, seems to be recognized, it is held to have no application to the case of a mortgagee taking a conveyance of the land as a satisfaction of his mortgage, for the reason that the mortgagee in this state has no estate in the land, but a lien upon it, and anything he takes in satisfaction is payment, though it may prove afterwards valueless in his hands. The case therefore rests on the absence of proof of intention that the mortgage should not be satisfied, and on the nature of a mortgage under our statute law. In *Bleckley v. Branyan*, 26 S. C. 424, 429, 2 S. E. 319, referring to the satisfaction of a mortgage by merger, the court says: "On account of this seeming hardship, it has been held that the mortgagee, thus purchasing the equity of redemption, may set up the prior mortgage against subsequent encumbrances, if the parties at the time of the transfer intended and covenanted to prevent merger and to keep the mortgage open. See *Agnew v. Charlotte, C. & A. R. Co.* supra, and authorities. So that the real question in this case is whether the facts as to the intention of the parties bring it within the principle announced in the case of *Agnew v. Charlotte, C. & A. R. Co.* supra." It is then held that there was not only no evidence of intention to keep the mortgage open, but that the facts led to a contrary conclusion. It is true in this case the court said: "We cannot venture to go further in relieving a mortgagee who purchases the mortgaged property than was indicated in the case of *Agnew v. Charlotte, C. & A. R. Co.* supra." But this clearly did not mean that there must be present the precise facts of *Agnew v. Charlotte, C. & A. R. Co.* in order to prevent merger, for what was indicated in that case was the principle that merger would be prevented by an intention that it should not occur, either expressed or implied, because the interest of the mortgagee required it. In *Agnew v. Renwick*, 27 S. C. 562, 573, 4 S. E. 223, Mr. Justice McIver uses this language: "Where parties have taken the precaution to protect themselves against the operation of the general rule, by an express covenant to that effect, they then bring themselves under the exception recognized in *Agnew's Case*, beyond which this court has said it will not venture to go; but where no such precaution has been taken, then the case must fall under the operation of the general rule." This cannot be regarded as having the force of *stare decisis*, for the reason that it is stated in the opinion it would be difficult, if not impossible, to find any evidence of intention

to keep the mortgage open, and for the further convincing reason that a reference to the case will show the conclusion might well be sustained on other grounds, and the majority of the court concurred in the result only.

Up to this point, therefore, it cannot fairly be said the court ever adjudged that the intention would not control, unless evidenced by an express agreement in writing. On the contrary, the tendency was to regard the fact of the intention controlling in whatever way it might be indicated. But in the second appeal, in *Bleckley v. Branyan*, 28 S. C. 445, 6 S. E. 291, the court was unanimous, and it is there said to be settled in this state that "a mortgagee who buys the estate under mortgage not under process of foreclosure of his lien extinguishes the debt or claim, with lien on the land," and that the only exception to this rule is the one recognized in *Agnew v. Charlotte, C. & A. R. Co.* 24 S. C. 18, 58 Am. Rep. 237, whereby the mortgagee may, by express agreement in writing, protect himself from such a result." There is a *dictum* to the same effect in *Parker v. Parker*, 52 S. C. 382, 29 S. E. 805, but, so far from the result of the case resting on that ground, it was decided that the mortgage remained open. While the case of *Michalson v. Myrick*, 47 S. C. 297, 25 S. E. 162, rests mainly on the ground that merger did not take place because the deed from which it was claimed to result was held to be absolutely void for fraud, yet the court, by a *dictum*, gives sanction to the controlling effect in equity of intention, either expressed or implied. The precise question was involved, however, in *Lipscomb v. Goode*, 57 S. C. 182, 35 S. E. 493, and an intention to keep the mortgage open was implied, because it was to the interest of the mortgagees that it should not be satisfied, and it was held there was no merger. *Powell v. Patrick*, 64 S. C. 190, 41 S. E. 894, is to the same effect. In *Glenn v. Rudd*, 68 S. C. 102, 102 Am. St. Rep. 659, 46 S. E. 555, the difficulty is pointed out of reconciling the cases in this state which intimate that to prevent merger an express contract against it is necessary, and those which hold the contract against it is sufficiently shown by proving the intention, and that the intention will be implied when the interests of the party against whom the merger is claimed require it. But the single point decided was that an agreement to keep the mortgage open after conveyance of the property to the mortgagee need not be in writing and incorporated in the deed of conveyance.

From this review we think it clear the later cases in this state establish the propo-

sition, which, as we have seen, is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united. It is argued, however, that, though in equity an intention that it shall not take place may prevent merger, at law, whenever the greater and lesser estate coincide in the same person without any intermediate estate, the rule that merger takes place is inflexible, and entirely unaffected by the intention; that is to say, that if in this case Mrs. McCreary had made, and Hunter had accepted, a deed to the life estate, accompanying the execution with the most explicit expression of an intention on the part of both of them that merger should not result to the destruction of the contingent remainder, the life estate nevertheless would have been merged and the contingent remainder destroyed. It will hardly be thought that any such difference "at law" and "in equity" can be rested on a difference between the jurisdiction and practice of courts of law and courts of equity. If this supposed distinction ever had such a foundation, it has been taken away by the adoption of the reformed procedure. Pom. Code Remedies, §§ 94-103. The court on its law side will recognize and enforce equitable rights wherever they are necessarily involved in the decision of a legal issue. For example, if A, in a suit against B to recover possession of land, proves his own title, and B shows a deed from A for the land in dispute, this would be a complete bar to A's recovery; but, if A then proves the deed to B was intended as a mortgage and the debt had been paid, he would still have the right to recover possession, and it makes no difference whatever whether we call his right legal or equitable. So if, in an action to recover possession of land, the title of the plaintiff depends upon an alleged merger, if the merger could be held by a court of equity not to have taken place because contrary to the intention, the plaintiff could not recover.

If it is contended the supposed distinction is founded on the difference between equitable and legal estates and interests, we can find no authority which compels us to recognize it. Indeed the doctrine that merger at law will take place without respect to the intention seems rather to have been taken for granted by the courts of equity than established by the decisions of the courts of law. The statement that at law the intention of the parties can have no effect seems

to be founded on *Compton v. Oxenden*, 2 Ves. Jr. 261, and *Forbes v. Moffatt*, 18 Ves. Jr. 384; the lord chancellor in the former case using this language: "It is a clear principle, both at law and in equity, that, where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion; but there is an immediate merger. But it is true in equity, though there may be that which, if all was reduced to a legal right, would of necessity operate as a merger, this court, acting upon the trust, will, on the intent, express or implied, preserve them distinct, and that confusion of rights will not take place." Similar expressions will be found in *Smith v. Roberts*, 91 N. Y. 470; *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107, and our own cases of *Agnew v. Charlotte, C. & A. R. Co.*; *Michalson v. Myrick*; and *Lipscomb v. Goode*,—*supra*, and other modern cases. But these expressions have the weight of dicta and nothing more, for in all the cases in which they are found the rule of equity, and not the rule of law, was involved and under discussion; and we have been able to find no law case in which it was adjudged that merger had taken place or would take place at law though opposed to the intention of the parties as established by the evidence. There is high authority against the existence of such rigidity in the rule of merger at law as is stated in the equity cases to which we have referred. "The intention is considered in merger at law, but it is not the governing principle of the rule, as it is in equity; and the rule sometimes takes place without regard to the intention, as in the instance mentioned by Lord Coke." 4 Kent, Com. *102. So far as we can discover, there is no reference to Coke on Littleton, where the general doctrine of merger is laid down, as to the effect of intention. In *Fink's Appeal*, 130 Pa. 256, 18 Atl. 621, it was held where a widow holds dower, which is a legal interest, in lands, the fee to which descends to her by the death of her son, merger of the two estates becomes a question of intent, and cannot take place against the wishes of the widow, and will not be presumed against her interest. To the same effect is *McLeery v. McLeery*, 65 Me. 172, 20 Am. Rep. 683, where it is said the tendency in the courts has been to admit and apply the same principle in law and in equity. It is true, in *Youmans v. Wagener*, 30 S. C. 302, 3 L.R.A. 447, 9 S. E. 106, it was held that the widow's dower was merged when she acquired the fee, but there was no proof of a contrary intention, and no reference to the effect of intention. In *Flanigan v. Sable*, 44 Minn. 417, 40 N. W. 854, the action was on prom-

issory notes, and on the question of merger the court says: "The distinction in practice between law and equity having been abolished, and both legal and equitable remedies being now administered by the same court, and in the same action, there is no reason why the rule at law, which was merely technical, should obtain in any case; but the equity rule should always be applied, regardless of the form of action." It is said in 20 Am. & Eng. Enc. Law, p. 590: "This distinction appears of waning importance, as now in the main the equitable doctrines of merger have superseded the legal doctrines even in courts of law." Id. 591, 595; note to *James v. Morey*, 3 Sharswood & B. Am. Law of Real Prop. 236.

From the inception of the rule that merger would take place and the contingent remainder thereby defeated when the owner of the fee acquired the preceding particular estate, an exception was allowed when the will itself gave the particular estate and the fee to the same person, for the reason that to apply the rule in that case would defeat the intention of the testator. *Fearne, Contingent Remainders*, 340-344; 2 Washb. Real Prop. 638, 639. The same exception was applied to a deed to avoid defeating the intention of the grantor in *Burton v. Barclay*, 7 Bing. 745. Since the law holds it to be practically possible for one person to be the owner of a separate life estate and of the fee at the same time, though this is technically impossible, in order to save the contingent remainder and thus give effect to the intention of the testator or grantor, as expressed in the will or the deed, it would be difficult to find any sound reason against giving a like effect to the common intention of the separate owners of the life estate and of the fee simple, when the owner of the fee acquires the life estate. The whole doctrine of merger is founded on the reasoning that it is technically impossible for a man to hold a valid charge on property which he himself owns, or a life estate in lands to which he has a fee-simple title. If the technical argument may be overcome for the sake of the intention in one case, it would be difficult to find just reason to disregard the intention in the other. To do so without reason would be a reproach to the administration of justice. Obviously nothing but precedent from which there is no escape would justify the establishment of one rule as to merger as equitable and another as legal. The tendency of the law is to conform to equity. "Since the doctrines of equity began to react upon the law, and especially since the impulse given by the brilliant career of Lord Mans-

field, the common-law courts have consciously adopted and applied, as far as possible, purely equitable notions—not so much the technical equity of the court of chancery, but the principles of natural justice—in their decision of new cases, and in the development of the law, until a large part of its rules are as truly equitable and righteous in their nature as those administered by the chancellor." 1 Pom. Eq. Jur. § 69.

We conclude there is no controlling authority that the intention is not to be regarded in an issue of law or as to legal estates; but, on the contrary, the tendency of modern authority is to regard the intention controlling at law as well as in equity. There is certainly no reason to be found for any distinction. It is not necessary in this case to decide whether "in law" the intention against merger is to be implied from the fact that it would be contrary to the interest of the party in whom two estates are united for one to be merged in the other, for, assuming that the burden is on the plaintiffs to affirmatively prove the intention against it, we think such intention is clearly established by the evidence, and nothing was offered to disprove it.

No deed from Mrs. McCreary to Morris Hunter was offered in evidence; defendant's claim that he acquired the life estate of Mrs. McCreary being based entirely on proof of possession. Mr. Peter A. Brunson, a witness of the highest respectability, testified that Morris Hunter was in possession of the land in 1835 claiming it as his own. It is impossible, however, that he was making any such claim against Mrs. McCreary at that time, for he writes to her on February 20, 1836, about the land, referring to it as "your land." In addition to this, the will directed him and the other executors to "retain and manage" the land for Mrs. McCreary, then Miss Coleman, until "she arrives at the age of twenty-one years or marriage," and there was no proof of any notice to her of adverse holding. *Floyd v. Mintsey*, 7 Rich. L. 181. When Hunter went into possession, therefore, in 1835, he held it for Mrs. McCreary, and his subsequent holding would be regarded permissive without proof to the contrary. The witnesses, James G. Hutchinson and Albert Sawyer, say they knew of his possession, but testify nothing of the claim under which he held. The defendants' claim of adverse possession by Morris Hunter against Mrs. McCreary therefore rests on the evidence of Henry Perkins and H. L. Poston, and they cannot take the benefit of this evidence without its qualification. Both these witnesses say Hunter was in possession claiming only the life interest of Mrs. McCreary,

saying the "heirs were out west," clearly referring to the children of Mrs. McCreary, plaintiffs in this action. The proof was plenary and undisputed of declarations to the same effect made by Thomas P. Lide, who was afterwards in possession under a sheriff's deed purporting to convey the interest of Hunter; and as late as 1885 the defendant A. C. Coggeshall wrote Mrs. McCreary, saying: "I own a part of your lifetime interest in a tract of land in this county, which was sold to Mr. Thos. P. Lide in 1858 by the sheriff to satisfy a claim of Mr. Hopkins P. Charles against Maurice W. Hunter, Esq. I would like to either buy the interest of your heirs or sell them mine. . . . I would like for them to make me an offer to either buy or sell." Even if there had been testimony which left something to go to the jury as to the intention of Morris Hunter, this could not help defendants, because the claim of title in him acquired by possession adverse to Mrs. McCreary is without support, and therefore the life estate did not merge in the fee while he held the fee. His possession could not have begun to be adverse until after his letter to Mrs. McCreary, dated February 20, 1836, in which he acknowledges her title and right. Before this date, on December 30, 1835, Mrs. McCreary, *née* Coleman, was married and remained under the disability of coverture until 1861, four years after the death of Morris Hunter. The law will not presume a deed from her while under this disability. 2 Washb. Real Prop. 316. Nor could title be acquired against her by adverse possession. *Jones v. Reeves*, 6 Rich. L. 132. If Thomas P. Lide acquired the fee by his purchase of Morris Hunter's interest at sheriff's sale, and he and his successors in possession acquired the life estate of Mrs. McCreary by adverse possession or presumption of a deed from her, this possession was accompanied and qualified by the statement that the contingent remainder of the plaintiffs was unclaimed and unaffected. If Hunter or any of his successors who had acquired his fee in the land had claimed under a deed from Mrs. McCreary, expressly stipulating the contingent remainder should not be destroyed by its execution, this beyond doubt would be an expression of intention against merger, because by merger the remainder would necessarily have been destroyed; and, when the claim to the life estate is based on adverse possession accompanied by a declaration that the contingent remainder was unaffected, the result cannot be different.

The charge that merger did not take place and the contingent remainder was not defeated, was right, not for the reason stated 7 L.R.A. (N.S.)

by the circuit judge, but because it was the understanding and intention of all parties concerned that there was no merger, and that the contingent remainder-men should have the land upon the death of the life tenant. Before ending the discussion of this point, it may be well to say that, if any of the grantees claiming under Morris W. Hunter had acquired the land without knowledge of the intention that there should be no merger, and relying upon the rule that ordinarily in such conditions the life estate is merged and the contingent remainder destroyed, a very different question would have been presented.

3. The defendants objected to the introduction of a letter from Morris W. Hunter to Mary A. McCreary, dated 20th February, 1836, offered as an admission by him that he had not acquired her life estate, on the ground that the genuineness was not proved. The letter was an ancient document and required no proof. 1 Elliott, Ev. § 421. It was found among the papers of Mrs. McCreary, the addressee, nearly seventy years after it was written, and to solve any doubt of its genuineness it was competent to introduce for the purpose of comparison the records of the ordinary's office, presumably written by Hunter, the incumbent of that office. It is said in *Cantey v. Platt*, 2 M'Cord, L. 261: "When a writing is offered in evidence, so antiquated as to render it difficult, if not impossible, to produce a witness who had ever seen the person write, whose signature is attached to the writing, justice would be defeated if a comparison of handwriting were not permitted. In the case of *Allesbrook v. Roach*, 1 Esp. 351, the jury were allowed to examine papers admitted to be the party's handwriting to compare them with the writing in question, and to draw their own conclusions. And in the case of *Roe ex dem. Brune v. Rawlings*, 7 East, 279, the signature in an entry made by a person long since dead was allowed to be compared with another signature of the same person in a deed of settlement. So, also, where a parson's books were produced to prove a *modus*, the parson having been long dead, a witness who had examined the parish books, in which the same parson's name was written, was permitted to swear to the similitude of the handwriting. Bull. N. P. 236."

4. Objection was made also to the introduction of the record of a deed from Morris Hunter to Thomas Hunter, dated February 18, 1820, purporting to be probated before "George Bruce, U. Q.," on the ground that the letters "U. Q." did not indicate the official designation of any officer authorized at that time to take a probate. The statute

of 1804 (5 Stat. at L. p. 479) enacted: "Clerks of the several courts of record of this state . . . shall be and they are hereby declared to be *ex officio* justices of the quorum." The letters here used no doubt signified *unum quorum*. The probate of deeds taken not long before and just after the execution of this deed purport to have been made before "George Bruce, Clerk of the Court and one of the Quorum *ex officio*." Aside from any proof on the subject, the court of common pleas could take judicial notice that George Bruce was its clerk, and *ex officio* justice of the quorum. A justice of the quorum was a magistrate and therefore authorized to take probates under the act of 1788 (7 Stat. at L. p. 247). The omission of his official title did not affect the validity of the probate. *Carolina Sav. Bank v. McMahon*, 37 S. C. 309, 16 S. E. 31.

5. The letter of A. C. Coggeshall to the life tenant, taken in connection with the several deeds, the parol evidence of successive possessions, and the admissions of those who successively held the land, was certainly evidence sufficient to justify the circuit judge in refusing to grant a motion for nonsuit made on the ground of a total failure to prove the *locus in quo*.

6. The motion for a new trial on "the ground that the verdict of the jury was against W. D. Coggeshall as well as A. C. Coggeshall, notwithstanding the plaintiffs proved that the said W. D. Coggeshall derived his title from one Thomas Rogers, a different source of title altogether from the title of A. C. Coggeshall, which might have been superior to the title of Mary Ann Coleman or these plaintiffs, and in no way connected therewith," was properly refused. There was evidence that Thomas Hunter and those who claimed under his will, subject to the rights of the plaintiffs, were in possession of the land for a much longer period than was necessary to establish the presumption of a good title against all the world. The right of the plaintiffs to recover possession against A. C. Coggeshall, the last of these successive holders under the will, necessarily embraced the right to recover against W. D. Coggeshall because any independent title he or his grantors may have held was acquired by the life tenant and those who held under her by the long stretch of successive possessions adverse to all the world except the plaintiffs, the contingent remainder-men.

The sixth exception was abandoned, and as to it no opinion is expressed.

The judgment of this court is that the judgment of the Circuit Court be affirmed. 7 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. C. HARVEY, Exr., etc., of Robert T. Harvey, Deceased, Appt.,

v.

M. B. RYAN et al.

(59 W. Va. 434, 53 S. E. 7.)

Injunction—collection of purchase money.

1. Equity will enjoin the collection of purchase money on land where the vendee is in possession under conveyance with covenants of general warranty, where the title to the land is questioned by suit, prosecuted or threatened, or where it is clearly shown to be defective.

Same—necessary allegations.

2. Such injunction will not be granted unless the bill alleges facts showing a clear outstanding title in a stranger; and the burden will be on the plaintiff to prove the existence of that title. Allegations of defect of title, which do not show in what re-

Headnotes by SANDERS, J.

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I. Generally.

The rule in equity is that this court will not take cognizance of a suit where the complainant has a plain and adequate remedy at law, unless in certain prescribed cases in matters pertaining to which courts of equity have always claimed jurisdiction, as fraud in the sale of real estate, suits for rescission, etc. There has attached to the jurisdiction of the courts of equity another line of cases growing out of the insolvency of the vendor, where the remedy at law would be fruitless. This unquestionably gives a court of equity jurisdiction to issue an injunction to restrain proceedings at law for purchase money where the title is defective; and, while the rule is well recog-

spect such defect exists, or facts which establish nothing more than that the title is doubtful or unmarketable, will not support the application for an injunction.

Same—eviction of vendee.

3. Where a vendee has entered into possession of land under deed with covenants of general warranty, and, in an action of ejectment, a stranger asserts title to and recovers the land, and the vendee is evicted, equity will enjoin the collection of the purchase money due the vendor therefor, upon proper bill filed for that purpose.

Same—remedy at law.

4. At common law, the defense of failure of consideration could not be interposed, nor damages for a breach of warranty of title claimed by way of recoupment, against a sealed instrument. But while, under our statute, these defenses can

nized, and is the solution of many of the cases, still many cases have stumbled over the decision of *Johnson v. Gere*, 2 Johns. Ch. 546, which held that, where an action of ejectment was brought against the vendee having a warranty deed, claiming adverse paramount title, the vendee was held entitled to an injunction against the collection of the purchase money until the question of title was determined. In the same volume, at page 519, 7 Am. Dec. 554, is the case of *Abbott v. Allen*, which holds that, in the absence of fraud, insolvency, or eviction, the purchaser must look to his covenants in the deed. The *Johnson Case* has been criticized, and efforts have been made to explain it, in *Banks v. Walker*, 3 N. Y. Leg. Obs. 343, on the ground that the bill must have shown an absolute failure of title in the vendor. On the other hand, it is suggested in *Miller v. Avery*, 2 Barb. Ch. 582, that the reporter is mistaken in the statement of the case, or that the chancellor overlooked the fact that it was not alleged in the bill that the complainants even believed their title to the land was defective. Be that as it may, the case of *Johnson v. Gere* does not refer to *Abbott v. Allen*, supra, holding that, where there was no eviction or fraud, there would not be ground for an injunction; and courts have sometimes followed one, and sometimes cited the other. But it will be found that, except in a few cases, the jurisdiction has attached to equity by reason of the fact of fraud, insolvency, or nonresidence of the vendor.

A point emphasized in the *Johnson v. Gere Case* is that a suit in ejectment is held equivalent to an eviction. So, disturbance of the possession is held essential in some cases, and the term is often used, "purchaser in possession" will not be entitled to an injunction. This was the case in *Harding v. Commercial Loan Co.* 84 Ill. 251, where the grantee of a purchaser in possession was held not entitled to an injunction against the collection of a purchase-money trust deed given by his grantor, on the ground that the title of his grantor was defective in that one of the grantors therein was an in- 7 L.R.A. (N.S.)

be made at law, yet where, but for the statute, equity would have jurisdiction, such equitable remedy is not taken away, because the remedy at law is given by statute.

(February 27, 1906.)

A PPEAL by complainant from a decree of the Circuit Court for Cabell County in favor of defendants in a suit to enjoin the enforcement of a bond for purchase money. Reversed.

The facts are stated in the opinion.

Messrs. Wyatt & Graham for appellant.

Messrs. Simms & Enslow for appellees.

Sanders, J., delivered the opinion of the court:

On the 21st day of June, 1883, M. B.

fant. The court said that, if suit had been threatened by the supposed claimant, it would be different. This case does not apply the rule laid down in Virginia to sales under deeds of trust.

In Virginia and West Virginia some cases, which must be considered as exceptional to the weight of authority elsewhere, follow the rule laid down in *Johnson v. Gere*, supra, that an injunction will be granted against the collection of purchase money on land where the purchaser is in possession under conveyance of general warranty deed, where the title is threatened by suit; and where it is clearly shown to be defective. This was held in *HARVEY v. RYAN*. But in that case, as in several other cases in those states, the vendor was insolvent, which in the *HARVEY CASE* was said to be "an additional reason for equitable interference."

In *Heavner v. Morgan*, 30 W. Va. 335, 8 Am. St. Rep. 55, 4 S. E. 406, which was an action for specific performance, the case of *Johnson v. Gere*, supra, was approved.

In *Morgan v. Glendy*, 92 Va. 86, 22 S. E. 854, the purchaser filed a bill for an injunction against collection of the purchase money on the ground of defective title, in that the property had been sold to the grantor by a purchaser under a deed of trust, and it did not appear that the interests of the *cestui que trust* had been canceled. The grantor in this case was insolvent. It was held that the lapse of twenty years had so cured the title that it was not shown to be so defective as to entitle the purchaser to an injunction. This case approved the doctrine "that a vendee in possession of land, under a conveyance with general warranty, may enjoin the collection of the purchase money on the ground of defect of title, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective."

In *Womensdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191, the deed to the grantor was set aside on account of his fraud in procuring the same. There was an eviction of the grantee. The grantor was insolvent, and the bill in equity by the purchaser for

Ryan, by deed with covenants of general warranty of title, conveyed to Robert T. Harvey a certain lot in the city of Huntington, in consideration of which Harvey executed his bond for \$450, payable to Ryan. Ryan's grantor was one Andrew Griffith, who bought the lot of the Central Land Company. Harvey placed a dwelling upon this lot shortly after his purchase, and on the 23d day of December, 1885, John B. Laidley, claimant of the lot, instituted, in the circuit court of Cabell county, an action of ejectment for the recovery thereof, against Harvey's tenant, and, by an order of court, Harvey was substituted as defendant in the action. After the institution of the action of ejectment, Griffith, as assignee of Ryan, brought an action of

assumpsit in the circuit court of Cabell county, on the note executed by Harvey to Ryan, whereupon Harvey filed his bill, setting up the facts of the purchase, the execution of the note, the pendency of the action of ejectment, and further alleging that, some time in the year 1882, John B. Laidley instituted an action of ejectment against the Central Land Company to recover possession of a certain tract of land in the city of Huntington, within which tract was included the whole of the lot in question, and that in said action the supreme court of this state decided that the acknowledgment of the grantor, in the deed to the Central Land Company, was defective, and that, in all probability, Laidley would be adjudged the lawful owner of the

an injunction proceeded upon the theory that the grantor was insolvent, and on the fraud of the vendor in procuring his title. An injunction was granted, the court saying: "It is clearly settled law that, even where it is not the case of unpaid purchase money under an executory contract for the sale of land, but where a deed has been made, the purchaser will not be compelled to pay purchase money remaining in his hands, and looks to his warranty, where the grantor is insolvent and title defective."

In *Thompson v. Catlett*, 24 W. Va. 524, which was an action to foreclose a vendor's lien, and which held that the defendant was entitled to an abatement of the price on account of defective title, it was said: "Neither can it now be doubted that, if the title of the vendor to the whole or any part of the land sold be shown to be clearly defective, a court of chancery will, even after conveyance, with covenant of general warranty executed, and accepted by the vendee, who is in possession of the land thereby granted, grant relief to the vendee by enjoining the collection of the unpaid purchase money to the extent of the loss caused by such defect of title; but in such a case the burden of proof rests upon the vendee to show that the title derived from his vendor was clearly defective."

Among the exceptional cases is *Renick v. Renick*, 5 W. Va. 285, where a purchaser under a deed of general warranty from his father and mother held the land nine years. His mother had died, and he brought a suit alleging that his father had only a life estate, and that the title was in the wife and had descended to many infant heirs, and that the deed, through defective acknowledgment and certificate, was void as to her. No fraud, concealment, or insolvency was charged. It was held that the purchaser was entitled to an injunction against the collection of the purchase-money bonds in the hands of an assignee. The court said: "Under the peculiar circumstances of this case, I think it would be unreasonable to restrict the vendee to his covenant of general warranty, and compel him, with the admitted defect and failure of title, to dis-

charge the whole of his purchase money, and to risk the hazard of the solvency of his vendor's estate after his decease."

So, holding that failure to get possession, or interference with the possession, is the material question, it was held, in *Williams v. Williams*, 94 Ga. 627, 20 S. E. 108, where the vendor's wife was in possession of the land under a decree of divorce, that the purchaser was entitled to an injunction against the collection of the purchase money. In this case the vendor had assigned to the purchaser a bond for reconveyance on assuming a prior loan made to the vendor, and the purchaser had received a quitclaim deed from the lender on paying the loan.

In Virginia injunctions against sales of land under deeds of trust are also treated as peculiarly within the jurisdiction of a court of equity.

A vendee in a warranty deed made a deed of trust to secure the purchase money. It was held that where the title was doubtful an injunction would be granted against the sale of the land, or such part as to which the title was in doubt. *Miller v. Argyle*, 5 Leigh, 460. The court said: "The case, it must be observed, is not that of an injunction to a judgment at law. It is an injunction to a sale under a deed of trust, on the ground of defect of title. Now, a distinction has always been strongly drawn between these cases, for it never can be equitable to permit a sacrifice by sale under a doubtful title, though it may be but just that the vendor should be suffered to enforce a judgment for his purchase money, where the vendee is in possession, since the doubt about the title may eventually turn out to be frivolous and groundless. Accordingly, it has been decided that, if there is a cloud hanging over the title, or if the amount to be raised is uncertain, the sale should be enjoined. *Lane v. Tidball*, *Gilmer* (Va.) 130; *Gay v. Hancock*, 1 Rand. (Va.) 72. In this case the bill distinctly alleged the loss of 16½ acres of the land on the trial of a writ of right, and it also alleged a defect of title as to the 100 acres."

So, it was held that a sale under a deed

lot in question. The bill, after alleging that Ryan and Griffith were nonresidents, and insolvent, prayed that an injunction might be awarded, restraining the prosecution of the action of assumpsit until the matter respecting the title to the lot was adjudicated, which injunction was granted. The action of ejectment brought by Laidley against Harvey was determined in September, 1900, it being ascertained by the final judgment entered therein that the plaintiff had an estate in fee simple in the lot, and that the value thereof, without improvements, was \$450, and the value of the improvements made thereon by Harvey was \$1,000. Laidley elected to relinquish his estate in the lot to Harvey, at the value ascertained. The parties to this suit having

all departed this life, the same was revived in the name of and against the personal representatives of such respective deceased parties. On the 23d day of July, 1904, the executor of R. T. Harvey, deceased, filed an amended and supplemental bill, which, after adopting the allegations of the original bill, and stating the result of the determination of the action of ejectment, alleged that Ryan and Griffith, though often requested, had failed and refused to protect Harvey's title to the lot, and especially the improvements thereon, and that Harvey was compelled to and did pay the judgment, interest, and costs, which exceeded any sum which might be due on the purchase-money note; that Harvey paid said purchase money, interest, and costs through his

of trust given for the purchase money would be enjoined, in *Gay v. Hancock*, supra. In this case land was sold with a warranty, and a suit was then pending against the title, of which the purchaser had no knowledge at the time of purchase.

While many cases speak of the necessity of showing ouster or interference with possession, as giving equity jurisdiction, it will be found generally that in those cases that refused to entertain jurisdiction, the complainant did not allege either fraud, insolvency, or nonresidence of the vendor.

The general rule may be stated, that to restrain the collection of the notes given for the purchase money of lands, or to rescind the contract, by one in undisturbed possession under the contract of purchase, requires a very strong case. To authorize equitable interference, there must be fraud to mislead the party; or there must be insolvency in the vendor and a clear case of unquestioned outstanding paramount title exhibited to the court, which will be enforced; or the complainant must show nonresidence, so that the vendor is out of the jurisdiction of the court, or something analogous, which has been discovered since the contract, of equal dignity which will show that it would be inequitable to enforce the contract.

II. Fraud or concealment.

There appears to be no question but that in cases of defective title fraudulent misrepresentations as to the title, or the concealment of material facts by the vendor, where relied upon by the vendee, will be sufficient ground for an injunction against the collection of the purchase money. In most of these cases the vendor was insolvent. This is an additional ground for the exercise of equitable jurisdiction. In some of the cases a rescission of the contract of purchase was sought.

So, fraudulent misrepresentations as to title, quantity, and quality of land, made by the vendor, were held sufficient ground to enjoin a judgment at law for the purchase money, in *Boyce v. Grundy*, 3 Pet. 210, 7 L.R.A. (N.S.)

7 L. ed. 655. The court said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

So, the fraud of a vendor in falsely representing that he had title when he had none was held sufficient for an injunction against the collection of the purchase money, and for the equitable jurisdiction of a suit for rescission, in *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49. In this case the purchaser held by title bond, and the vendor's estate was insolvent.

And, false representation as to the use of the well was held sufficient ground for enjoining the collection of the purchase money to the extent of the cost of sinking a well on plaintiff's lot, in *Elder v. Sabin*, 66 Ill. 126.

In *Fitch v. Polke*, 7 Blackf. 564, the purchaser was held entitled to an injunction against a judgment for the purchase money, where the grantor was insolvent and had deceived the purchaser by false representations as to the title.

So, an answer making a cross petition for an injunction was held to be a good defense in an action for purchase-money notes, where it alleged that the vendor was insolvent and had fraudulently induced the purchase by representing that he had title, when he had none. *Hinkle v. Margerum*, 50 Ind. 240.

Fraud and false representations knowingly made as to the title, where the vendor was insolvent and nonresident, were held sufficient to sustain a cross petition, in an answer in a suit on purchase-money notes. *Reed v. Tioga Mfg. Co.* 66 Ind. 21.

And an injunction was held to be the proper remedy where the purchaser was induced to make the purchase by the fraudulent representations of the vendor as to title. *Warren v. Carey*, 5 Ind. 319. In this case the seller represented that the grantor had full title, when he had only three fifths, and the grantor had left the state.

False representations by the agent, in the presence of the vendor, as to the size of a

attorney, Z. T. Vinson, who procured an assignment of the judgment from Laidley to himself; that after the death of Harvey, without the knowledge of his executor, the lot was advertised for sale under the order of sale entered in the action of ejectment, and sold, and purchased by Rufus Switzer, to whom Vinson had transferred the assignment from Laidley; that the Central Land Company, through its attorneys, had promised to save harmless all of its grantees in the property claimed by Laidley, but, the company failing to do so as to this lot, the executor of Harvey, at the March term, 1904, of the circuit court, procured an order to be entered showing that the judgment and costs in the action of ejectment had been paid, and the sale was

thereupon set aside and the action dismissed. The amended and supplemental bill averred that Ryan and Griffith were both nonresidents, and died, insolvent, in the state of Ohio, and prayed that the injunction awarded R. T. Harvey be made perpetual, that the action of assumpsit be ordered dismissed, the bond canceled and surrendered, and for general relief. The administrator of Griffith and Ryan appeared and demurred to the original and amended and supplemental bills, and moved to dissolve the injunction and dismiss the suit, which motions the court sustained, and entered an order to that effect. From this order the executor has appealed.

The single question presented by the bill is whether or not equity has jurisdiction to

lot agreed to be conveyed, affecting one half of the lot, were held sufficient for an injunction in favor of the purchaser against the collection of the purchase money. *Lee v. Vaughan, Sneed (Ky.) 238.*

And fraudulent misrepresentations of title, where the vendor had none, were held sufficient to authorize an injunction against the collection of purchase money, in *Gill v. Corbin, 4 J. J. Marsh, 392.*

And fraudulent representation by the vendor that he held by title bond, when he had none, was held sufficient ground for rescission by the purchaser, and for an injunction against the collection of the purchase money. *Brannum v. Ellison, 58 N. C. (5 Jones, Eq.) 435.* The purchaser was required to surrender possession.

Concealment of a material fact as to the title gives the court of equity jurisdiction, the same as fraudulent misrepresentation.

So, the suppression of the fact that the land had been sold for taxes was held to be sufficient cause for an injunction against a suit for the purchase money, where the purchaser held under a quitclaim deed. *Houston v. Hurley, 2 Del. Ch. 247.* This was on the ground of fraud.

The concealment from the purchaser, by the vendor, that he had no title to five sixths of the land, and the insolvency of the vendor, and his retaining possession, were held sufficient to authorize a rescission and an injunction against the enforcement of a mortgage given to secure the purchase money, in *Liddell v. Sims, 9 Smedes & M. 596.* In this case the purchaser was an ignorant man, and relied on the honesty of the vendor.

So, the knowledge by the vendor of a fact which made his title invalid, and the concealment of the same from his vendee, were held sufficient for an injunction against the collection of the purchase money, in *Johnson v. Pryor, 5 Hayw. (Tenn.) 243.*

A vendor concealed the fact that he had no title when he gave a title bond. The purchaser was held entitled to an injunction against the collection of the purchase money on the ground of fraud. It was further held that he was entitled to a rescission, al-

though the vendor offered to perfect the title at the time of the decree. *Topp v. White, 12 Heisk. 165.*

The giving of a title bond by a vendor without disclosing that his title was also by title bond, and that \$1,000 was unpaid, was held a fraud on the purchaser, and entitled him to an injunction against a judgment for purchase money, where the vendor was insolvent. *Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626.*

See also *Smith v. Short, 11 Iowa, 523, subd. VI.*

III. Where purchaser held by title bond.

The rights of a purchaser holding by title bond are generally recognized as different from those holding under a deed. So, it is held that a purchaser having a bond for title will not be required to pay the purchase money if the vendor is unable to make a good title. The question of the solvency of the vendor does not seem to be material; and relief by injunction is generally granted to the holder of a bond for title where the title is defective, and where the purchaser has not assumed all risk as to the title. The exceptional cases are where tender by the purchaser is required, and where the contracts of the vendor and vendee are held to be independent of each other.

A vendor gave a title bond for a deed, and the purchaser gave a bond for the purchase money. It was held that the purchaser was entitled to an injunction against a judgment for the purchase money on a bill charging that the vendor could not make any title. *Brittain v. McLain, 41 N. C. (8 Ired. Eq.) 165.* The court said: "A court of equity will not compel a purchaser to take a doubtful title. He has a right to have the title brought into court, and a reference to the clerk, if he so chooses, to examine and report upon it. This the defendant has not done, and we do not consider him entitled to force the purchase money from the plaintiff, and to throw him upon the uncertain security of his bond to make a conveyance. He is not compellable,

grant the relief sought, or whether the plaintiff should be relegated to his remedy at law. To determine this question it will be necessary to know when equity will enjoin the collection of purchase money due the vendor, when the contract has been fully executed by a conveyance to the vendee, with covenants of general warranty of title. When we have determined this question, the facts will be found to be of easy application. The authorities in the different states are clearly at variance as to when a court of equity will intervene and grant such relief. "It is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of

courts and practitioners." 1 High, Inj. § 382. While such conflict exists, yet it is the well-established, if not the universal, rule, that a court of equity will grant such relief in cases of fraud or mutual mistake, or where the covenantor is insolvent, or a nonresident, or where to permit the collection of the purchase money will result in irreparable injury to the vendee. In this state, and in Virginia, injunctions have been granted against proceedings to collect purchase money, when there is a complete failure of title, though the vendee is in the undisturbed possession of the property, and the vendor is neither insolvent nor a nonresident, and though no suit by the real owner against the vendee has been prosecuted or threatened. Maupin on Marketable

in equity, to part with his money, until the vendor has conveyed or offered to convey the land. This the defendant has not yet done."

Impossibility of performance was held to be sufficient cause for an injunction against a judgment for purchase money where the vendor had given a title bond, and his wife, in whom the title was vested, had died, and the vendor was insolvent. *Williams v. Smith*, 2 Root, 464.

And the purchaser, holding by title bond from an insolvent vendor, was held entitled to an injunction against the collection of the purchase money where the vendor was unable to make title. *Puckett v. Draper*, 2 Baxt. 395.

So, where the vendor had no title, the purchaser was held entitled to a rescission and an injunction against the collection of the money due on the title bond. *Johnson v. Siesfell*, 6 Baxt. 41. In this case the vendor sold to the purchaser 5,000 acres for \$400, in 1870. The vendor's title rested upon the deed of the revenue collector for Washington county, who had reported the land for taxes and charges, \$8, and sold by collector's deed July 1st, 1871, but stated in the deed as 8th June, 1871. The vendor was in embarrassed circumstances.

The failure on the part of the vendor, in a title bond, to secure the purchaser in the possession of the whole tract within the time agreed upon, was held sufficient to authorize an injunction against the collection of a judgment for the purchase money until the complainant should be allowed compensation for the part for which possession should not be given. *Hillary v. Crow*, 1 Harr. & J. 542. No question as to solvency appears to have been made, or reference to remedy at law.

So, where the vendor stipulated in his contract for deed that he would exonerate the land from the payment of legacies charged upon it, it was held that judgments obtained upon the bond for title should be enjoined until the title was perfected. *Dorsey v. Smith*, 7 Harr. & J. 345. The only question involved seems to have been the right of the purchaser to extinguish the

legacy claims by purchase, and have a credit on his bond.

The vendor of a title bond mortgaged the property to other persons, and the mortgage was foreclosed and a deed made. The vendor obtained judgment on the title bond, and on this judgment obtained a decree in another state, attaching land. The purchaser brought a suit for a rescission, and an injunction was granted, and it was held that equity, having jurisdiction of the person of the complainants in the decree in the other state, would enjoin the enforcement of that decree. *Buchanan v. Lorman*, 3 Gill, 51.

And the purchaser was held entitled to an injunction against an action for the purchase money where the contract was an executory one, and the vendor had no title. *Dorsey v. Hobbs*, 10 Md. 412. The court said: "A vendee of an estate, in an unexecuted contract, is entitled to have that for which he contracts, before he can be compelled to part with the consideration he agreed to pay."

So, inability to remove encumbrances, and insolvency on the part of the vendor, where possession was not given to the purchaser, were held sufficient to entitle the latter to an injunction against the collection of the purchase money. *Barton v. Rector*, 7 Mo. 524. In this case the purchaser held under title bond; and the court makes a distinction between executory and executed contracts.

And, where the vendor in a title bond had no title, it was held that a judgment for the purchase money, for the use of an assignee, should be enjoined, in *Welch v. Watkins*, 2 N. C. (1 Hayw.) 369. The court said: "Had the prayer of this bill extended far enough, we would have made Pickett refund the money he has received."

And where the pleadings in an injunction suit showed that the vendor had not a good title as required by a title bond, it was held that the injunction should stand continued, although he proposed to obtain such title as the court might direct. *Moore v. Cook*, 4 Hayw. (Tenn.) 84. In this case the vendor had title to only one half of the lot sold, and offered a deed from the holder

Title to Real Estate, 795, says: "The doctrine that the covenantee may retain the purchase money . . . without suit prosecuted or threatened by the real owner, and with a solvent covenantor to make good the damages when a substantial breach of the covenants has occurred, has received little, if any, recognition without the states of Virginia and West Virginia, where it prevails. It is there rested upon the ground that the covenantee has no remedy at law, there being no right of action on the covenant affirmatively or negatively by way of recoupment or equitable set-off, until an eviction occurs. Hence, it appears that in those states there may be a condition of the title which would justify an injunction against

the collection of the purchase money, and yet would not support the defense of recoupment or set-off at law." The doctrine is now well settled, both in this state and in Virginia, by a long line of well-considered decisions, beginning early in the jurisprudence of this state of Virginia, and followed in this state, that the collection of the purchase money will be enjoined when the vendee is in possession under deed with covenants of general warranty of title, and when the title is questioned by suit, prosecuted or threatened, or where the title is clearly shown to be defective; but this doctrine has been extended farther in these states than in any other jurisdiction. It is said by Judge Green, in *Ralston v. Miller*, 3 Rand. (Va.) 49, 15 Am. Dec. 704:

of the other half to the purchaser; but it was held that he was entitled to a warranty with covenants from his vendor.

In *Buchanan v. Alwell*, 8 Humph. 516, a purchaser holding under a title bond was held to have a right in equity to resist the payment of the purchase money, or to a rescission, on the ground of defect of title in the vendor. This was held without regard to the right on the ground of fraudulent concealment, which existed in this case, and although there had been no threatened suit or eviction.

A devisee under a will sold his land by title bond. The widow renounced the will and claimed dower, and an after-born child came in for his share, thus affecting the title. It was held that the purchaser was entitled to an injunction against the collection of the purchase money until the estate was determined. *Price v. Browning*, 4 Gratt. 68.

And where an injunction was prayed against the collection of a judgment on a title bond for the purchase money, on the ground of no title in the vendor; and the defendant answered that he had perfect title,—it was held that the defendant should set out his title, so that the court could determine whether he could make title or not. *Moredock v. Williams*, 1 Overt. 325.

So, in a bill for injunction against judgments for purchase money, where the purchaser holding a title bond alleged that the vendors had no title, and called on the defendants to disclose their title in their answer, it was held that the defendants must show a good title, otherwise the plaintiff would be entitled to the relief prayed. *Vititoe v. Jones*, 6 J. J. Marsh, 515. The court said that there is a difference between a suggestion that the title is defective and an allegation that the vendor has no title.

The inability of the vendor to convey title to land that he had contracted to sell was held sufficient cause for an injunction against a judgment at law, to be continued until title should be perfected, in *Fishback v. Williams*, 3 Bibb, 342.

But the failure of the purchaser to make an unconditional tender of the purchase

money was held sufficient ground to refuse an injunction, in *Morris v. Continental Ins. Co.* 116 Ga. 53, 42 S. E. 474. In this case the purchaser demanded a deed in accordance with his title bond, and, on failure to receive the same, applied for an injunction.

In *Coleman v. Rowe*, 5 How. (Miss.) 460, 37 Am. Dec. 164, the purchaser's contract to pay was independent of the covenant of the vendor in a bond to make title. It was held that the purchaser was not entitled to an injunction against a judgment for purchase money, where his possession was undisturbed, and no eviction had occurred, and there was no fraud and no proof of an outstanding title. In this case the vendor was solvent.

See also *Seago v. Bass*, 49 Ga. 9, and *Bullitt v. Songster*, 3 Munf. 55, subd. V.

IV. Insolvency or nonresidence of vendor.

The insolvency or nonresidence of the vendor is held to be sufficient ground, in equity, for an injunction in favor of the purchaser, where the title is defective, and where the purchaser did not assume all risk. In some cases a rescission was decreed, in others an abatement of the purchase price.

So, in *Jones v. Waggoner*, 7 J. J. Marsh. 144, the insolvency of the vendor was held to confer jurisdiction in equity, to enjoin a judgment for the purchase money, and to decree a set-off against the judgment at law of damages growing out of the breach of covenant for title.

And in *Markham v. Todd*, 2 J. J. Marsh. 364, an injunction against the collection of the purchase money was held to be the proper remedy, where the grantor was insolvent and the title was defective. But it was held that the pleadings should be amended, and that complainant must elect whether he would rescind or plead an equitable set-off.

In *Simpson v. Hawkins*, 1 Dana, 305, it was said: "The relief granted by the court is, we think, to say the least, premature. If granted at all in this case, it should be when it is shown that the defendants have suffered an eviction, or what shall be

"This court has, in favor of purchasers, gone far beyond anything which has been sanctioned by the courts of chancery in England or elsewhere, in enjoining the payment of the purchase money after the purchaser has taken possession under a conveyance, especially with general warranty. Yet, it has never gone so far as to interfere unless the title was questioned by a suit either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective." And this was quoted with approval by Judge Green, of this state, in *Wamsley v. Stalnaker*, 24 W. Va. 223, and, continuing, he said: "This is the view which, according to my understanding of the case, has been followed in Virginia and West Virginia, when the ven-

dee was protected by a warranty of title, and had not been evicted."

The case of *Wamsley v. Stalnaker* is a leading case, giving a review of several of the Virginia decisions upon this subject, which proceed upon the theory that the purchaser should not be required to pay the purchase money where he is in great danger of losing the property. He is not required to take the hazard of the future insolvency of his vendor. No right of action would exist in favor of the vendee until a breach of the covenant, and, it being a covenant of general warranty of title, the breach would not occur until actual or constructive eviction. In discussing the question, Judge Green says that Judge Tucker, in *Koger v. Kane*, 5 Leigh, 608, questions the right to

equivalent thereto. We think that in cases like this, where the vendors are alleged to be insolvent, and there are just grounds for fearing an eviction, the chancellor may interpose, and suspend the payment of the purchase money, although the vendor has executed the contract on his part by a conveyance. But whenever he does, if there has been no eviction at law, we regard it as indispensable that all parties interested should be brought before the court, when the chancellor should settle their respective rights; and if, in doing this, he finds it necessary to take the land from the vendee of the insolvent vendor, then he may secure the vendee, by setting off the damages occasioned by the loss of the land, against so much of the unpaid purchase money. This cause was not prepared under this view of the law."

In *Fehrle v. Turner*, 77 Ind. 530, the purchaser was held entitled to an injunction against the foreclosure of a purchase-money mortgage which included other lands, also, than the tract purchased, where there was a pending suit against the purchaser, and the grantor was insolvent. This case overruled *Strong v. Downing*, 34 Ind. 300, which held that an injunction should be denied where fraud was not alleged, and it was not alleged that the grantor was insolvent at the time of making the deed, or that the grantee did not know of his insolvency or nonresidency at that time. In this case the grantor was a resident of California, and suit had been brought against the grantee by parties claiming title.

And where the grantor was irresponsible it was held that an injunction should issue restraining the transfer of purchase-money notes, until the question of damages caused by loss of title to part of the tract conveyed was determined. *McDunn v. Des Moines*, 34 Iowa, 467.

And the insolvency of the grantor, who, having divested himself of title by a previous conveyance to his children, had conveyed by warranty deed, was held sufficient cause for an injunction against a judgment for purchase money. *Walton v. Bonham*, 24 Ala. 513.

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An injunction was held proper where there was a warranty deed, but the vendor was insolvent and had no title to the most important tract conveyed, in *Yonge v. McCormick*, 6 Fla. 368, 63 Am. Dec. 214. In this case the vendee was in possession.

And where the grantor had warranted the title, and it was admitted that the title was defective, and there was great doubt as to the solvency of the vendor, the purchaser was held entitled to an injunction against a judgment for the purchase money. *Jones v. Stanton*, 11 Mo. 433.

An insolvent vendor sold lands by warranty deed where the title was clearly defective. The purchaser assigned, as purchase money, bonds held by him, given by another party. It was held that the purchaser was entitled to an injunction against their collection until the title should be cured or the value of that part ascertained to which the vendor had no title. *Clarke v. Hardgrove*, 7 Gratt. 399. The court said: "It not being incumbent upon the purchaser, in case of such clear defect of title, to risk the hazard of the vendor's solvency."

And a purchaser evicted by superior title was held entitled to an injunction against a suit on his purchase-money notes, where the grantor had covenanted that he was seised in fee simple, and the grantor's estate was insolvent. But he was held not to be entitled to an injunction against one of the notes assigned during solvency of the grantor, and the consideration of which was a lot, the title to which was good. *Wray v. Furniss*, 27 Ala. 471.

The purchaser under a warranty deed, having been evicted by a superior title from one of the tracts, was held entitled to an injunction against the collection of the purchase money, where the vendor was insolvent, in *Walker v. Johnson*, 13 Ark. 522. Speaking of the right to a defense of partial failure of consideration, the court said: "Their right to this relief would not require a rescission of the contract, but would rest upon the ground of a partial failure of consideration; and this would have been available to them in equity, if not at law."

So, the purchaser, having lost part of the

the remedy where there is a covenant of good title, because such a covenant would be broken the instant it is entered into, if the title should be defective. And Judge Green also says: "Judge Tucker bases this right of a court of equity to enjoin the purchase money, though there is a general warranty deed held by the purchaser, if the title is clearly shown to be defective, partly on the ground that on the general warranty the vendee could not sue at law till he was evicted, and seemed to regard it as doubtful whether such relief in equity would be given, if in the deed there were other covenants, which could be sued upon at law before eviction, as, for instance, a covenant for good title; but this point was not decided, nor do I know of its decision

in any case in Virginia or in West Virginia. It would seem, therefore, that the extension of the right of a court of equity to enjoin the collection of the purchase money by the vendor because of defect of title, however clear, might, perhaps, be confined to the case when there was no other covenant but the covenant of warranty, and might not be recognized when there were also covenants on which the vendee could sue at any time at law, such as covenants of good title." But, in reviewing what Judge Tucker said in *Koger v. Kane*, supra, we find that he used this language: "The jurisdiction thus confessedly exercised by the courts of equity with us results from what may be called the preventive justice of those tribunals. It arrests the compulsory pay-

land by an adverse claim, was held entitled to an injunction against the collection of part of the purchase money, where the vendor in a warranty deed was insolvent. *Rawlins v. Timberlake*, 6 T. B. Mon. 225.

But in *Moredock v. Rawlings*, 3 T. B. Mon. 73, an insolvent vendor gave a title bond, and then gave to the assignee of the bond a warranty deed. The assignor sued on his purchase-money notes. The purchaser sought an injunction against their collection on the ground of defect of title and loss of part of the land. It was held that the purchaser was entitled to a rebate for deficiency in quantity, but for defects in the title his remedy was against his warrantor, as the assignor would be liable to him only in case of failure to recover of the warrantor.

The nonresidence of the vendor is regarded in equity the same as insolvency, so as to give jurisdiction to enjoin the collection of the purchase money where the title is defective.

So, where the purchaser had accepted a deed, and acquired possession, the removal of the vendor from the state was held sufficient ground for an injunction against the collection of the purchase money, where the vendor had no title to a part of the land. But the decree should provide for an abatement of the price, or for a rescission. *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 582.

And the purchaser was held entitled to an injunction against the collection of the purchase money where the vendor in a warranty deed had no title and was a non-resident, and had no property in the state where the action was brought. *Green v. Campbell*, 55 N. C. (2 Jones, Eq.) 446. The court said: "The plaintiff is entitled to have a perpetual injunction as to a part of the purchase money; which part is to be ascertained by comparing the value of the land in dispute at the time of the purchase with that of the other tracts purchased by the plaintiff, the title to which is good, supposing the whole to be worth the amount mentioned in the deed; and, to ascertain this comparative value, there must be a reference."

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A judgment for purchase money in favor of a nonresident vendor in a warranty deed, having no property in this state, was held properly enjoined where the title was defective, in *Richardson v. Williams*, 56 N. C. (3 Jones, Eq.) 116.

The insolvency or nonresidence of the vendor is held sufficient ground for an injunction in favor of the purchaser, where there is a prior lien existing against the property, which the grantor is bound to remove.

So, the purchaser was held entitled to an injunction against the foreclosure of a purchase-money mortgage where there were outstanding judgment liens exceeding the amount due against the grantor, who was insolvent. *Arnold v. Curl*, 18 Ind. 339.

And, where the grantor in a warranty deed was insolvent and dead, the purchaser was held entitled to an injunction against the collection of purchase money, where the estate sold was encumbered by a mortgage lien. *Morrison v. Beckwith*, 4 T. B. Mon. 75, 16 Am. Dec. 136.

A vendor executed a mortgage which was filed for record before a warranty deed made by him. The purchaser was not aware of the mortgage when he accepted the deed. The vendor sold the notes and died insolvent. It was held that the collection of so much of the last note as would pay the mortgage should be enjoined. *Kyle v. Thompson*, 11 Ohio St. 616. This mortgage was held to be an eviction *pro tanto*.

And where the grantor gave a quitclaim deed when he should have given a warranty deed, and there was a mortgage on the premises, it was held that the purchaser was entitled to an injunction against the collection of the purchase money. *Bowen v. Thrall*, 28 Vt. 382. The court said: "The purchaser has a right to retain so much of the purchase money as is sufficient to secure him against the encumbrances on land, particularly where the grantor is insolvent, and no adequate remedy can be had on his covenants."

In *Richardson v. Donehoo*, 16 W. Va. 685, an injunction was granted in favor of a purchaser holding under a general warranty deed, against a sale of the land under a

ment of the purchase money when the purchaser can show that there is either a certainty, or a strong probability, that he must lose that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus, if the purchaser can show that he has received a deed with general warranty, and that the title is bad, yet, if he has not been evicted, he cannot maintain covenant at law and ascertain his damages before that tribunal, in order then to set them off against the demand. If, indeed, there are covenants of good title, etc., it may be otherwise; and so it may often happen that an action may be brought where there are such covenants of good

title, etc., upon which the validity of the title may be tested, and the damages of the party ascertained. Whether in these cases relief could be given in equity, it is not necessary here to say." It will be observed that Judge Tucker says it is not necessary to decide this question, and from his language it would seem to be susceptible of the construction given by Judge Green, if this were all Judge Tucker said on the subject; but, continuing, he said: "But, where there is only a covenant of warranty, this cannot be done; and hence, I conceive, the party would be entitled to the assistance of a court of equity where he is full handed with proof that his title is defective, although he has not yet been evicted." This would seem to indicate that he thought,

deed of trust given for the purchase money, on account of liens existing against the property. The liens were released before decree, and the injunction was dissolved. The grantor and trustee were nonresidents.

In *Clark v. Cleghorn*, 6 Ga. 225, where it was held that the apprehension of a lien against vendor's land was not well founded, it was said: "If the bill disclosed nothing more than that a title, with a covenant of warranty, had been made by the vendor to the vendee, in the absence of any fraud or other equitable circumstance, the argument would be entitled to consideration; but here the complainant alleges that the vendor resides without the limits of the state, and has no property, to his knowledge, within the state. This is an equitable circumstance which, in our judgment, entitles the complainant to maintain his bill, when taken in connection with the other allegations. The remedy on the covenant in the deed, against a nonresident who has no property in the state, would, to say the least, be very inadequate." The holding in this case was based on the denial in the answer, of the allegations in the bill.

See also *Washington v. Pollard*, 5 Gratt. 432, subd. VIII.; *Worthington v. Curd*, 22 Ark. 277, subd. XI.; *Patton v. Taylor*, 7 How. 132, 12 L. ed. 637, subd. XI.

V. Contract of vendor.

The purchaser is held entitled to an injunction against the collection of the purchase money, where the title is defective, and the grantor has contracted to remove these defects as a condition precedent to the payment of the purchase money. In one case, the covenant against encumbrances having been broken by reason of existing liens, it was held that equity would take jurisdiction on the ground that the remedy at law was not as prompt or efficient as in equity.

Thus, a purchaser was held entitled to an injunction and rescission of the contract of purchase, where the contract provided that, if the title was not made, the notes were to be delivered up to the purchaser. The 1 L.R.A. (N.S.)

bill alleged that the vendor was unable to make title. *Black v. Bowman*, 9 Ark. 501. The question of insolvency does not appear. The court said: "The power to enforce the specific execution of a contract (particularly in respect to real estate); to rescind a contract; to decree that outstanding deeds, and other contracts, be called in and canceled; to enjoin the collection of the purchase money until title is made,—has been so long recognized as within the appropriate jurisdiction of courts of equity as to render it unnecessary to refer to authorities."

A purchaser who bought by title bond, on representation that an indemnifying bond would be given to protect him against the claim of a third party, was held entitled to an injunction against an execution sale for purchase money, where the vendor had lodged a warranty deed for record and then levied on the land, and there was a suit pending by the third party claiming the land. *Seago v. Bass*, 49 Ga. 9. In this case the remedy at law on the covenants of the deed would not have availed, as the damages there would have been only the purchase money, while the breach of the bond would have been for damages and interest, including improvements.

And the collection of purchase money was held to be properly enjoined where the grantor had contracted to remove a previous encumbrance, had failed to do so, and was insolvent. *Addleman v. Mormon*, 7 Blackf. 31.

So, a contract of the vendor that the title was to be perfected before the purchase money was to be paid was held sufficient to entitle the purchaser to an injunction against an order of sale in favor of the vendor, where there was a prior mortgage existing on the land. *Wade v. Percy*, 24 La. Ann. 173.

An injunction against the collection of the purchase money was held proper where the purchaser was unable to obtain possession of the most valuable part of the farm purchased, containing the buildings and spring, which were held by an adverse claimant. *Nelson v. Owen*, 38 N. C. (3 Ired. Eq.) 175.

after eviction there would be stronger grounds for equity jurisdiction. And then, in *Beale v. Seiveley*, 8 Leiga, 675, Judge Tucker says: "With us it cannot be denied that the practice has been more lax. But even with us relief is only given to a purchaser who had obtained his deed, where there had been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior claimant, can show a clear outstanding title or encumbrance."

But, even if that decision, in dealing with this question, did place it partly upon the ground that there is no breach of the covenant of general warranty until eviction, and, therefore, no right of action accrues to the vendee, still there is an additional

reason why this remedy should be extended; that is, the remedy of the vendee, at law, is not adequate and complete. If the purchaser should be required to pay the purchase money, and the suit, prosecuted or threatened, should result in a total loss to him of the property, it would then be necessary for him to bring an action for breach of the covenant, while, in the meantime, the covenantor might have become insolvent. And this would also be true as to a vendee who had been evicted by reason of a superior title before the purchase money had been collected, because, while a right of action for damages would exist to the vendee upon the covenant, yet the defense would not be available to him in an action brought against him upon a writing

In this case the vendor orally agreed to oust the claimant, but failed to do so.

The vendor in a title bond covenanted under seal that he would not bring suit for the purchase money until the vendee could establish the title by a suit in a reasonable time. The purchaser brought suit, and it was held that prior patents conflicted, and that his title was defective. It was held that he was entitled to an injunction against the collection of the purchase money. *Bullitt v. Songster*, 3 Munf. 55. There was no suggestion of insolvency of the vendor.

In *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1, the covenant against encumbrances was held to have been broken as soon as made, and a court of equity had jurisdiction to enjoin a judgment for the purchase money in such a case. This was on the ground that the doctrine of recoupment was a good defense against the purchase money, but that "the adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity."

In this case, the class of cases holding that until eviction in case of warranty the purchaser was not entitled to equitable relief, was distinguished, as in the *Neely* Case the covenant was broken at once, where there were encumbrances existing at the time of conveyance, and in the other cases the covenant was not broken until eviction.

See *Dorsey v. Smith*, 7 Harr. & J. 345, subd. III.

VI. Solvent vendors.

Equity will not intervene where there is a complete and adequate remedy at law. So, it is held that, where the grantor is solvent, the purchaser who seeks an injunction on account of defective title will be left to his remedy on the covenants of his deed, in the absence of fraud or concealment. In some of the cases, the expressions are used, "a purchaser in possession," and, "where there is no eviction," but it will be found that these cases generally turned 7 L.R.A. (N.S.)

on the fact that there was amply remedy at law on the covenants of the deed by reason of the solvency of the vendor. But see exceptional cases, subd. I. "generally."

So, a purchaser under a warranty deed was held not entitled to an injunction against the collection of the purchase money on the ground of defect of title, where no fraud, or eviction, or insolvency of vendor, was alleged. *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554. No suit was pending against the title, and the purchaser had been in possession twelve years.

And where there was no eviction, and the vendor was solvent, and the alleged defects in the title were not specified, the purchaser in a warranty deed was held not entitled to an injunction against the collection of the purchase money. The remedy was held to be on the covenants. *Young v. Butler*, 1 Head, 640. The court said: "And this is so if the covenants have been actually broken, unless the grantor is insolvent, in which event a court of equity may restrain him from proceeding to collect the whole amount due for the purchase money, and may offset the damages occasioned by the breach of the covenant of seisin, etc., against such unpaid purchase money."

In *Merriman v. Norman*, 9 Heisk. 270, it was said: "It is the settled law that when the contract is executed by conveyance, the complainant in possession under a deed with covenant of warranty of title, in the absence of fraud, eviction, or insolvency of the vendor, equity will not relieve by rescission, or by enjoining the payment of the purchase money for mere defect of title."

And a purchaser in possession under a warranty deed was held not entitled to an injunction against the collection of the purchase money on the ground of defective title, where neither fraud nor insolvency on the part of the vendor was shown. *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Vick v. Percy*, 7 Smedes & M. 256, 45 Am. Dec. 303.

A purchaser in possession was held not entitled to an injunction against the collection of the purchase money on account of defects of title, where there was no dis-

obligatory, given for the purchase money. The writing being under seal, it imports consideration, and a defense of failure of consideration or want of consideration cannot be interposed to a writing under seal, at common law. Neither could the damages resulting from the breach of the covenant of warranty be relied on as a common-law counterclaim in the nature of recoupment, since the writing sued on is under seal. The supreme court of Virginia, in *Columbia Acci. Asso. v. Rokey*, 93 Va. 684, 25 S. E. 1010, says: "But, while a defendant, under the plea of nonassumpsit, might give evidence of matter by way of recoupment, or in diminution of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the

defendant to recover in that suit any damages he may have shown in excess of the damages of the plaintiff. If he wished to recover such excess, he could only do so in an independent action against the plaintiff. 4 Minor, Inst. pt. 1, 793, 798. Nor was it competent at common law, as against sealed contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of title or soundness of personal property; but the defendant was driven, as when he proposed to recover against the plaintiff any excess of damages, to his independent action at law to recover the damages he had sustained. 4 Minor, Inst. pt. 1, 792; *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Burners v. Keran*, 24 Gratt. 42; and *Hayes v.*

turbance or eviction, and no suit pending, in *Hile v. Davison*, 20 N. J. Eq. 228. In this case there were full covenants of warranty. No reference was made to solvency.

And the possession by the purchaser under a warranty deed, and the solvency of the vendor, were held sufficient to prevent an injunction against the collection of the purchase money, in *Wilkins v. Hogue*, 55 N. C. (2 Jones, Eq.) 479. No suit had been brought or threatened; the bill showed that 36 acres of the best of the land were held by an older and superior title.

A purchaser in possession under a warranty deed from a solvent vendor, where no suit was threatened, was held not entitled to an injunction against the collection of the purchase money, in the absence of a fraudulent concealment of defects in the title, which he had no means of discovering. *Beale v. Seiveley*, 8 Leigh, 658. The court held that, under a special warranty, the purchaser would be without remedy, except in case of fraud; that, under a general warranty, relief would be given only in cases of eviction; that, if a covenant of good title were given, it would be broken at once. The court said: "Accordingly, it is the established principle in the courts of equity in England that, if the conveyance has been actually executed, the purchaser can obtain no relief against the payment of the purchase money. He must look to his covenants; he has contracted for his remedy, and to that remedy he must resort. . . .

To that rule there has recently been an admitted exception. Where the seller is aware of a fact from which a defect of title arises, and which the vendee had no means of knowing, the purchaser may either maintain an action at law for the deceit, or have a rescission of the contract itself, by an appeal to a court of equity. . . . With us it cannot be denied that the practice has been more lax. But, even with us, relief is only given to a purchaser who has obtained his deed, where there has been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior

claimant, can show a clear outstanding title or encumbrance."

In *Wamsley v. Stalnaker*, 24 W. Va. 214, the language in Judge Tucker's opinion in *Beale v. Seiveley*, 8 Leigh, 673, stating the exception to the English rule as quoted above, and the Virginia rule, was criticized. The judge saying: "In my judgment this conclusion drawn by Judge Tucker from this and other Virginia cases is inaccurate, and 'the rights of the vendee have, by the decisions both in Virginia and in West Virginia in numerous cases, been extended in equity beyond the covenants he has taken for his protection.' But I must say I am indisposed to extend these rights of the vendee in equity any further than I am compelled to do by the decided cases, which are binding authorities on us, or beyond such cases as come clearly within the meaning on which these cases must have been based. . . . They have generally been cases in which there was only a covenant of general warranty; and in *Ralston v. Miller*, 3 Rand. (Va.) 49, 15 Am. Dec. 704, Judge Green, in delivering the opinion of the court, says: 'This court has, in favor of purchasers, gone far beyond everything which has been sanctioned by the court of chancery in England or elsewhere, in enjoining the payment of the purchase money after the purchaser had taken possession, under a conveyance,—especially in the general warranty. Yet it has never gone so far as to interfere, unless the title was questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective.'"

Where no insolvency of the vendor in a warranty deed was alleged, it was held that the purchaser was not entitled to an injunction against an execution sale for purchase money, although he alleged that the title had failed, in *Allen v. Thornton*, 51 Ga. 594. There was a good defense at law if the title had failed, or a remedy on the covenants.

In *Wimberg v. Schwegeman*, 97 Ind. 528, holding that, where a vendor was not insolvent, an injunction in favor of the purchaser should not be granted against the

Virginia Mut. Protection Asso. 76 Va. 225. The object of the act of 1831 was to remedy these defects, and to enable a defendant both to make such defenses to a suit at law on specialties, and also to recover against the plaintiff any excess of damages he may have sustained, in order to settle in one suit all the rights of the parties arising under the contract, and to prevent circuitry of action and a multiplicity of suits. Its object was to enlarge the right of the defense, and not to impair any previous right, or to take away such defenses where the law previously permitted them to be made." And in *Kinzie v. Riely*, 100 Va. 709, 42 S. E. 872, it is held that damages for breach of warranty could not be claimed at common law by way of recoupment, against a

sealed instrument. *Sterling Organ Co. v. House*, 25 W. Va. 83; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Watkins v. Hopkins*, 13 Gratt. 743. It will therefore be seen that, although there is a breach of the covenant of warranty in the deed from Ryan to Harvey, yet he cannot set this up as a defense in the action brought against him upon the purchase-money bond, but must rely upon his separate action for damages for a breach of the covenant, and, not being able to make this defense to the action of assumpsit, a court of equity will not require him to pay the money to the vendor, and compel him to resort to his action upon the covenant, and take the hazard of his vendor's insolvency. We fail to see the reason for such course. The title to the

collection of the purchase money on account of defective title, the court said: "In holding that, where insolvency is alleged, the grantee may restrain the collection of the purchase money, we do not adopt a doctrine new to this court; for the principle upon which it rests was laid down long since in the cases of *Fitch v. Polke*, 7 Blackf. 564; *Addleman v. Mormon*, 7 Blackf. 31; *Buell v. Tate*, 7 Blackf. 55; *Arnold v. Curl*, 18 Ind. 339."

A vendor conveyed land in which his wife and the wife of his grantor had a potential right of dower. In a suit by the purchaser for an injunction against the collection of the purchase money, it was held that the solvency of the vendor would prevent an injunction on the ground of dower right in his grantor's wife. But, having promised to secure his wife's signature, which was obtained after this suit, it was held that the injunction should be dissolved without damages. *M'Koy v. Chiles*, 5 T. B. Mon. 259.

And a purchaser having covenants in his deed was held not entitled to an injunction against the collection of the purchase money for defective title where insolvency was not shown, in *Swain v. Burnley*, 1 Mo. 404. The court said: "A court of equity, in a case of this kind, undoubtedly would have the right to interpose, by enjoining the money due on the judgment until a suit could be commenced and determined at law, upon the covenants in the deed; and, if there should be a recovery in such suit, might compel an offset. But it has no authority to take jurisdiction for the purposes of general relief, nor to grant a perpetual injunction. This court interfering merely in aid of and auxiliary to a proceeding at law, it is necessary that the complainant should show, in the first place, such facts as will induce their interference, such as the insolvency of the party who has the judgment, etc.; and, secondly, that the party, in order to continue the injunction, should show all proper diligence in prosecuting his remedy at law."

And where there was no allegation of insolvency on the part of the vendors, it 7 L.R.A. (N.S.)

was held that the remedy of the purchaser should be by an action on the covenants of the deed, in *Woodruff v. Bunce*, 9 Paige, 443, 38 Am. Dec. 559. In this case the conveyance to the purchaser by one only of several executors was held to pass only a defective title; but it was suggested that a perfect title could be had. The court said: "As a general rule, where a contract to sell has been executed by an actual conveyance, a court of chancery will not rescind the contract on account of the mere defect of title, except in a case of fraud, but will leave the purchaser to his remedy upon the covenants in his deed. If the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount due for the purchase money, and may offset the damages occasioned by the breach of the covenants of seisin or of warranty against such unpaid purchase money."

Notice, being given at a public sale of defective title, but that the vendor would warrant the same, was held to preclude a purchaser at the sale from obtaining an injunction against the collection of the purchase money, where the vendor tendered a warranty deed, and there was no question made as to his solvency. *Merritt v. Hunt*, 39 N. C. (4 Ired. Eq.) 406.

In *Platt v. Gilchrist*, 3 Sandf. 118, it was held that a purchaser under a warranty deed was not entitled to an injunction against the foreclosure of a purchase-money mortgage on the ground that a suit was pending against the purchaser to establish a paramount title, where the grantor was solvent.

And the failure to allege insolvency of the vendor was held sufficient to defeat the remedy of injunction against collection of the purchase money, although the complaint alleged that the vendor had no title and induced the contract by fraud, and that the consideration had failed. *Smith v. Short*, 11 Iowa, 523. This was held to have constituted a defense that could have been made at law.

And the same ruling has been made where

land has been adjudicated to be in Laidley, and Harvey has been ousted. The property for which the purchase-money bond was given has been totally lost to him, and there is no reason why a court of equity should not enjoin its collection. His legal remedy is wholly inadequate. He may pay the money, and then sue at law upon the covenant to recover it back, but this could not be a complete and adequate remedy. The vendor, in the meantime, may have become totally insolvent. This risk the vendee will not be compelled to accept, but equity will extend its aid and prevent the collection of the purchase money.

What we have said as to the defenses to a sealed instrument applies to the common-law doctrine, for, under our statute, § 5,

there were liens existing against the property, and it was not shown that the vendor was insolvent or nonresident.

So, an injunction against the collection of a purchase-money judgment on account of judgment liens against the vendor was denied where the vendor tendered an indemnifying bond, and was able to satisfy any lien there might be against the property. *Collins v. Clayton*, 53 Ga. 649.

And, where the grantor was not alleged to be an insolvent or a nonresident, it was held that an injunction against the collection of the purchase money on the ground of outstanding liens should be denied. *Crowfoot v. Zink*, 26 Ind. 187.

A vendor, in a general warranty deed, covenanted "that the same shall not be subject to any liability from encumbrances thereon." There were judgment liens existing at the time of the conveyance. It was held that the purchaser was not entitled to an injunction against the collection of the purchase money, where he did not show that the vendor had no other land sufficient to satisfy the judgments, or was insolvent. *Wamsley v. Stalnaker*, 24 W. Va. 214.

In *Shannon v. Marselis*, 1 N. J. Eq. 413, where it was held that different mortgagees were entitled to priorities and to protection in the order of their mortgages, it was said: "It is very evident that, if the amount of the mortgage money is raised from Carrick's property, and paid to satisfy the mortgage, Carrick can immediately recover it back by action on the covenant. There can be no good reason assigned why there should be this circuity of action; but a very good one why there should not,—which is, that the money might be lost to Carrick altogether, he having no security but the covenant. If Griffin was prosecuting at law on the bond, this court would certainly enjoin him, and compel him to appropriate the money so as to discharge the encumbrance against which he had covenanted, . . . [citing] *Johnson v. Gere*, 2 Johns. Ch. 546. . . . Where there is a mere allegation upon an outstanding title or encumbrance, the court will not interfere, but leave the party to his remedy on the cov-

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chap. 126, Code 1899, a defendant may plead failure of consideration, fraud in the procurement of the contract, or breach of warranty of title; but this is only concurrent with the equitable remedy, and by § 6 of the same chapter it is provided that such defense need not be interposed at law, and, if not so interposed, it can be availed of in equity. By this statute, it was not intended that the equitable remedy be taken away; but, on the other hand, it is expressly reserved. It was only intended to permit such defense to be made at law, at the election of the defendant. Therefore, if equity, before the enactment of this statute, had jurisdiction, it still has jurisdiction, notwithstanding a remedy by defense at law is given by statute. *Knott v. Sea-*

nant; but where there is an eviction, or even an ejectment brought, it will interpose. In this case the first mortgagee is prosecuting his claim; the second one is before the court and asks to be paid what is due; and also the third. All parties are here, and justice can be done."

In *Withers v. Morrell*, 3 Edw. Ch. 560, it was held that a defendant could not prevent a foreclosure by alleging that as to part of the property conveyed the grantor had no title. But the court might refuse a personal judgment *in personam* against the mortgagor for the balance, and relegate the obligee to a suit at law. The court said that then the purchaser could file a bill for relief.

VII. Purchasers under quitclaim deeds.

It seems that the purchaser of a defective title will not be entitled to an injunction against the collection of the purchase money where there is no warranty of title, or fraud or deceit.

So, where there was neither fraud nor eviction, a purchaser under a "special" warranty deed was held not entitled to an injunction against the collection of the purchase money. *Elliott v. Thompson*, 4 Humph. 99 40 Am. Dec. 630. In this case the vendors offered to allow an abatement on the price *pro tanto* for the portion to which they had no title, and this was made the decree.

In *Keyton v. Brawford*, 5 Leigh, 39, holding that the contract of purchase was one of hazard as to the quantity, and disallowing an injunction for lack of title to a part, it was said: "Admitting the right of a party to enjoin the payment of purchase money, upon proving an actual outstanding superior title in another, which seems now to be the well-established principle of our courts (*Ralston v. Miller*, 3 Rand. [Va.] 44, 15 Am. Dec. 704), I am well satisfied that there is no such ground for relief in this case, because the vendor never contemplated selling that portion of land which lies within the boundaries claimed by the McKnights."

mands, 25 W. Va. 99; Bias v. Vickers, 27 W. Va. 456; Jarrett v. Goodnow, 39 W. Va. 602, 32 L.R.A. 321, 20 S. E. 575; Kinzie v. Riely, supra. While some cases have been referred to to support the views herein expressed, yet, to demonstrate more conclusively that the rule is firmly fixed, and has been followed in this state since the question was first presented, it may be well to review other cases on this subject. In *Womensdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191, it was held that where land was conveyed by deed with general warranty, and the vendee lost the land, that equity will enjoin the collection of the purchase money. Judge Brannon, in delivering the opinion of the court in this case, on page 316 of 53 W. Va., and page 192 of 44 S. E., says:

And where a grantee in a warranty deed sold to a purchaser by special warranty, it was held that an injunction would not be granted on the ground of defective title, in favor of the purchaser, against a judgment for purchase money; but injunction would be granted for deficiency in quantity. *Koger v. Kane*, 5 Leigh. 606.

A trustee under a deed of trust sold the land and conveyed by quitclaim deed. The purchaser, alleging that the title was defective as to part and that a dower interest existed as to all, was held not entitled to an injunction restraining the payment of the purchase money by the trustee to the *cestui que trust*. *Sutton v. Sutton*, 7 Gratt. 234, 56 Am. Dec. 109.

And, where the vendor in a quitclaim deed did not perpetrate a fraud on the buyer by concealing or knowing that the title to land purchased at execution sale by him was in other than the execution defendants, it was held that there was no cause for injunctive relief against a judgment for purchase money. *Carrico v. Froman*, 2 Litt. (Ky.) 178. The fact that there were more heirs than the defendants in the execution sale, who were not parties, was held immaterial, where the complainant in the injunction suit alleged that none of the heirs had title.

See also *Houston v. Hurley*, 2 Del. Ch. 247, subd. II.; *Williamson v. Raney*, Freem. Ch. (Miss.) 112, subd. XI.; *Latham v. Morgan, Smedes & M. Ch.* 618, subd. XII.

VIII. Estoppel.

The purchaser of a defective title may, by estoppel, be precluded from obtaining an injunction against the collection of the purchase money; as where a bona fide holder of a purchase-money note buys the same on the representation of the maker that the same will be paid.

So, a holder of a title bond was held not entitled to an injunction against a judgment on purchase-money notes, although the land had been sold on an encumbrance existing at the time of his purchase, where the note was held by a bona fide holder who had bought the same on the purchaser's 7 L.R.A. (N.S.)

"Counsel for O'Connor would impress upon us the law of actions upon a covenant of warranty; would treat this as if it were a suit by *Womensdorf* to recover back money paid upon the land under a breach of warranty. It is not such a suit. It is a suit to enable *Womensdorf* to keep in his hands purchase money for his indemnity. I should rather say, not for his indemnity, should he lose the land, but to be relieved from paying money for land already irrevocably lost to him." And in *Bennett v. Pierce*, 60 W. Va. 604, 40 S. E. 395, the same doctrine is announced, citing with approval *Wamsley v. Stalnaker*, 24 W. Va. 223. And in the case of *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85, we have: "Equity will enjoin the collection of the purchase money of land

representation that it would be paid. *McLain v. Coulter*, 5 Ark. 13.

On the ground that the purchaser had a fund in his hands as a security, of which it would be inequitable to deprive him, it was held that he was entitled to an injunction against the collection of the purchase money, in *Jaques v. Esler*, 4 N. J. Eq. 461. He held by warranty deed, and an action of ejectment by a claimant was pending. But the injunction was dissolved because the answer alleged that the purchaser had informed the assignee of the note, before purchase, that he would pay the same. It was held that the equity of the complainant existed without regard to whether or not he had notice of the defect in the title. No reference was made to solvency.

In *Bumpus v. Platner*, 1 Johns. Ch. 213, a purchaser in possession under a warranty deed, where there was no suit against the title, or allegation of insolvency, was held not entitled to an injunction against the collection of the purchase money, although there was an older conveyance outstanding, made by his vendor's grantor; and it was alleged that it was believed that the deed to the vendor was forged. This purchaser had renewed his mortgage to the assignee of the vendor, which fact, also, was ground for refusing the injunction.

And where the purchaser under a deed gave a new mortgage bond to the assignee of the vendor, it was held that an injunction would not be granted against the collection of the purchase money. *Washington v. Pollard*, 5 Gratt. 432. The ground alleged was a prior mortgage on the land; but it was not shown that the assignee had notice. The vendor was insolvent.

IX. Purchaser in default.

Where a purchaser is negligent in taking steps to perfect his title, or where the defect is caused by his failure to meet the payments, he is held not entitled to an injunction.

The default of the purchaser in neglecting to pay the purchase money, where the vendor died leaving infant heirs, and the failure

on the ground of defective title after the vendee has taken possession under conveyance from the vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective." It is said in this case, to show that the title is questioned by a suit, either prosecuted or threatened, that the bill, on its face, must allege the ground on which the threatened suit is based, which must be such as will put a reasonable man in just apprehension of a loss of his land; that the mere fact that someone has asserted claim to the land is insufficient to justify a court of equity in restraining the collection of the purchase money. And in *Heavner v. Morgan*, 30 W. Va. 335, 8 Am.

St. Rep. 55, 4 S. E. 406, it was held that equity will not require a vendee, who has purchased land and taken a deed with covenants of general warranty, to pay the purchase money, when a part of the land sold is claimed by others, and the title is defective; but that, if the purchaser can show clearly that the title is defective, equity will not require him to pay the purchase money until such defect is removed, or a proper abatement decreed; and citing with approval *Yancey v. Lewis*, 4 Hen. & M. 390; *Ralston v. Miller*, 3 Rand. (Va.) 44, 15 Am. Dec. 704; *Koger v. Kane*, 5 Leigh, 606; *Clarke v. Hardgrove*, 7 Gratt. 399; *Lovell v. Chilton*, 2 W. Va. 410; *Wamsley v. Stalnaker and Kimports v. Rawson*, *supra*. Also see the following authorities: *Renick v.*

to make the infants parties to the injunction suit, were held sufficient to preclude relief, where the complainants alleged that the title could not be conveyed on account of infant heirs. *Prout v. Gibson*, 1 Cranch, C. C. 389, Fed. Cas. No. 11,445.

Where the contract provided that a deed should be made when all the purchase money was paid, and the purchaser sued for a rescission and for an injunction against a judgment for purchase money because the vendor had not good title, it was held that the failure to tender the purchase money would be sufficient ground for denying the bill. *Mitchell v. Sherman*, Freem. Ch. (Miss.) 120. This was on the ground that he who seeks equity must do equity.

The mere bringing of a suit in ejectment and securing of a verdict without a judgment against the purchaser by a claimant were held insufficient causes for an injunction against the collection of the purchase money. *Miller v. Avery*, 2 Barb. Ch. 582. In this case, the purchaser having been intrusted with a deed to the grantor for record, failed to record the same prior to a levy under a judgment against the grantor of the vendor. The allegation of insolvency was denied and not proved.

X. Contract. of purchaser.

A purchaser, contracting to pay without regard to defective title, is, of course, not entitled to an injunction against the collection of the purchase money. So, where he procures title from another than his vendor.

A contract by the purchaser to pay without regard to perfecting title was held to bar an injunction against the collection of purchase money, where the vendor showed that he had taken proper steps to acquire such title, and that his action was then pending, although the vendor had left the state, but alleged that his intention was known to the purchaser at the time of sale. *Lucas v. Chapeze*, 2 Litt. (Ky.) 31.

And a vendee taking conveyance from other than the vendor was held not entitled to an injunction against the collection of the purchase money on account of defective title. It was held that his remedy was 7 L.R.A. (N.S.)

against his grantor. *Holeman v. Maupin*, 3 T. B. Mon. 380.

A contract by the vendee to pay the last instalment on the settlement of a dispute as to the title to a part of the land was held to be a legal defense, and would have been a good defense to an action at law. The litigation having terminated successfully for the vendor, the purchaser had no standing in equity. As to other claimants of title, possession for over twenty years was held to cure any defects on those grounds. *Allen v. Philips*, 2 Litt. (Ky.) 1.

XI. Notice to purchaser.

Some cases deny the right of the purchaser to an injunction where he had full knowledge of the defects of the title at the time of purchase.

So, a purchaser knowing of the defects in the title at the time of purchase was held not entitled to an injunction against the collection of the purchase money, where it was shown that the title could be cured within a reasonable time, and the vendor had taken steps to cure the same. *Green v. Finucane*, 5 How. (Miss.) 542.

And a purchaser at sheriff's sale was held not entitled to an injunction against the collection of the sale bonds on account of a conveyance made by the execution debtor, claimed to be prior to the sheriff's sale, where the purchaser had due notice of the difficulties he had to encounter. *Fuller v. Harman* 9 Rob. (La.) 205.

And a purchaser buying with knowledge of defective title, and taking no covenants for title, was held not entitled to an injunction on the ground of want of title in his vendor. *Williamson v. Raney*, Freem. Ch. (Miss.) 112.

A knowledge by the purchaser of existing encumbrances was held to be in equity a waiver of the right to enjoin the collection of the purchase money, where there had been no ouster, and there was a covenant of warranty, although the vendor was a non-resident. *Worthington v. Curd*, 22 Ark. 277. The court said: "A knowledge of encumbrances, or defects of title is no objection

Renick, 5 W. Va. 285; Thompson v. Catlett, 24 W. Va. 524; McClaugherty v. Croft, 43 W. Va. 270, 27 S. E. 246; Morgan v. Glendy, 92 Va. 86, 22 S. E. 854; Gay v. Hancock, 1 Rand. (Va.) 72; Beale v. Seiveley, 8 Leigh (Va.) 658; Grantland v. Wight, 5 Munf. 295; Richards v. Mercer, 1 Leigh, 125.

It is argued by counsel that there is no averment of irreparable injury; that, while it is averred that Ryan, the immediate grantor of Harvey, is insolvent, yet it is not averred that the Central Land Company, Harvey's remote grantor, is insolvent. The allegation of insolvency has never been one of the requisites for extending relief of this character, and, even if it were so, it is averred in the bill that Ryan, the immediate grantor, is a nonresident, having died, in

the state of Ohio, insolvent; and the vendee would not be required to pay the purchase money and then resort to his action against a remote vendor. While it is true the Central Land Company conveyed with covenants of general warranty of title, which covenant runs with the land, and of which the vendee could avail himself, yet equity will not permit the collection of the purchase money from him, and compel him to resort to this remedy; and not only that, but the remote grantor would only be liable upon his covenant for the amount of the purchase money paid him, which might, in many instances, be wholly inadequate, even if such remedy should be resorted to. While it is true, in this case the consideration paid to the Central Land Company is the same as

to recovery upon the covenants of the deed in a court of law; but it is a ground for equity to refuse relief out of the unpaid consideration, because it supposes that, with such knowledge, the vendee chose to rely upon the covenants; and to their legal effect he will be remitted."

A purchaser with knowledge of defective title of the vendor was held not entitled to an injunction against a judgment for purchase money, although the vendor was insolvent and had given a warranty deed. *Patton v. Taylor*, 7 How. 132, 12 L. ed. 637. In this case the vendor had been in possession for twenty years, and the purchaser had been his agent in relation to this land. The court held that mere insolvency was insufficient ground for relief. The court said: "These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed. That, if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed."

The purchaser by bond for title, of an equitable title, with knowledge of the legal title, was held not entitled to an injunction against a judgment for one half the purchase money in favor of an assignee, where the other half of the lot was sufficient indemnity, although a judgment had been had in ejectment for one half of the lot. *Green v. McDonald*, 13 Smedes & M. 445. It was not shown that the vendor could not make a good title. The court said: "The judgment recovered against Green, therefore, does not prove that Finucane's title is more defective than Green understood it to be at the purchase, nor than Finucane will be unable to coerce a conveyance from the heirs of Dickson and Caldwell."

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XII. Pleading, parties, and proof.

Injunctions have been frequently refused where the plaintiff failed to specify the defects in the title, or to show that the alleged defects were of sufficient importance to entitle him to that kind of relief. Injunctions were refused the purchaser where he failed to sue the proper parties, or failed to establish the allegations of his bill where the same was denied by answer.

So, the failure of complainant to give any particulars as to any defects in his title was held sufficient to preclude him from any equitable relief. *French v. Howard*, 3 Bibb. 301.

And a purchaser was held not entitled to an injunction against a judgment for purchase money, where he alleged only misapprehension as to the title, and did not state facts showing adverse title, or charge fraudulent representations. *Spence v. Duren*, 3 Ala. 251.

A purchaser was held not entitled to an injunction against a trustee's sale on purchase-money mortgage, where it was not alleged in the bill that the vendor was insolvent, and it was not shown on the trial that an adverse claimant suing in ejectment had any title. *Hoppes v. Cheek*, 21 Ark. 585. The court said: "Although it is shown in evidence that Jacob Hoppes was insolvent, and unable to respond in damages on the covenants in his deed, still, there is no allegation to that effect in the bill, and without such allegation, according to the well-settled and familiar rules of pleading and practice in courts of equity, the evidence establishing the fact of insolvency cannot be regarded. Furthermore, the alleged title of Winchester does not appear in the record."

Mere apprehension of a defective title, where the purchaser was in possession under a warranty deed, was held insufficient ground to obtain an injunction against a judgment on award. Facts must be stated. *Cantrell v. Cobb*, 43 Ga. 193. In this case the plaintiff alleged that the vendor was a nonresident and insolvent.

that paid by Harvey, yet this cannot alter the case, because the rule must be one of general application, and not one which may be applicable to some cases, and not to others. We deduce from the authorities that it is clear, from the allegations of the bill, that equity has jurisdiction to enjoin the collection of the purchase money. The original bill shows that the action of ejectment was instituted for the recovery of the land conveyed to Harvey for which the bond was executed. The amended and supplemental bill shows that the suit was prosecuted to a final termination, which resulted in a judgment in favor of Laidley. Harvey having made improvements upon the

property, the question of the value of the improvements, and the value of the lot without improvements, was submitted to the jury, and, the lot, having been found to be of the value of \$450, and the value of the improvements, \$1,000, Laidley elected to relinquish his title to the lot, and accept its value, and the lot was ordered sold unless the amount at which it was valued was paid by Harvey. Subsequently, the lot was sold, but the sale was not confirmed, and Harvey satisfied the judgment. This being so, a court of equity will not require the payment of the purchase money by Harvey, and force him to his action upon the covenant contained in his deed from Ryan, even if he

And a bill for an injunction was held insufficient where the purchaser did not state wherein the defect of title consisted. It was further held that, if insolvency of the vendor had been properly alleged, it would not have been sufficient where the deed warranted only against the acts of vendor. *Latham v. Morgan, Smedes & M. Ch. 618.*

And a purchaser under a warranty deed, where he was in possession and a suit was pending in ejectment, was held not entitled to an injunction against the collection of the purchase money, as he did not show that the outstanding title was paramount. *Senter v. Hill, 5 Sneed, 505.* The remedy was said to be on the covenants in the deed.

So, a purchaser in possession under a warranty, where no suit was threatened, was held not entitled to an injunction against the collection of the purchase money, where he did not show any superior outstanding title. *Yancey v. Lewis, 4 Hen. & M. 390.*

In *Grantland v. Wight, 2 Munf. 179*, where an injunction was erroneously granted on account of an alleged discrepancy of some feet frontage, the sale being by boundaries, it was held that the injunction should not be dissolved until a deed was tendered to the purchaser.

In same case, *5 Munf. 295*, it was held that the purchaser in possession was not entitled to an injunction where he did not clearly show that the title was defective.

So, the purchaser under a warranty deed was held not entitled to an injunction against the collection of the purchase money, on the ground that his neighbor's wall encroached on his lot some 2 feet, where his lot had the number of feet purchased, and no proof of error was shown by any valid survey. *Ralston v. Miller, 3 Rand. (Va.) 44, 15 Am. Dec. 704.* No suit was threatened, and lapse of time would cure any error as to survey.

In *Kinports v. Rawson, 29 W. Va. 487, 2 S. E. 85*, where it was held that an injunction should not be granted because it was not shown that the title was defective, the court said: "If it had appeared that a bona fide suit had been brought against Rawson's vendee to establish what was

really believed to be a valid claim of superior title, and the court could see from the exhibition of such title that there was, indeed, doubt about the title, or if, under such circumstances, a suit of such character was threatened, then there would be grounds to enjoin the payment of the purchase money; but it certainly never was intended by the judges, who have used the language, 'title questioned by suit, either prosecuted or threatened,' to be understood to mean that, if an idle suit had been brought or threatened, when there was really [no] ground for such suit or such threat, this would be sufficient to prevent an honest vendor from collecting his purchase money by the enforcement of a judgment, deed of trust, or otherwise." In this case the purchaser under a warranty deed alleged insolvency of the grantor, and that his title was in doubt.

A purchaser was held not entitled to an injunction against the collection of the purchase money, as to three fourths of the purchase money, on the allegation that the taxes had not been paid, where the amount was not stated, and they were only nominal, and the answer claimed they were paid. It was further held that other defects as to the title did not exist, and the injunction was dissolved. *Ashe v. Hale, 40 N. C. (5 Ired. Eq.) 55.*

One of two joint owners was held not entitled to an injunction against the collection of the purchase money on account of defective title, where the other owner was not a party complainant. *Merriman v. Norman, 9 Heisk. 269.* The court said that, where the complainant was in possession in another state, under title depending on a decree of that state, an allegation in the bill that the vendor was a nonresident of this state was not of itself sufficient for an injunction. As to whether the fraud of vendor in concealing the defects in the title would be sufficient for an injunction was not decided.

A party having no title found a purchaser who accepted a warranty deed from the owner, and gave his bond to the seller, who accounted to the owner. Afterwards a street was changed to its original place,

were solvent, but the fact of his insolvency is an additional reason for equitable interference. It is claimed that at the time Harvey purchased the lot the ejectment suit was pending, and that this is an additional reason why a court of equity should not entertain him. The deed to Harvey is with covenants of general warranty of title, and, although the action of ejectment was pending, yet this will not prevent him from enjoining the collection of the purchase money.

Care should be taken, however, to distinguish the case here from that class of cases in which injunctions to prevent a sale under a deed of trust, whether executed to

secure deferred payments of purchase money, or to secure general indebtedness, have been freely granted in this state and in Virginia, upon the allegation that there is a cloud upon the title to the land about to be sold. In such cases, the injunction is granted until the cloud on the title is removed. This is done in the interest of all parties, that there may be no sacrifice of the property, and that the title of the purchaser may be assured.

For the reasons given, we reverse the decree of the Circuit Court, dissolving the injunction and dismissing the bill, and remand the cause.

cutting the lot. The owner and seller were insolvent. In the absence of fraud, it was held that the purchaser had no claim on the seller, who made no warranty, but that the remedy, if any, was against the warrantor. *Price v. Ayres*, 10 Gratt. 575.

So, a surety on a note for purchase money was held not entitled to an injunction against a judgment in favor of the vendor against the vendee and surety, on the ground of fraud on the part of the vendor in regard to the title, where the purchaser did not complain and was not a party to the bill. *Walker v. Gilbert*, 7 Smedes & M. 456, 45 Am. Dec. 303.

XIII. Rescission.

The purchaser is not entitled to an injunction and also the land, and a court of equity will adjust the decree to the equities of the case. But the court will refuse a perpetual injunction where the complainant does not offer to rescind.

Thus, in *Jackson v. Norton*, 6 Cal. 187, an injunction against a judgment for purchase money on the ground of a pending suit in ejectment and insolvency of the grantor was held to have been properly refused, where the plaintiff did not offer to rescind. This was on the ground that he could not avoid his contract and hold the land.

And in *Edwards v. Strode*, 2 J. J. Marsh. 506, a perpetual injunction against the collection of the purchase money was held to be erroneous, where the complainant did not offer to rescind.

In *Shreveport v. Flournoy*, 26 La. Ann. 709, where it was held that the objection that there was not sufficient evidence to authorize the order of executory process cannot be examined on an injunction, the remedy was by appeal. The court said: "The objection that the defendant had no title to the lots is of no force. No eviction has been complained of, and no tender or offer has been made to return the property to defendant. The city of Shreveport cannot keep the property and refuse to pay the price."

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XIV. Curing title.

Where a title is cured before decree, the injunction is usually dissolved; the only question then being one of costs. So, where the lapse of time has cured the title, an injunction is denied.

A claim made by the purchaser, in an injunction suit, that the vendor misrepresented the amount of land conveyed, was held not to be sustained by the evidence, in *Lovell v. Chilton*, 2 W. Va. 410. A claim that the title was defective, showing outstanding title, was held to be cause for an injunction, but, on defendant's curing the same before decree, the injunction was dissolved.

So, where an injunction was granted to the purchaser on account of defective title, and the title was perfected before the hearing, it was held that the injunction should be dissolved without damages. *Lampton v. Usher*, 7 B. Mon. 57.

And, where an injunction was granted on account of dower right affecting the title, it was held that on the title being perfected the injunction should be dissolved with costs to plaintiff. *Porter v. Scobie*, 5 B. Mon. 387.

And a purchaser holding land until the title was cured by the statute of limitations was held not entitled to an injunction against the collection of the purchase money, on account of defect of title when purchased. *Amick v. Bowyer*, 3 W. Va. 7.

Where the vendee was in possession fourteen years, it was held that an injunction should not be granted against the collection of the purchase money on the ground that a deed to the vendor was not acknowledged. *Cooley v. Rankin*, 11 Mo. 642. It was held that a deed not properly acknowledged passed title; and it was not shown that the grantor had ever made any other deed, or was then living.

XV. Code and statutory provisions.

The Louisiana Civil Code provides for an injunction against the collection of the purchase money where the purchaser has just reason to believe that he will be disquieted in his possession.

Article 2535 provides that, if the buyer is disquieted in his possession, or has just reason to fear that he will be disquieted, he may suspend payment until the seller has restored to him possession or prefers to give him security. Under this article, it has been held that the payment should have been suspended until the vendors gave security, where the vendor sold community property as his own, and his wife died, leaving infant heirs. *Denis v. Clague*, 7 Mart. N. S. 95. In this case the vendor was insolvent.

Under this section, the purchaser was held entitled to stay of execution on a judgment for purchase money until security was given by the vendor against a legal mortgage in favor of the vendor's children, existing against the property. *Cammack v. Daunis*, 6 La. Ann. 117.

In *Rowlett v. Shepherd*, 4 La. 93, it was held that the Louisiana Code in force when a sale was made applied, which provided that, if the buyer be disquieted by an action, whether hypothecary or in revindication, he might suspend payment of price; and that an injunction was the proper remedy where suit had been brought against him by a claimant of title. It was further held that interest was not payable until the claims were removed from the property. This overrules as to interest *Duplantier v. Pigman*, 3 Mart. La. 245, as that decision was based on the French and Roman civil law. See *manuel de Droit Francais*, Code Napoleon, arts. 1652, 1653. But the Louisiana Code is derived from the Spanish *curia Phillip*, Lib. 2, cap. 2, no. 24, which provides that he should pay interest from the time he ought to have paid the price until he does pay it. It was further held that this contract stipulated that the purchaser should retain in his hands an amount equal to all encumbrances.

An encumbrance on the land at the time of sale was held sufficient cause for an injunction against a judgment for purchase money, in *Bushnell v. Brown*, 3 Mart. N. S. 449. The court said: "It is a point clearly settled by law and many decisions, that a vendor [vendee?] of property, who is in danger of loss or eviction, by suit actually commenced, *questioa mota*, ought not to be compelled to pay the price, unless good security be offered by the vendor to save him from injury."

The location of the land by government survey, giving the purchaser swamp land instead of elevated ground that he purchased, was held sufficient cause for injunction against a judgment for the purchase money. *Barrow v. Cazeaux*, 5 La. 72. The court does not discuss the solvency of the vendor; the sale was by authentic act of the vendor.

And, where suit was brought against the purchaser by third parties claiming title to the land, it was held that he was entitled to an injunction restraining the collection of the purchase money, until the question of title was determined. *Exnicios v. Weiss*, 3 Mart. N. S. 480. The case does not show

the purchaser's contract, or discuss the question of the vendor's solvency.

But, under the old Civil Code of Louisiana, in force in 1822, providing that the vendee could not resist the payment of the price unless he was disturbed by a suit, the purchaser was held not entitled to an injunction, where a suit by a claimant was dismissed before the hearing in the injunction suit. *Thompson v. Dupuy*, 3 La. 432.

The Georgia Code now requires the defense of defective title to be made in the action at law.

Under § 2939, requiring all existing defenses to be set up at the same time, it was held that a purchaser was not entitled to an injunction against a judgment for purchase money, where a defense at law was made of breach of warranty, and one breach existing, but not pleaded or excused, was alleged as cause for injunction. *Desvergers v. Willis*, 58 Ga. 388.

And the same was held where the purchaser held by title bond, where no new matter was alleged which was not or could not have been litigated in the action at law. *Moore v. Hill*, 59 Ga. 760.

And, under Ind. Civ. Code, § 56, sub. 3, requiring the defendant to set up all his defenses, legal or equitable, the failure to set up that there were encumbrances on the land, and the fraud of the vendor in misrepresenting the title, was held to preclude an injunction. *Ricker v. Pratt*, 48 Ind. 73.

This section was not referred to in *Fehrle v. Turner*, 77 Ind. 530, although the defense was set up by cross-complaint in a foreclosure suit, and it was held that insolvency of the vendor was ground for injunction against a foreclosure of a mortgage given by the vendee where the title was defective; but the court said that "it is held in this state that, in a suit to foreclose a mortgage on land conveyed by the mortgagee to the mortgagor, a defect of title will be no defense to the suit, for the reason that, if the mortgagor has no title, the foreclosure cannot injure him."

Under Md. act 1826, chap. 192, providing that no injunction shall be granted to stay any sale authorized by the act, unless the plaintiff in the injunction suit shall be a party to the deed or mortgage under which it is to be sold, or shall claim under such party, and unless he shall allege that the debt has been paid, or that fraud was used in obtaining the deed or mortgage, it was held that an injunction against collection of the purchase money should be denied when fraud was not alleged. It was further held that a suit in ejectment, by a claimant, was not ground where the title of the claimant was not alleged to be superior to that of plaintiff. *Gayle v. Fattle*, 14 Md. 69. The court said: "We content ourselves with a reference to *Miller v. Avery*, 2 Barb. Ch. 594, a case conclusive of this, and now everywhere in this country acquiesced in. There Chancellor Walworth, in alluding to the decision in *Johnson v. Gere*, 2 Johns. Ch. 546, says: 'I

think it evident that the reporter was under a mistake in the statement of the case, for it cannot be possible that he intended to decide that a mere claim of a paramount title, by a third person, and the bringing of a suit upon that claim against the purchaser, was sufficient to authorize the court to stay the vendor, who had warranted the title, from proceeding at law or in equity to collect the unpaid purchase money. If the law was so, any vendee who was not ready to pay his purchase money when it became due might make a secret arrangement with some third person to claim the premises and bring an ejectment suit therefor, and thus tie up the vendor from collecting indefinitely."

XVI. English and Canadian cases.

It seems that in Canada the purchaser will be entitled to an injunction against the collection of the purchase money on showing that the vendor has not a good title.

The purchaser of land in an executory contract was held entitled to an injunction against a suit for interest on the purchase money where he alleged that the vendor had not a good title, and the vendor failed to show by an abstract that he had a good title. It was held that the vendor could not claim that he would have a good title at the time of the last payment. *Thompson v. Brunskill*, 7 Grant, Ch. (U. C.) 542. No defects in the title were pointed out, the court holding that the burden was upon the vendor to show that his title was good.

And where the vendors had not furnished an abstract of title notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that, by reason of the delay, the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction. The court held that an injunction should be granted. *Walton v. Armstrong*, 11 Grant, Ch. (U. C.) 379.

On a bill filed by a purchaser, alleging a defective title, a reference was had, and the referee reported the title defective. A perpetual injunction was granted against an action at law for the purchase money, and decree of rescission. *Tiffany v. Thompson*, 9 Grant, Ch. (U. C.) 255.

In England there is a scarcity of injunction cases in favor of the purchaser. His rights are probably generally concluded by the abstract and title papers furnished in the practice in that country. But it seems that he can defeat suits for specific performance, and prosecute suits for rescission, where his contract is obtained from him by the fraud, misrepresentation, or concealment of material facts on the part of the vendor. A statute seems to furnish *ex parte* relief on application to a judge in chambers. A few authorities are cited to show the general jurisdiction of a court of equity.

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In *Koger v. Kane*, 5 Leigh, 606, it was said: "In England, indeed, if the purchaser has obtained his deed, he can have no redress in equity, but must look to his covenants; and, if he has but a covenant of warranty, he can have no redress until eviction. And this principle has received countenance from the decisions of the courts of a sister state. . . . And in *Ralston v. Miller*, 3 Rand. (Va.) 44, 15 Am. Dec. 704, Judge Green, delivering an opinion in which the other judges concurred, remarks that this court has, in favor of purchasers, gone far beyond anything which has been sanctioned by the courts of chancery of England, or elsewhere, in enjoining the payment of purchase money after the purchaser has taken possession under a conveyance, especially with general warranty. Yet it has never gone as far as to interfere, unless the title was questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective."

In England the vendor and purchaser act 1874, chap. 78, provides that a vendor or purchaser may obtain a decision of a judge in chambers in a summary way in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract).

Encumbrances must be paid off by the vendor before he can compel payment of the purchase money, if discovered before the conveyance. 2 Sugden, Vend. & P. 124.

After conveyance executed, if the vendor knew and concealed the defect in title it is a fraud, and the purchaser will be relieved in equity. *Id.* 132.

"If, after the Execution of a Conveyance, but before Payment of the Consideration Money, the Purchaser has Notice that the Vendor has no Title to the Lands, this is sufficient to avoid the Purchase. *Jones and Stanley*, Mich. 5 Geo. II. [1731], in *Scac's MS. Rep.*" 2 Eq. Cas. Abr. 685.

A purchased an estate, and, having paid down part of the purchase money, gave bond for the residue. The plaintiff had an equitable lien on the purchased premises, of which the defendant alleged he had no notice at the time of making his purchase, but was apprised thereof before payment of the money due on the bond. And it was contended that this notice was not material, since the giving of the bond was as payment; and the purchaser, after he had given his bond for payment of the purchase money, was bound in all events to proceed, and could not plead at law that there was an equitable encumbrance on his purchased premises. *Tourville v. Naish*, 3 P. Wms. 307. It was held: "If the person who had a lien in equity of the premises gives notice before actual payment of the purchase money, . . . it is sufficient; and, though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet

he would be entitled to relief in equity, on bringing his bill, and showing that, though he has given his bond for payment of the residue of his purchase money, yet now he has notice of an encumbrance, under which circumstances the court would stop payment of the money due on the bond."

In *Maynard's Case*, Freem. Ch. 1, which was an action by a purchaser against the vendor for repayment of the money because the title failed, "it was said by Mr. Attorney that, if a man sell another's land, and covenant to discharge it of such particular encumbrances, and, before the payment of the money, other encumbrances are discovered, this will prevent the suit for the money till all the encumbrances are discharged. It was said, likewise, by Mr. Keck, that, if there be no covenants against any encumbrances, yet, if, before payment of the money, any are discovered, the party may retain his money till they are cleared; *quod fuit concess. per cancellar.*" But it was said by Sir John King, and not denied *per Cur.* that those must be encumbrances made by the vendor himself, or otherwise the party cannot detain the money, unless they be covenanted against."

In a suit for the payment of creditors, the real estates of the testator were ordered to be sold. A, being reported the purchaser of one of the estates for £14,480. entered into possession and accepted the title, and proper conveyances were executed. On application by the creditors to have the purchase money paid out, the purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title. But it was held that the purchaser, having accepted the title, etc., could not now prevent the money being paid out of court, and ordered accordingly. The lord chancellor said: "The court, having given Mr. Digby possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not be heard at this stage of the business to object to the application of the purchase money." *Thomas v. Powell*, 2 Cox, Ch. Cas. 394.

XVII. Summary.

In cases of fraudulent representation of title, or concealment of material facts, by the vendor, the purchaser of a defective title is held entitled to an injunction against the collection of the purchase money. And an injunction is usually granted to the holder of a bond for title, where the vendor is unable to make good title. The insolvency or nonresidence of a vendor gives equity jurisdiction to enjoin the collection of the purchase money, where the purchaser holds by warranty deed and the title

is defective. Where the vendor stipulates that the purchase money is not to be paid until the title is perfected, and he brings suit before that time, equity will interfere. But, where the vendor is solvent, and is not a nonresident, the weight of authority is clear that the purchaser must look to the covenants of his deed, and that a remedy at law will prevent the court from granting an injunction. Purchasers under quitclaim deeds, in the absence of fraud, are not entitled to an injunction against the collection of purchase money, where the title is defective. So, a purchaser may be estopped by his conduct from obtaining an injunction, as where he tells a party who contemplates buying a note given for the purchase money that he will pay it at maturity, and the note is purchased on the strength of that representation. So, a purchaser whose default prevents the perfection of the title is not entitled to an injunction. A purchaser who contracts to pay for the title in its present condition, with full knowledge of its infirmities, is in the same condition as a purchaser under a quitclaim deed, and is not entitled to an injunction.

The complainant in an injunction suit should set out the facts showing that the title is defective; otherwise he will not be entitled to an injunction. The purchaser should ask an abatement of the price, or seek for a rescission, on the ground that "he who seeks equity must do equity." Where the title is cured at the time of hearing, the injunction is generally dissolved. In some states the Code and statutory provisions provide for injunction for defective title. Others provide that defenses against plaintiff's claim must be pleaded in that action. It seems that in some states sales under deeds of trust will be enjoined where the title is defective. The rule in *Johnson v. Gere*, 2 Johns. Ch. 546, that an injunction will be granted in favor of a purchaser where suit in ejectment is pending by a claimant of paramount title, is not supported by the weight of authority without the further qualification of, "provided the grantor was guilty of fraud, or is insolvent or a nonresident," and does not appear to have been followed in its broad statement by other cases, except in isolated cases, and in Virginia and West Virginia.

A few cases seem to hold that an absolute want of title at the time of conveyance will authorize an injunction; but the general rule is that there must be some equitable ground, as insolvency, or nonresidence, or fraud on the part of the grantor, before the court will grant an injunction.

For injunctions in favor of purchasers at sales by executors and administrators, and court sales, see *Norwegian Plow Co. v. Bollman*, 31 L.R.A. 747, note.—Injunctions against judgments for defenses existing prior to their rendition. I. T.

UNITED STATES CIRCUIT COURT OF
APPEALS, THIRD CIRCUIT.

STANDARD LUMBER COMPANY, Plff. in
Err.,
v.
BUTLER ICE COMPANY.

(76 C. C. A. 39, 146 Fed. 359.)

Contract—corporation—fraudulent act of
president—liability.

1. A contract to pay for the construction of a building does not become enforceable against a corporation because it is executed by its president under its corporate seal, if a large bonus in addition to the amount of the bid is included in the contract price, which is to be divided between such president and the contractor and its

representatives, even as to extra work after the price named in the contract has been paid, where, under the statutes of the state, such conduct on the part of the president is a misdemeanor.

Same—denial of validity.

2. Where a contract on which an action is founded is *contra bonos mores*, or forbidden by express law, defendant may plead its invalidity, even though he is a participant in the wrong.

(June 20, 1906.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment in favor of defendant in an action brought to recover for work done and materials furnished

Case Note.—Secret bonus to officer or director of corporation as affecting right to enforce contract against corporation:—

In *Stanton v. Sturgis*, 140 Fed. 789, it was held that, where a contractor agreed to build a railroad for 15 per cent upon the cost of construction, and on the same day entered into another agreement with five of the seven directors of the railroad company to pay them two thirds of his profit, both contracts being made at the same time and substantially between the same persons, though one is executed in the name of the corporation and the other in the names of the majority of the directors, are to be treated as *in pari materia* and as constituting one contract, which, being void as against public policy, will not support an action by the contractor against the railroad company for damages in not being permitted to perform it. The court intimated, however, that, if the contractor had built the railroad, his right to recover the agreed compensation might not be affected.

But in *Yellow Poplar Lumber Co. v. Daniel*, 48 C. C. A. 204, 109 Fed. 39, it was held that the right of the seller of logs to enforce a contract lien for the purchase price was not affected by the fact that, after the contract of sale was made, an agreement to divide the profits was forced from the seller by a threat by the manager of the purchasing corporation, who had negotiated the purchase, that the corporation would repudiate the contract, where no damage was shown to have resulted to the corporation from the subsequent agreement.

In *Findlay v. Pertz*, 29 L.R.A. 188, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 427, it was held that, where the superintendent of a municipal gas works was paid a commission upon a sale to it, the city, upon discovering the fact, was entitled to rescind; but that the city might thereafter become liable by continuing to use the property purchased; and that the contract was unaffected by a statute declaring it a penal offense for any public officer, agent, servant, or employee to be directly or indirectly

interested in any contract for the purchase of any property for the state, county, or municipality. The court said: "We must distinguish between the bargain for a commission between the defendants in error and the agent of the city and the contract between the two principals. The first was clearly illegal and incapable of enforcement; the latter was, on its face, altogether within the contracting power of the parties, was free from any immorality, and altogether legitimate. . . . It has been pressed upon us that, inasmuch as the agent corrupted was a public agent, the contract made through his corruption was absolutely void and incapable of ratification, and that no subsequent conduct of the plaintiff in error in retaining and using the machines bought can furnish a basis upon which the guilty party can maintain a suit founded upon the corrupt contract. It seems to us that this argument confounds the corrupt agreement between the agent of the city and the other principal with the contract between the principals."

So far as *STANDARD LUMBER CO. v. BUTLER ICE CO.* may be in conflict with the preceding case, it seems to be more fully in accord with the weight of indirect authority. As to the effect of the statute cited to taint the contract with illegality, reference may be made to a few of the many cases which, by an overwhelming weight of authority, support the rule that contracts made in violation of a penal statute cannot form the basis of an action, though not expressly prohibited or declared void. See *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210; *Cook v. Pierce*, 2 Houst. (Del.) 499; *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; *Durgin v. Dyer*, 68 Me. 143; *Allen v. Hawks*, 13 Pick. 79; *Ingersoll v. Randall*, 14 Minn. 400, Gil. 304; *Downing v. Ringer*, 7 Mo. 585; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Cov-*

by plaintiff in the construction of defendant's building. Affirmed.

The facts are stated in the opinion.

Argued before Dallas and Gray, Circuit Judges, and McPherson, District Judge.

Mr. William M. Hall, for plaintiff in error:

The corporate name being signed to the contract, and the corporate seal being affixed thereto, a presumption thereupon arises that the instrument is binding on the corporation.

Cook, Corp. p. 1824; Parkinson v. Parker, 85 Pa. 313; Am. Dig. title, "Corporations," § 1729; Benedict v. Denton, Walk. Ch. (Mich.) 336; Morris v. Keil, 20 Minn. 531, Gil. 474; St. Louis Public Schools v. Risley, 28 Mo. 415, 75 Am. Dec. 131; Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 32 W. Va. 244, 9 S. E. 190; Ruffner Bros. v. Welton Coal & Salt Co. 36 W. Va. 244, 15 S. E. 48; Angell & A. Priv. Corp. § 224; 2 Morawetz, Priv. Corp. § 617.

Messrs. T. C. Campbell, W. D. Brandon, and James S. Campbell, for defendant in error:

The best way to suppress any public vice is to make it unprofitable.

Ham v. Smith, 87 Pa. 63.

The fraudulent act involved in this case is made illegal by statute, or by public policy.

Peters v. Grim, 149 Pa. 163, 34 Am. St. Rep. 599, 24 Atl. 192.

The contract is therefore void.

Bredin's Appeal, 92 Pa. 241, 37 Am. Rep. 677; Ham v. Smith, supra; Swing v. Munson, 191 Pa. 582, 58 L.R.A. 223, 71 Am. St. Rep. 772, 43 Atl. 342; Columbia Bank & Bridge Co. v. Harleman, 7 Watts & S. 233, 42 Am. Dec. 229; Seidenbender v. Charles, 4 Serg. & R. 151, 8 Am. Dec. 682; Eberman v. Reitzel, 1 Watts & S. 181; Com. v. Philadelphia County, 2 Serg. & R. 193; Coppell

v. Hall, 7 Wall. 558, 19 L. ed. 248; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737.

Even though this contract had not been prohibited and been made punishable by statute, it was unlawful as fraudulent. The contract is indivisible, and the defense goes to the whole of it.

Frazier v. Thompson, 2 Watts & S. 235; Filson v. Himes, 5 Pa. 452, 47 Am. Dec. 422.

If there are two claims, one legal and the other illegal, application of the credit must be made to the valid claim.

Harker v. Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691; Greene v. Tyler, 39 Pa. 361.

Gray, Circuit Judge, delivered the opinion of the court:

In the court below, the plaintiff in error, the Standard Lumber Company, a corporation of the state of Pennsylvania, brought an action *ex contractu* against the defendant, the Butler Ice Company, a corporation of the state of Delaware. The statement of claim sets forth a certain contract in writing between plaintiff and defendant, whereby the plaintiff undertook to provide the materials and do all the work mentioned and shown in specifications and drawings, referred to in said contract, for the erection and completion of an ice plant, with certain exceptions therein stated, and in consideration thereof, the defendant agreed to pay plaintiff the sum of \$10,808. It was also agreed that there should be paid \$6.50 per perch for extra stonework, above that shown in said plans, and 50 cents per yard for extra excavating, subject to additions and deductions as in said contract provided. It is then alleged that plaintiff had provided all the materials, and had performed all the work stipulated for in said contract, in accordance with the terms thereof, and that defendant had accepted the same; that

ington v. Threadgill, 88 N. C. 186; Thorne v. Travellers' Ins. Co. 80 Pa. 15, 21 Am. Rep. 89; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Snoddy v. American Nat. Bank, 88 Tenn. 573, 7 L.R.A. 705, 17 Am. St. Rep. 918, 13 S. W. 127; Territt v. Bartlett, 21 Vt. 184. Compare Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720, which holds that though, as a general rule, a contract founded on an act forbidden by a statute under a penalty is void although it is not expressly declared to be so, it does not necessarily follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it; but that the question is in a great measure one of legislative intent.

It is also well settled that, where the consideration for a contract is illegal in part, the whole is vitiated thereby. See Brieske v. North Chicago Street R. Co. 82 Ill. App. 7 L.R.A. (N.S.)

256 (citing Tobey v. Robinson, 99 Ill. 222; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; Bishop, Contr. § 487); Chicago, I. & L. R. Co. v. Southern Indiana R. Co. (Ind. App.) 70 N. E. 843 (citing Higham v. Harris, 108 Ind. 256, 8 N. E. 255; Ricketts v. Harvey, 106 Ind. 566, 6 N. E. 325; Rainbolt v. East, 56 Ind. 538, 26 Am. Rep. 40; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124); Padget v. O'Connor (Neb.) 98 N. W. 870 (citing 1 Parsons, Contr. 457; Norton, Bills and Notes, 2d ed. 276; Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514; Wilde v. Wilde, 37 Neb. 891, 56 N. W. 724; Wilson v. Parrish, 52 Neb. 6, 71 N. W. 1010; McCormick Harvesting Mach. Co. v. Miller, 54 Neb. 644, 74 N. W. 1061; McClelland v. Citizens' Bank, 60 Neb. 90, 82 N. W. 319); Covington v. Threadgill, supra; Wegner Bros. v. Biering, 65 Tex. 506; Burck v. Abbott, 22 Tex. Civ. App. 216, 54 S. W. 314.

plaintiff had also done extra work under the contract, amounting to \$2,838, so that the \$10,808 agreed to be paid for the completion of the work specified in the contract, and the amount to be paid for the extra work, at the rate stipulated for therein, amounted to \$13,646. Against this sum, the plaintiff allows defendant credits to the amount of \$11,624, leaving a balance of \$2,022 claimed as due from defendant to plaintiff.

The written contract, as set out in the statement of claim and produced at the trial, was executed by the plaintiff, the Standard Lumber Company, under its seal and the signature of J. M. Wetherill, manager, and on the part of the Butler Ice Company, under the seal of said company and the signatures of Peter F. McCool, its president, and S. B. Hermes, its secretary. The affidavit of defense set out, and it was proved at the trial, that the plaintiff company, by a letter addressed to P. F. McCool, then president of the defendant company, and signed by the Standard Lumber Company, "Per F. E. Brotherton," agent of the plaintiff company, duly authorized in that behalf, proposed to build the ice plant for defendant company, according to the plans and specifications submitted, for the sum of \$6,309.50; that the plans and specifications referred to in said bid were the plans and specifications referred to in, and made part of, the contract between plaintiff and defendant companies, upon which suit was brought in the court below, and in which the consideration named for the work included in this bid was \$10,808; and that the bid for \$6,309.50 was full price for said work. Subsequent to the making of said bid, by agreement between Peter F. McCool, president of the defendant company, and the plaintiff company, acting through its manager, Wetherill, the said bid for said work was increased to the sum of \$10,808, and the contract upon which suit was brought was then entered into upon that consideration to be paid by the defendant company, it being understood by the said officers of the two companies that, when the consideration was paid by the defendant company, \$2,000 of the difference between the original bid and the contract price was to be paid to the said Peter F. McCool, and that the balance was to be divided between the said Wetherill and the said plaintiff company. The testimony as to this corrupt understanding and contract was uncontradicted, and it was not denied that the consideration of the written contracts was thus corruptly increased, or that the president of the defendant company conspired with the plaintiff company and its manager,

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Wetherill, to defraud the said defendant company for his own benefit.

The facts thus summarized not being denied, counsel for plaintiff contends that the defendant is bound by the action of its president and secretary; and that, inasmuch as the corporate seal was attached, as well as the signatures of the last-named officers, defendant cannot now avoid the obligation of the contract thus formally executed; and that plaintiff had a right to rely upon the signed contract under the corporate seal. The cases relied upon by plaintiff seem to be those in which corporate obligations duly executed have come into the hands of innocent third persons, where it is held that, inasmuch as there is a presumption that the seal was affixed by the proper authority, it is not to be overcome by the mere fact that no vote of the directors authorizing it is shown. We are not, however, dealing with a case of the innocent holder of such a contract, the undisputed facts being that the manager of the plaintiff corporation, with the knowledge of its directing and executive authorities, entered into a corrupt bargain with the president of the defendant company, to add more than 50 per cent to the original bid, with the understanding that the amount by which the bid was thus increased should, when paid by the defendant company, be divided between the conspirators. It is too mild a characterization of such a transaction to say that it was fraudulent. It was a gross scheme for the abstraction of more than \$4,000 from the treasury of the defendant company, to be converted to the use of the conspirators, the larger share of it to the defendant's own president. The acts and conduct thus described are clearly in violation of two statutes of Pennsylvania, which provide as follows:

Act of March 31, 1860: "If any two or more persons shall falsely and maliciously conspire and agree to cheat and defraud any person or body corporate of his or their moneys, goods, chattels, or other property, or to do any other dishonest, malicious, and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine, not exceeding \$500, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years." P. L. 413, § 128.

Act of June 12, 1878: "Sec. 1. If any person, being an officer, director, superintendent, manager, receiver, employee, agent, attorney, broker, or member of any bank or other body corporate, or public company, municipal or quasi municipal corporation, shall fraudulently take, convert, or apply to

his own use, or the use of any other person, any of the money or other property of such bank, body corporate, or company, municipal or quasi municipal corporation [or association], or belonging to any person or persons, corporation or association, and deposited therein, or in possession thereof, he shall be guilty of a misdemeanor."

"Sec. 5. That every person found guilty of a misdemeanor under any or either of the preceding sections of this title, wherein the nature and extent of the punishment is not specified, shall be sentenced to pay a fine not exceeding \$1,000, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding six years." P. L. 196, 197.

The contract was not only immoral, but it was illegal and criminal, and therefore void. No court would be justified in enforcing the whole or any part of such a contract. From an origin so flagitious, no right of action can arise. The maxim *Ex turpi causa, non oritur actio*, founded as it is on sound morals, has been long recognized by courts in the practical administration of justice. *Petrie v. Hannay*, 3 T. R. 422; *Collins v. Blanters*, 2 Wils. 341. A contract otherwise void, as being founded upon an immoral consideration, cannot be rendered valid by the mere ceremony of attaching a seal thereto. *Gaslight & Coke Co. v. Turner*, 5 Bing. N. C. 675.

The defendant, however, contends that the contract, as to the payment of \$10,808, which included the amount to be stolen from defendant, was executed, and that the balance sued for referred to the extra work under the stipulations of the contract, and had no relation to the fraudulent part thereof. The evidence will not permit a serious consideration of this contention. There was no appropriation of the payments made from time to time to any particular part of the contract, and plaintiff cannot now make that appropriation for his own benefit. The poison of the immoral consideration infects the contract as a whole, and the court below was right in refusing to lend its aid to the enforcement of any part thereof.

Nor is the principle invoked by the defendant, that no one may show his own turpitude, applicable here. The real defendant is the company. It was the victim, not a perpetrator, of the fraud. Its president conspired with plaintiff to take from it a large sum of money by falsehood and deception practised through the medium of the contract here sued upon. But, even if the defendant could by any possibility have been shown to have been a party to its own spoliation by the dishonest conduct of its

president, it could still have alleged the illegal consideration as a defense. Where the contract on which the action is founded is *contra bonos mores*, or forbidden by express law, the defendant may plead its invalidity, even though he be a participator in the wrong. In such a case the courts refuse to enforce the contract on grounds of public policy, and not as a matter of private interest.

In *Holman v. Johnson*, 1 Cowp. 343, Lord Mansfield says: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

It is objected that in such cases fraud is always a question for the jury, and that the court erred in giving binding instructions to find in favor of the defendant. We see no reason, and none has been shown, where the facts constituting such a defense are undisputed, why the court may not, as in other cases, direct a verdict in accordance with such facts, if it would feel compelled, upon the rendition of a contrary verdict, to set the same aside. That this was such a case, we have no doubt. It must not, however, pass without notice, that each side requested the court to give peremptory instructions for a verdict in its favor, and the record discloses the fact that, after the testimony was closed on both sides, it was agreed by counsel for both the plaintiff and defendant that the question was a question of law for the court, and the judge opened his charge to the jury with the statement: "It is agreed on both sides that this is a question for the court to dispose of under the evidence; and therefore it becomes my duty to direct the character of the verdict which you are to render."

As was said by the supreme court of Pennsylvania in a similar case: "It would be unfair to the court and to the defendant to sustain an assignment of error, based upon the failure to submit the question to the jury." *New Era Life Asso. v. Weigle*, 128 Pa. 577, 18 Atl. 393.

The judgment of the court below is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

VIRGINIA W. TINCHER, Appt.,
v.

THOMAS S. ARNOLD et al., Trustees, etc.,
of LeGrand L. Wells, Deceased, et al.

(77 C. C. A. 649, 147 Fed. 665.)

Trust—action to test—laches.

1. Laches will not debar an heir from proceeding to test the validity of a trust created by the ancestor's will for the accumulation of a fund to establish a charity school.

Same—uncertainty of beneficiaries.

2. A charitable trust for the education of poor boys is not rendered invalid by the fact that the class is not restricted in any way by the capacity, color, or condition of the beneficiaries.

Same—nonexisting object.

3. The existence of a public free-school system does not necessarily render invalid a trust for the benefit of boys unable to educate themselves, on the theory that the trust has no field for operation, since, notwithstanding such system, there may be boys who, by reason of poverty or other circumstances, cannot avail themselves of it.

Same—selection of beneficiary.

4. That no provision is made by the donor for the selection of the beneficiaries of a trust for the education of boys not able to educate themselves does not invali-

date the trust, since equity will appoint a trustee for that purpose.

Same—cy près application.

5. That the donor of a fund to be held in trust for the education of boys unable to educate themselves provides that, after the building is secured, the income of the fund shall be used to pay teachers, does not prevent the use of a part of it for the heating, lighting, and care of the building.

Same—construction—solicitors' fees.

6. Complainant's solicitors' fees will not be paid out of the trust estate in a proceeding by an heir to annul his ancestor's bequest for charity,—especially where a judicial construction has already been given to the will which is sufficient for the purposes of the trustees.

(August 11, 1906.)

APPEAL by complainant from decrees of the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois upholding a trust created by the will of LeGrand L. Wells, deceased, and refusing to allow complainant solicitors' fees out of the fund. Affirmed.

The facts are stated in the opinion.

Argued before Grosscup and Baker, Circuit Judges, and Sanborn, District Judge.

Messrs. E. A. Otis, W. K. Otis, and Warren Pease, for appellant:

The trust is void for uncertainty. The will gives no power to anyone to select the

Case Note.—Existence of public free-school system as affecting validity of trust for education of children: —The objection that the existence of a public free-school system renders invalid a trust for the education of poor children was made in the case of *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375, and was there, also, held untenable; the court saying that it did not follow that, because the legislature had devised a method by which all the children of the state might receive an education free of charge, testators may no longer devote a part of their estates to the education of the poor, since it is undeniable that the class designated is still in existence and as capable of being the beneficiary of such a charitable trust as it ever was.

In *Re John*, 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, 50 Pac. 226, it is also held that a bequest for the maintenance of free public schools is not prevented from being a public charity by the fact that the state has for all practical purposes provided for the maintenance of free public schools for all children of school age within the same territory,—especially where, under the system provided by the state, there is no absolute assurance that a free school will be maintained, so that the purposes of the testator will be assuredly and inevitably met by the provision made by the state.

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And see also the case of *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522, as quoted in the opinion in *TINCHER v. ARNOLD*.

As tending indirectly to support the doctrine of the foregoing decisions, reference may be made to the cases of *Swasey v. American Bible Soc.* 57 Me. 523, which sustains a bequest "for the education and instruction of poor and needy children in the first school district in the town of Bucksport, to furnish them with necessary clothing while attending school;" and *Crow v. Clay County*, 196 Mo. 234, 95 S. W. 369, which holds that the establishment of a public-school system, not compulsory on individual districts, supported partly by state funds and partly by local taxation, did not so certainly meet the purpose of the creator of a charitable trust for the tuition and education of poor children under the age of sixteen within a certain district as to supplant such trust.

And in the following cases gifts for the benefit of the public schools themselves were upheld: *Huntsville v. Smith*, 137 Ala. 382, 35 So. 120; *Heuser v. Harris*, 42 Ill. 425; *Webster v. Wiggin*, 19 R. I. 73, 28 L.R.A. 510, 31 Atl. 824; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Handley v. Palmer*, 91 Fed. 948.

beneficiaries or to establish or conduct a school.

Fountain v. Ravenel, 17 How. 369, 15 L. ed. 80; *Perry*, Tr. §§ 719, 729; *Hunt v. Fowler*, 121 Ill. 280, 12 N. E. 331, 17 N. E. 491; *Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *White v. Fisk*, 22 Conn. 31; *Adye v. Smith*, 44 Conn. 60, 26 Am. Rep. 424; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Philadelphia Baptist Asso. v. Hart*, 4 Wheat. 1, 4 L. ed. 499; *Jackson v. Phillips*, 14 Allen, 539.

The trust is impossible of execution, and must fail.

Beall v. Drane, 25 Ga. 430; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Yingling v. Miller*, 77 Md. 104, 26 Atl. 491; *Literary Fund v. Dawson*, 10 Leigh, 147; *White v. Fisk and Grimes v. Harmon*, *supra*.

There is no room for a *cy près* construction.

Gilman v. Hamilton, 16 Ill. 225; 3 Am. & Eng. Enc. Law, p. 133; *Cherry v. Mott*, 1 Myl. & C. 123; *Bispham*, Eq. § 129; *Tilden v. Green*, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; *Jackson v. Phillips*, *supra*.

The fund never vested in a charity.

Cherry v. Mott, *supra*.

The petition by the complainant for payment of her costs including reasonable solicitors' fees out of the fund in the hands of the court should have been allowed.

Ingraham v. Ingraham, 169 Ill. 471, 48 N. E. 561, 49 N. E. 320; *Studholme v. Hodgson*, 3 P. Wms. 300; *Deane v. Home for Aged Colored Women*, 111 Mass. 135; *Jolliffe v. East*, 3 Bro. Ch. 25; *Straw v. East Maine Conference*, 67 Me. 493; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 338, 23 N. E. 603; *Sawyer v. Baldwin*, 20 Pick. 378.

Messrs. Pease & Polkey, also for appellant:

In order to create a valid trust three concurring conditions must exist: (1) Sufficient words to raise it; (2) a definite subject; (3) a certain or ascertained object.

Mills v. Newberry, 112 Ill. 123, 54 Am. Rep. 213, 1 N. E. 156; *Johnson v. Johnson*, 92 Tenn. 559, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114; 30 Am. & Eng. Enc. Law, 2d ed. p. 694; 1 *Jarman, Wills*, 5th Am. ed. 649, 653; *Schouler, Wills*, 2d ed. §§ 292, 596; *Heiss v. Murphey*, 40 Wis. 291; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305; *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730; *Tilden v. Green*, 130 N. Y. 29, 14 L.R.A. 7 L.R.A. (N.S.)

33, 27 Am. St. Rep. 487, 28 N. E. 880; *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382; *Re Taylor*, 81 Cal. 9, 15 Am. St. Rep. 17, 22 Pac. 297; *Gambell v. Trippe*, 75 Md. 252, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; *Wheeler v. Smith*, 9 How. 55, 13 L. ed. 44; *Norcross v. Murphy*, 44 N. J. Eq. 522, 14 Atl. 903; *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190; *Simmons v. Burrell*, 8 Misc. 388, 28 N. Y. Supp. 625; *Phelps v. Phelps*, 28 Barb. 121.

The beneficiaries are uncertain and cannot be ascertained.

Philadelphia Baptist Asso. v. Hart, 4 Wheat. 1, 4 L. ed. 499; *White v. Fisk*, 22 Conn. 31; *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731; *Henry Watson Children's Aid Soc. v. Johnston*, 58 Md. 139; *Simmons v. Burrell*, *supra*; *Schell v. Merkle*, 75 Hun, 74, 26 N. Y. Supp. 1021; *Yingling v. Miller*, 77 Md. 104, 26 Atl. 491; *Read v. Williams*, *supra*; *Wheelock v. American Tract Soc.* 109 Mich. 141, 63 Am. St. Rep. 578, 66 N. W. 955; *Jones v. Green* (Tenn. Ch. App.) 36 S. W. 729; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Bridges v. Pleasants*, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94; *Gallego v. Atty. Gen.* 3 Leigh, 450, 24 Am. Dec. 650; *Heiss v. Murphey*, 40 Wis. 276; *Hoffen's Estate*, 70 Wis. 522, 36 N. W. 407; *Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *McCord v. Ochiltree*, 8 Blackf. 15.

No power of selection is given the trustees.

Levy v. Levy, 33 N. Y. 97; *Norcross v. Murphy*, *supra*; *Fosdick v. Hempstead*, 125 N. Y. 581, 11 L.R.A. 715, 26 N. E. 801; *Heiss v. Murphey*, 40 Wis. 276; *Fairfield v. Lawson*, *supra*.

The devise is so vague and indefinite that it cannot be performed and is incapable of being executed by a judicial decree.

Prichard v. Thompson, 95 N. Y. 76, 47 Am. Rep. 9; *Brennan v. Winkler*, *supra*; *Schmucker v. Reel*, 61 Mo. 592; 2 *Perry*, Tr. § 719; *Fuller's Will*, 75 Wis. 431, 44 N. W. 304; *Wheeler v. Smith*, 9 How. 55, 13 L. ed. 44.

Messrs. Free P. Morris, Vincent J. Walsh, and W. H. Boys, with Messrs. Edwin Burritt Smith, McClellan Kay, and Frank L. Hooper, for appellees:

The bill is barred by the equitable doctrine of laches.

Bowman v. Wathen, 1 How. 189, 11 L. ed. 97; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *McDearmon v. Burnham*, 158 Ill. 55, 41 N. E. 1094; *McMillan v. McMillan*, 184 Ill. 230, 56 N. E. 302; *Mason v. Stevens*, 91 Ill. App. 623.

The trust estate is a valid gift to charitable uses.

Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516; *Heuser v. Harris*, 42 Ill. 435; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Alden v. St. Peter's Parish*, 158 Ill. 631, 30 L.R.A. 232, 42 N. E. 392; *Crerar v. Williams*, 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467.

The gift is for a charitable use, being for the promotion of education whether at Watseka or Onarga.

Grand Prairie Seminary v. Morgan, supra; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; *Jackson v. Phillips*, 14 Allen, 556; *Pennoyer v. Wadhams* (School Land Comrs. v. Wadhams) 20 Or. 274, 11 L.R.A. 210, 25 Pac. 720; *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183; *Andrews v. Andrews*, 110 Ill. 223; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Saltonstall v. Sanders*, 11 Allen, 456; *Donohugh's Appeal*, 86 Pa. 312; *Bullard v. Chandler*, 149 Mass. 532, 5 L.R.A. 104, 21 N. E. 951.

The trust is a valid and charitable use in favor of boys unable to educate themselves, although all children in Illinois are entitled to the privileges of the public schools.

Grand Prairie Seminary v. Morgan, supra; *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375; *Re John*, 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, 50 Pac. 226; *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Ill. 115; *Hunt v. Fowler*, supra.

The trustees have the power to select from the class designated the particular boys who may attend the school to be established.

Grand Prairie Seminary v. Morgan; *Hunt v. Fowler*; and *Pennoyer v. Wadhams*,—supra; *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009.

The trust does not appear by actual experience to be incapable of execution.

Gilman v. Hamilton, 16 Ill. 225; *Grand Prairie Seminary v. Morgan*, supra; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270; *Crerar v. Williams*, supra.

The order denying the petition to direct the trustees to pay from the trust fund the costs, including solicitors' fees of complainant, was proper.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *New Castle Northern R. Co. v. Simpson*, 26 Fed. 133; *Boston Safe-Deposit & T. Co. v. Adrian*, Mich., *Waterworks*, 47 Fed. 8; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 91 Fed. 19; *Internal Improv. Fund v. Greenough*, 105 U. 7 L.R.A. (N.S.)

S. 527, 26 L. ed. 1157; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 124, 28 L. ed. 918, 5 Sup. Ct. Rep. 387; *Smith v. Smith*, 4 Paige, 271; 22 Enc. Pl. & Pr. p. 212.

Mr. William H. Stead, Attorney General, for the State.

Mr. W. E. Lewis for the city of Watseka.

Sanborn, District Judge, delivered the opinion of the court:

Action to construe a will, to determine the validity of a trust clause therein, to have such clause held void, determine that complainant, as sole heir at law of the testator, is entitled to the amount of the trust funds in the hands of the trustees, and that they be required to account for the same and turn them over to complainant. The court below held that the trust was valid, as creating a good, charitable use, and dismissed the bill for want of equity. Complainant also moved the court to allow her the amount paid for attorneys' fees, on the ground that her solicitors had rendered valuable and important services to the value of \$1,500, and that the terms of the will are ambiguous, indefinite, and uncertain, and application to the court was necessary to obtain a construction thereof; that at the time of the filing of the bill in this cause the trustees under the will had themselves prepared a bill to be filed in the circuit court of Watseka county, Illinois, asking a construction of the will. This petition was denied by the court, on the ground that complainant in this case was suing in her own right, and not for the benefit of the trust estate. Complainant has appealed from the decree dismissing the bill, and from the order or decree denying her petition for attorneys' fees.

Complainant is the daughter and sole heir at law of the testator, LeGrand L. Wells, deceased. On September 24, 1883, said Wells made his will, and by the fifth clause thereof attempted to create a trust, as follows: After giving his daughter, the complainant, a life estate in a farm in Iroquois county, Illinois, remainder to the heirs of her body share and share alike, and a legacy of \$1,000 and certain personal property, and \$1,000 each to her children as they should arrive at the age of twenty-one years, the will contains a residuary devise to his trustees for the purpose of carrying out the full terms of the will, and then proceeds as follows: "I further direct that my trustees and their successors manage my estate until it has accumulated a fund of at least thirty thousand dollars after setting aside a sufficient sum to pay all specific legacies, debts, etc., which shall form a fund known as the Wells fund, and shall

be used in the following manner, to wit: If the city of Watseka will donate a suitable lot for such purpose within thirty days after being notified by said trustees, said trustees shall cause a building to be erected on said lot for the purpose of educating boys who reside in the state of Illinois between the ages of 12 and 18 years, and who are unable to educate themselves, which shall cost not exceeding five thousand dollars, and the balance of my estate in the hands of my said trustees after the payment for said building, shall be kept at interest and the net income, except ten dollars per year set apart for the purpose of keeping my family burial lot in repairs, shall be used for the purpose of paying teachers employed in said school. And I further direct my said trustees that in case the city of Watseka refuses or neglects for thirty days after being notified by the trustees that they are ready to carry out this provision in said Will as to said school, then they shall pay the whole sum set apart for this purpose over to the finance committee or the trustees of Onarga Seminary, located at Onarga, Illinois, the net income of which shall be used to carry on said Seminary and shall be known as the Wells Fund."

The specific legacies were paid by his executors, but the estate has never been settled in the county court of Iroquois county, nor the executors discharged. The executors and trustees continued to manage and invest the residuary estate until about the year 1890, when the trust fund amounted to \$30,000. Soon after a lot of land in Watseka was conveyed by the owners thereof to the trustees as a site for the erection of the school building pursuant to the terms of the will, but there was no donation of the lot by the city which it is alleged in the bill did not have any power or authority to purchase the lot or make any donation thereof. The will was admitted to probate May 7, 1884. The original bill was filed May 14, 1903, and the amended bill July 21, 1903.

The bill further set up that about the year 1898 the trustees erected on the lot so conveyed to them a building to be occupied as a school for the purpose of educating boys of the class mentioned in the fifth clause of the will, expending therein \$5,000, and, although the building was so erected and completed in 1898, no steps had been taken by the city, or anyone, to put in operation a school for the purpose mentioned; that, before any school can be put in operation in the building, it is absolutely necessary and indispensable to furnish the necessary fixtures, furniture, apparatus, li-

braries, fuel, and janitor's services; that the school building must be properly cared for, and suitable persons employed and paid to keep the building, fixtures, and appurtenances in reasonable condition and repair; that the building should be insured, and the taxes and assessments thereon paid, all of which would require the annual expenditure of a large sum of money over and above the salary of teachers employed therein, and that the city has no power or authority to discharge or perform these indispensable duties for the operation of a school of the character mentioned, and the trustees are absolutely without power to pay these expenses; with the result that no one is authorized or able to give the building any care or attention whatever, and that it has remained vacant and unoccupied ever since its construction. Its windows and doors have been boarded up, and the same is becoming in a ruinous condition from lack of care and attention, no arrangements having been made or contemplated by any of the defendants, or otherwise, to maintain any school or carry into practical execution the provisions of the will; that the net income of the trust will not exceed \$1,000 to \$1,250 a year, and that sum is wholly insufficient and inadequate to pay the salaries of teachers in said school even if the other expenses mentioned were otherwise provided for, and the carrying on of such a school will require annually the expenditure of many times the amount of such net income; that pursuant to the mandate of the Constitution of Illinois there was at the time of the death of the testator a complete system of free public schools in force in Illinois, whereby all boys of the ages mentioned in the will could and can be educated without charge, and there are no boys in Illinois who are unable to educate themselves, and no class of persons to which the fifth clause of the will applies. The city has no power to levy any tax to support or maintain such a school, and the trust provision of the will is uncertain, illegal, indefinite, and incapable of being carried into execution.

It is further alleged in the bill that the defendant Grand Prairie seminary (successor to Onarga seminary) is a school conducted for profit, is not a charity under the laws of Illinois, and the trust provision of the will is void as against said Grand Prairie seminary, if otherwise valid, because it creates a perpetuity; and that it is impossible to ascertain and determine what school or seminary should receive the benefit of the trust in case no site for the erection of the building had been supplied by the city of Watseka.

It is further averred that the Grand Prairie seminary, claiming to be the school referred to in the will, filed a bill in the circuit court of Iroquois county, claiming the legacy in its own behalf, and that neither the complainant nor the city of Watseka was a party to that bill or concluded by the same in any way. That suit proceeded to final hearing and decision in the supreme court of Illinois, wherein it was finally determined that Grand Prairie seminary was not entitled to said fund. A final decree was made in that suit in the circuit court, June 30, 1896, declaring the trust illegal and void, and a final decision sustaining the trust was made by the supreme court of Illinois on February 14, 1898. 171 Ill. 444, 49 N. E. 516. Grand Prairie seminary answered the bill in this case. The trustees, the city of Watseka, and the attorney general demurred to the bill for want of equity, and also on the ground of gross laches and estoppel by election. The court sustained the demurrers, and entered a decree dismissing the original and amended bills for want of equity, reserving the question of costs on the pending motion. An order or decree was afterwards entered, denying the motion, and appeals taken from both degrees.

As tending to explain the delay in filing the bill, complainant stated in the amended bill that about a year and a half after the death of her father she removed to Nebraska. She was advised by the executors to believe that several years would elapse before the residuary fund in their hands as trustees would amount to \$30,000, and that there was no necessity for her to assert any claim thereto, because the trust estate was required to remain in their custody. She was in limited circumstances, and unable to pay the expenses of instituting the proceedings to obtain a construction of the will, and, having entire confidence in the integrity, honesty, and responsibility of the trustees, she was induced to delay proceedings. In 1895 she first ascertained that steps were being taken by the Grand Prairie seminary to obtain a construction of the will, and during the pendency of that suit, and for a long time thereafter, she was informed and fully believed that the final decision in that case would settle and determine the rights of all the parties to the trust fund, and she did not learn otherwise until a short time before beginning this suit. She further submits that no injury has resulted to any of the parties claiming the trust fund by reason of her omission to commence suit earlier, and that the ultimate rights of the parties to the trust fund remain substantially unchanged. Upon the 7 L.R.A. (N.S.)

argument the court disposed of the question of laches through the following expression by Judge Baker, in which we all concurred: The legacy is either void or valid. This is to be determined by the will. If valid, the delay is of no consequence; if void, the laches of appellant could not make it valid. In no event could it become the individual property of the trustees. That the bequest does not offend against the rule of perpetuities, because of perpetuity in the first taker, and is not void for remoteness, is equally clear; and is settled by the cases of *Crerar v. Williams*, 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467, and *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. See also *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327.

The only difficult question presented is that of definiteness and possibility of execution. The testator gave to his executors, to be held by them as trustees for the purpose of carrying out the full terms of the will, all his residuary estate. They are directed to manage the property until it has reached at least \$30,000, when it is to form a fund to be known as the "Wells fund," to be used in the following manner: If the city of Watseka will donate a suitable lot within thirty days after notice by the trustees, said trustees shall cause a building to be erected on said lot for the purpose of educating boys who shall reside in Illinois between the ages of twelve and eighteen, and who are unable to educate themselves, to cost not exceeding \$5,000; the balance to be kept at interest and the net income (except \$10 a year set apart to keep the family burial lot in repair) shall be used for the purpose of paying teachers employed in the school.

Several important questions are presented. As the Illinois public-school system affords a free education to boys of the ages mentioned, it is urged: First, that there were not, and are not now, any boys in Illinois unable to educate themselves; second, if such a class is decided to exist, its members are said to be indefinite, and no means of selection provided, the trustees not being empowered to select them; and, third, that the will imperatively requires all income to be used for teachers' wages, leaving nothing for other things absolutely essential, such as heating, lighting, care of the schoolhouse, repairs, taxes, and board and clothing of the boys. Wherefore the scheme is alleged to be indefinite, impracticable, illusory, and void.

1. Is there a class of boys to which the charity may apply, notwithstanding the public-school system? Such system existed when the will was made, and when it be-

came operative; and the testator was fully aware of its operation, scope, and limitations. Perceiving this, he well understood that there are many boys who are still unable to avail themselves of its great advantages; whether by reason of indifference of parents, poverty, and consequent necessity of earning their own living, or otherwise. It is said the class is not restricted in any way by the capacity, color, or condition of the beneficiaries; but it is enough to say that charity delights in uncertainty. "Charity begins where certainty in the beneficiaries ends." In fact such a certainty will avoid the trust. "It is the number and uncertainty of the objects, and not the mode of relieving them, which is the essential element of a charity." *Dodge v. Williams*, 46 Wis. 97, 1 N. W. 92, 50 N. W. 1107. Trusts for charitable purposes "may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity." *Russell v. Allen*, *supra*. The very indefiniteness complained of is the best means of making the charity effective and beneficial, since those boys to whom the school may be of real and substantial good may be selected from the large class indicated. "The rule that, to raise a valid trust, there must be sufficient words, a definite subject, and a certain object, has its exception in charitable uses, of which uncertainty and indefiniteness of object are characteristic." *Daly's Estate*, 208 Pa. 58, 57 Atl. 180. In *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270, a trust was created for the erection and maintenance of a polytechnical college for the purpose of giving the boys and girls of the state of California a practical training in the mechanical arts and industries, the better to fit them to engage in the different pursuits of life. It was urged that the trust was void for uncertainty in the recipients, the trustees not being authorized to designate what boys and girls, and, if all applied, the trust would be impossible of execution. It was held that, when the class has been fixed, this very vagueness and uncertainty as to individuals and numbers are not only permitted, but are absolutely essential elements, in the creation of a valid charitable trust.

But it is also objected, as all children may obtain a free education in the public schools, there are no boys in Illinois unable to educate themselves. It is well known, notwithstanding the public schools are free to all, there is still a class of boys who are unable to attend them; among whom are

orphans, the poor who need public assistance, and those obliged to labor during school hours. Such an objection has never been sustained by the courts, so far as we have been able to find; on the contrary, similar charities have been sustained in a number of cases. A trust for the education of the children of the state of Kentucky, particularly the poor and most unintelligent, was sustained in *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926; *Handley v. Palmer*, 43 C. C. A. 100, 103 Fed. 39. Also a trust for a home and place for the maintenance and education of poor children, in *Howe v. Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390. For the education of the poor or orphan children of a township. *Mason v. Methodist Episcopal Church*, 27 N. J. Eq. 47; *State v. Smith*, 16 Lea, 664. To establish an institution for the benefit, tuition, etc., of the youth residing from time to time in New Jersey. *Stevens v. Shippen*, 28 N. J. Eq. 487. For the support of a school for white children. *Cincinnati v. McMicken*, 6 Ohio C. C. 188. For the education and tuition of worthy indigent females. *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. See also *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375; *Re John*, 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, 50 Pac. 226.

In *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522, a trust for the education of "the scholars of the poor people" of a certain county was sustained, although the public schools were also open to them. The court says: "The public schools being open to the scholars of the poor as well as of the rich, and being supported by taxation, it is manifest that the testator did not intend to have his bounty so applied as to relieve the taxpayers in any measure of the burden of the support of these schools. Neither did he intend to have it applied to all of the children of the poor people of the county indiscriminately; for he has designated a definite class of such children,—the scholars, not necessarily those attending schools, but those children of this class who have an aptitude for learning, and who could not avail themselves, for the want of a suitable education, of the powers that the Creator has bestowed upon them, without extrinsic aid. If the trustee had applied the income arising from the trust fund in good faith, and in the exercise of ordinary discretion, in the purchase of books, payment of tuition or board of any of the class of scholars indicated, no one, we think, would doubt about his accomplishing the intention of the testator. If the trustee hesitates to take the exercise of this discretion upon him, it is clearly the province of the court

of chancery to aid him by devising a scheme for the appropriation of the income of the fund. Where a trust is created for a charitable use, the application will be effected by means of a scheme, to be directed and approved of by the court of chancery."

Leeds v. Shaw, 82 Ky. 79, was a trust to a school district, "for the education of poor children, or for the maintenance of a good common school in said district." It was held that the beneficiaries were children residing within the district, and who were by law entitled to the benefits of the common-school system of the state; and that the bequest was confined to white children, because there was then no law for the participation of colored children in the benefits of the common-school system; and the same result was reached in *Moore v. Moore*, 4 Dana, 354, 29 Am. Dec. 417, where there was a trust for educating "some poor orphans" of a particular county, "and to be confined to such as are not able to educate themselves."

2. But who is to select the limited number to be brought into the school under the small provision made, not exceeding \$1,500 a year? The rule stated by Mr. Perry is relied on: "The courts in America have generally declined . . . to administer these indefinite gifts to charity or religion or education or public utility unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons." [2 Perry, Tr. 5th ed. § 719.]

Here there are trustees, but it is insisted that they have no power to select the charitable donees. The will appoints the trustees "for the purpose of carrying out the full terms" of the will, and directs that they shall manage the estate. In *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516, involving this same will, the supreme court of Illinois held that these provisions were intended to provide for trustees to control the disposition of the fund; but that, in any event, a court of chancery might appoint a trustee for that purpose. In *Guilford v. Arthur*, 158 Ill. 600, 41 N. E. 1009, a trust was created for the benefit of "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," the property to be held under such rules and regulations as should be provided by the brotherhood. It was held that the trustee and the brotherhood had power to determine with certainty the beneficiaries. We think the will intends the trustees to manage the estate after the building should be built; and that this objection is not well taken. In any event a trustee may, if necessary, be appointed by 7 L.R.A. (N.S.)

the proper state court, to select the beneficiaries.

3. The most serious question, however, is whether the express direction of the will that all the income shall be used to pay the teachers must be literally executed, even though it may render the scheme abortive. Would it be a breach of trust to devote part of the income to pay for heating and other necessary expenses, or to the boys' support, so as to enable those selected to receive tuition? Or may education be regarded as the leading or dominant purpose of the charity, and effect be given to it by such a variation of the scheme as to make it practical and successful? The testator mentions the schoolhouse, the school, education, and teachers; thus making education his general object and purpose. He does not expressly refer to such things as are absolutely essential to such purpose, such as heat, light, care, repairs, etc.; essential because there can be no continuous use of the building without repairs and care, no school without heat and light; possibly no teachers or students without some pecuniary help to the latter.

After reasonable provision for his only heir and her children, the testator wished to devote the rest of his property to a charity. In this he was dictated less by policy than benevolence; and it was not as an expiation, for his property did not come from public spoliation. No need to examine with a microscope the gift to ascertain whether it bears any taint of unlawful gain, or selfishness, or personal or family interest; for from all these it is absolutely free. His benevolent and philanthropic purpose was to reach an unfortunate class of boys, and bring their hearts and minds under the benign influence of education. This he endeavored to bring about by appealing to the natural rivalry between adjoining communities; thus shrewdly adopting the very best means to secure the school in his own home city. True, he also wished to perpetuate his name by calling the gift the "Wells fund;" but this may be pardoned, and even be called laudable. Evidently he thought that "a boy is better unborn than untaught;" perhaps influenced by something he had himself missed, and valued accordingly. His dominant purpose is thus not only worthy and laudable, but clearly outlined, lacking only in perfection of detail; and is to be construed with the greatest liberality. *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Ould v. Washington Hospital*, 95 U. S. 303, 313, 24 L. ed. 450, 452. So construed, will a court of equity permit his charity to fail because he has not fully worked out the details of

his plan? Or because, in practice, it is somewhat inconsistent? The whole income cannot be applied, as literally directed, to teachers' wages, since there can be no teaching without other things. To earn wages, or have education, or carry on the designated school, or make it in any degree successful, or even tolerable, there must be heat, and light, and paid labor. To mention education, a school, a building, and teachers, is to impliedly mention those things essential to their success, if not to their very existence. A literal, ironbound construction makes the plan impossible, and defeats it. A liberal one saves it, through a mere change of detail, and thus gives effect to the testator's worthy purpose. *Qui hæret in litera, hæret in cortice.*

A limited application of the equitable rule of *cy près*, or the so-called "doctrine of approximation," is relied on for permitting a change of plan, by which the income, restricted by the will to teachers' wages, may be partly applied to other expenses necessarily preceding them. This is on the theory that the testator's main purpose was education, and that he could not have intended to so limit and hamper the use of the money as to defeat the very object designed. This dominant purpose to found a school and furnish the means of education being clear, imperfect or impossible details of method may be corrected, so long as the main object—education—is secured and preserved. Such correction of detail has often been adopted by the courts, and nowhere with more liberality than in Illinois. Instance the cases hereafter referred to of the John Crerar will, where the impossible direction to form a corporation was disregarded; and the school-district trust in *Heuser v. Harris*, where an incongruous direction as to the method of electing a trustee was also disregarded. An impossible, or even unlawful, plan may be corrected, in order to carry out the main trust purpose. Any other course would sometimes defeat the very purpose of the trust, disappoint just expectations, and destroy gifts of great public importance and utility. While some courts have entirely rejected the rule of *cy près*, and it has sometimes been characterized, like the evidentiary rule of *res gestæ*, as a cloak for loose reasoning, and as a means of interpretation which finds a meaning where none exists, yet its judicial application has usually been most just, enlightened, and beneficial. Where a main charitable purpose is disclosed with reasonable clearness, directions of the donor relating to management of the trust, not intended as limitations, will be regarded as directory only, and not mandatory, if nec-

essary to preserve the trust, and carry out its leading purpose. In such cases, it will be presumed that specified details of management were meant to be governed by circumstances; and this whether they be either impracticable or illegal. Administrative duties may be varied, details changed, and the main purpose carried out *cy près*, or as nearly as possible according to the plan prescribed by the trust instrument. A further application of the *cy près* rule sometimes takes place when the object itself fails; as a charity to emancipate slaves, made inoperative by their complete freedom; but it is not necessary to consider that aspect of the doctrine here.

The following cases illustrate the rule stated: When a definite charity is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, for equity will substitute another mode. Thus, where the testator provided that the trustee should not make any sale or other or different alienation from a certain one indicated, but did not so phrase such provision as to make it a condition, but merely an administrative limitation in respect to the management of the trust, it was taken to have been intended to advance the dominant purpose of the will, or the maintenance of the charity; and an alienation to further such purpose was permitted. The court said that it was clear that this involved no phase of what is known as the prerogative power of *cy près*, nor was it an instance which called for the exercise of the usual judicial power of *cy près*. *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414. It was also said by the court in the same case that this change of mode was not a deviation from the founder's intention as to the objects of the charity, but only from his directions as to management, varying only administrative duties, which were, no doubt, originally meant to be governed by circumstances. The difference was akin to that between the substance and its incidents, on the one hand, and form, or the rules of administrative detail, on the other; or the difference between the end in view and the means of its accomplishment.

In *McDonogh v. Murdoch*, 15 How. 367, 14 L. ed. 732, cited in *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, a charitable trust was sustained, and it was held that the testator's directions as to the management of the income "must be regarded as subsidiary to the general objects of his will, and, whether legal and practicable or otherwise, can exert no influence over the question of its validity." "Assuming that the whole scheme of management should fail, the charitable use will not be permitted

to fail." *Daly's Estate*, 208 Pa. 58, 57 Atl. 180.

In *Amory v. Atty. Gen.* 179 Mass. 89, 60 N. E. 391, there was a trust to create a home for poor women and their young children, for a temporary home for invalid women, both young and old, and for the poor, sick, and weary, of any denomination. The home was to be administered by a sisterhood, and, if it should not accept, the property was to be conveyed to a hospital for the same purposes. Both the sisterhood and the hospital refused the gift; and the master reported that the scheme could not be carried out as described in the will. It was also provided by the will that the trustees should not sell certain real estate known as "Seven Oaks." It was held that the fact that the scheme could not be carried out as prescribed was not fatal to the charity, but that it should be carried out as nearly as possible under the sanction of the court. Also, that "Seven Oaks" might be sold, especially as its sale was authorized by a codicil to the will. See also *Stuart v. Easton*, 21 C. C. A. 146, 39 U. S. App. 238, 74 Fed. 854, citing *Re John C. Mercer Home for Disabled Clergymen*, 162 Pa. 232, 29 Atl. 731, as to change of plan. *John v. Smith*, 42 C. C. A. 275, 102 Fed. 218.

When a definite function or duty is to be performed, and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for; and it is an essential element of equity jurisprudence. *Philadelphia v. Girard*, 45 Pa. 9, 28, 84 Am. Dec. 470. The doctrine of *cy près*, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor. *Doyle v. Whalen*, 87 Me. 414, 31 L.R.A. 118, 32 Atl. 1022, 1026; *Taylor v. Keep*, 2 Ill. App. 368, 383.

In Wisconsin the supreme court has quite recently adopted a more liberal rule as to charitable trusts of personal property than that formerly prevailing, and the legislature has followed by recognizing the validity of charitable trusts of real estate. See chapter 511, p. 950, Laws 1905, amending § 2039, Rev. Stat. 1898; Rev. Stat. Supp. § 1057.

In *Kronshage v. Varrell*, 120 Wis. 161, 97 N. W. 928, a testator, after reciting that, "having in mind the many catastrophes resulting from the actions of the elements, and the great suffering, distress, famine,

and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes; and having a desire to do what I can to relieve the same,"—made a bequest to trustees to annually expend a certain income for the purpose of relieving the wants, distress, and suffering arising from such causes, and for the purpose of aiding the victims of such accidents and catastrophes. No restriction was placed upon the trustees as to the locality where the moneys should be expended, but the will enjoined upon them to select subjects worthy of assistance, and to use their best judgment and prudence in so handling the moneys that they might be of the greatest possible assistance to suffering humanity. It was held that the bequest was not to charity generally, but defined a class of beneficiaries with such definiteness as would enable the court to determine whether any concrete expenditure was within the scheme of the testator. The court says: "The degree of definiteness essential to the validity of any grant in trust for charity is a subject so recently treated at large, and as to which our attitude is so unambiguously declared in *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345, that we cannot justify extended review of either its history or of the writings of authors or judges upon it generally. This court has decided, disregarding the reasons which some others have deemed controlling, that there are inherent in our courts all the strictly judicial powers ever exercised by the chancellor or the high court of chancery of England to find means to carry into effect a charitable purpose entertained by a testator or grantor; that such courts lack only the prerogative *cy près* power enjoyed by the sovereign to apply all goods devised to any charitable purpose to purposes never declared or even entertained by the donor, under certain circumstances, which prerogative power was in some degree exercised by the chancellor by delegation from the sovereign. All that is necessary is that the deviser shall place his property in trust, and designate a charitable purpose of his own narrower than the field of charity generally. The courts can find and will then see to it that a trustee is provided, if none be designated, and that means will be found to apply the property to the purpose, if no method be prescribed. They are limited to the defined purpose, and they must ascertain it from the words of the testator, but, in ascertaining it, may and will indulge the most liberal construction. *Re Donges*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786."

In *Harrington v. Pier*, supra, a will gave

three fourths of the net residuary personal estate to trustees to expend in temperance work in the city of Milwaukee. The trust was sustained, the court laying down the following rules: The common-law system of trusts for charitable uses did not originate with, nor is it dependent upon, the statute of 43 Eliz. chap. 4. A trust for a particular and valid charitable purpose, as distinguished from a bequest in trust for charity generally, was sustainable in chancery before the statute of Elizabeth solely by the judicial power of the court, and to that extent such statute was merely confirmatory of the common law; and to the same extent such statute was adopted as a part of the common law of this country and prevails in this state.

In sustaining a trust of the character last above indicated, courts of equity resort to liberal rules of construction to determine the intent of the donor, enabling them to go to the limit of the general purpose indicated by the donor and do everything necessary to enforce such purpose, but not to go outside of it into the realms of prerogative authority governed by the *cy pres* doctrine strictly so called. The *cy pres* doctrine, as indicative of prerogative authority, does not prevail in this state, but, as regards liberal rules of construction of charitable trusts, applied in chancery in England independent of the statute of Elizabeth, it does prevail.

Cy pres power, as commonly understood, has two features: One, the right to exercise prerogative authority, enabling a court to deal with a bequest to a charitable use having no designated particular purpose as a bequest to charity generally, treating the purpose as the legatee, or a bequest for an illegal purpose, or some purpose impossible of execution for some reason; and the other, the right, by liberal rules of construction, to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary. The former is not exercised here, but the latter is. Similar definition and application of this "doctrine of approximation" have been uniformly made by the supreme court of Illinois. In *Heuser v. Harris*, 42 Ill. 425, lands were directed to be sold, and one half the proceeds was to go to a certain school district, to be used for school purposes only, and to be under the control of one trustee, to be elected by "the people" of the district for the term of four years. The other half was to go to the poor of Madison county. It was objected that the scheme was utterly impracticable, because the will provided no lawful method for the election of the trustee. It was held 7 L.R.A. (N.S.)

that, if the trustee should not be elected, the district could apply to chancery to supply one; and the court would, in order to carry out the intent of the testator, by liberal intendment, appoint. "We entertain no doubt," say the court, "if the election of a trustee and his qualification are impracticable, a court of chancery, on a proper application, would remodel the will in this regard, *cy pres*, as near as possible to effectuate the design of the testator."

In *Crerar v. Williams*, 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467, there was a trust for the erection, creation, maintenance, and endowment of a free public library; and providing for a corporation to carry out the trust. It was objected that the corporation could not be legally organized. Held that, whether this was so or not, the gift was valid; that, even though the provisions for putting the library into practical operation might be held impossible of execution, the court would consider the charity as the substance, and, if the designated mode failed, would provide another by which it might take effect. The same conclusion is reached in *Andrews v. Andrews*, 110 Ill. 223; *Hunt v. Fowler*, 121 Ill. 276, 12 N. E. 331, 17 N. E. 491; and *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516. Such being the rule in Illinois, the Federal courts will follow it as a rule of property. *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974. We also think the same result would follow from an application of the liberal rules of construction adopted by the Supreme Court of the United States, and many of the states, appearing from the foregoing citations.

On the appeal from the decree denying the appellant costs out of the estate, we adopt the conclusions of the circuit court which follow: "When the terms of a will are so ambiguous that resort to a court of equity is necessary to obtain a construction of the said will it may be proper for the court to order the costs of the parties to the proceeding, together with reasonable solicitors' fees, to be paid out of the estate of the testator. Such cases have arisen where the executor has filed a bill to have determined the respective rights of various legatees which, under the ambiguous terms of the will, are not clearly defined, and which the executor is justified in asking the aid of equity in construing. In such a case it is equitable that the common fund should bear the expenses of the proceeding. This cause, however, presents no such situation. Complainant seeks to have the court declare void testator's bequest to charity, and,

the trust failing, she would then take the property as heir. The suit is one plainly for her own interest alone, and not for the interest of the defendant trustees who have been in possession of the property for years and engaged in carrying out the terms of the will. No case has been pointed out to me in which the court has gone to the extent of allowing fees to complainant's solicitor out of a trust estate under conditions similar to those of the case at bar. The case most strongly in complainant's favor is that of *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. Were I willing to subscribe to the doctrine of that case as to the allowance of fees, which I am not, I feel that the rule should not be further extended to embrace an allowance to the heir in this suit for securing a second adjudication of the validity of the bequest in clause 5, inasmuch as a construction thereof was made by the supreme court of Illinois in 1898, which was binding on all parties save the complainant herein, and under which construction of the will the parties for years have acted. The trustees neither desired, nor did they need, a further adjudication that the trust was valid. This suit was of no benefit to them as a guide to their future administration of the trust estate, for complainant has no standing to secure for the trustees the direction of the court as to the administration of the trust."

It may be further observed that the circuit court would have no jurisdiction of a suit brought merely to construe a will in order to obtain specific direction as to the duties of executors or trustees; since the "amount in controversy" would be lacking. *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 150. It is the appellant's claim to the estate, founded on the position that the trust provision is invalid, which gave the circuit court jurisdiction. The fact that such claim renders a construction of the will necessary does not entitle appellant to counsel fees, because the jurisdiction depends on her claim as heir, and not on her right to have, incidentally, a construction of the will.

The decrees of the Circuit Court are affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES H. FARRIGAN

v.

HENRY A. PEVEAR et al.

(— Mass. —, 78 N. E. 855.)

Trust—negligent servant—liability.

The rule of *respondent superior* does
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not apply in case of trustees who are administering a fund created for the sole purpose of educating and maintaining indigent boys without recompense, who have exercised reasonable care to select competent servants; and therefore they are not liable for injury to one servant through negligent orders given him by another.

(October 24, 1906.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for personal injuries for which defendants were alleged to be responsible, which resulted in a verdict in defendants' favor. Overruled.

Plaintiff was in the employ of defendants, and claimed that while in the performance of his work he was directed to work in a dangerous place, to wit, in a pump pit in an engine room which was filled with noxious gases which escaped from the exhaust pipe of a gasoline engine. For the injuries thereby caused he instituted this action.

Messrs. George S. Taft and George R. Stobbs, for plaintiff:

The doctrine of the inviolability of the trust fund was repudiated in *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93, in 1866.

The funds of a public charity may be diverted to pay for torts committed in the administration of the fund.

Powers v. Massachusetts Homeopathic

Case Note.—Liability of charitable institutions for personal injuries:—The liability of charitable institutions maintained by a state or municipality for personal torts of their agents or servants is the title of a note in 4 L.R.A. (N.S.) 269; and cases of that kind are therefore not included in this note.

While the courts have not agreed as to the fundamental reason for nonliability, they have generally held that such institutions are not liable in damages for personal injuries.

Powers v. Massachusetts Homeopathic Hospital, 101 Fed. 896, Affirmed in 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, was a suit for damages for injury to a patient through neglect of one of the hospital nurses. Defendant was held not liable, and the decision in both courts was based upon the ground that one who accepts the benefit of either a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants, if the benefactor has used due care in selecting those servants.

The decision in *Currier v. Dartmouth College*, 105 Fed. 886, was put upon the same ground. Here a student of the college, an

Hospital, 65 L.R.A. 372, 47 C. C. A. 129, 109 Fed. 294; Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368.

If the defendants saw fit to hire the plaintiff to assist them in their administration of the trust, their obligations to him are as broad as though they hired him in connection with their private business.

Breen v. Field, 157 Mass. 277, 31 N. E. 1075; Gilbert v. Trinity House, L. R. 17 Q. B. Div. 795.

Messrs. Parker & Milton and George A. Gaakill for defendants.

Braley, J., delivered the opinion of the court:

The Stetson Home, of which the defendants are trustees, was founded and is maintained under a trust created by gift for the sole purpose of affording an education and maintenance for destitute boys, and what-

ever advantages the institution offers are conferred without compensation. These distinctive features are ample to bring the home, even if unincorporated, within that class of benevolent institutions whose sole purpose is to furnish relief to destitute and deserving people, and therefore constitutes a valid public charity. Bartlett v. Nye, 4 Met. 378, 380; Odell v. Odell, 10 Allen, 1, 4; Jackson v. Phillips, 14 Allen, 539; Sherman v. Congregational Home Missionary Soc. 176 Mass. 349, 57 N. E. 702; Minot v. Atty. Gen. 189 Mass. 176, 179, 75 N. E. 149. At the outset it may be said that the case of Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368, on which the plaintiff relies, and that of Smethurst v. Independent Cong. Church, 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387, are not authorities in his favor, as the question of the liability of a public charity

institution organized and managed solely for the administration of a public charity, was injured by the alleged negligence of the superintendent of college buildings while engaged in clearing a tract of land for college purposes. This case was affirmed in 54 C. C. A. 430, 117 Fed. 44, on the ground that plaintiff was a mere looker-on, who was entitled to protection only as against wanton or wilful negligence, which did not appear in the case.

In Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, it was held that those accepting the benefit of a charity accept it upon the understanding that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage. This was a case of injury to a patient.

This rule was followed in Pepke v. Grace Hospital, 130 Mich. 493, 90 N. W. 278, where the alleged injury was to a patient.

In Parks v. Northwestern University, 121 Ill. App. 512, the liability of the university to a student who lost an eye through the alleged negligence of one of the professors was denied upon the ground that the law will not permit the trustee to divert or use the funds or property of his trust for any object not contemplated in the trust, and what the law will not permit the trustee to do it will not do itself. This case was affirmed in 218 Ill. 381, 2 L.R.A. (N.S.) 556, 75 N. E. 991.

In McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529, it was held that a charity hospital was not liable to a charity patient for unskillful surgical treatment by the house surgeon, if due care was exercised in selecting him. The court said that the funds of such an institution were not to be diminished by such casualties, if those immediately controlling them had done their whole duty 7 L.R.A. (N.S.)

in reference to those who had sought to obtain the benefit of them.

In the following cases the exemption of such institutions from liability was put upon the ground of public policy:

Thus, in Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595, it was held that a charitable corporation maintaining a hospital was not liable, on the ground of public policy, for an injury to a patient caused by the personal, wrongful neglect of servants who had been selected with due care. The court showed a leaning in favor of the doctrine first noted above when it said: "Such patient who may be injured by the wrongful act of a hospital servant is not a mere third party, a stranger to the transaction. He is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely, those who accept the benefit, contributing also by their payments to the public enterprise, and not to the private pocket of the defendant, assist as truly as the defendant in setting the whole thing in motion."

In Van Tassel v. Manhattan Eye & Ear Hospital, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620, it was held that the hospital, being a charitable corporation, was not liable to a charity patient for a negligent operation, nor for negligent treatment after the operation,—except where it failed to exercise due care in the selection of its surgeon or other employees.

A patient cannot recover from a charity hospital for an injury due to the negligence of a nurse who so placed or left a hot-water bottle that it severely burned the patient while unconscious. Joel v. Woman's Hospital, 89 Hun, 73, 35 N. Y. Supp. 37; Ward v. St. Vincent's Hospital, 23 Misc. 91, 50 N. Y. Supp. 466; Conner v. Sisters of Poor, 7 Ohio N. P. 514.

for the negligence of its servants or agents does not appear to have been raised or decided. See *Minns v. Billings*, 183 Mass. 126, 5 L.R.A.(N.S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593; *Osgood v. Rogers*, 186 Mass. 238, 240, 71 N. E. 306. Compare *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130, and *Donnelly v. Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505. Under the authority of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, if the home had been incorporated the plaintiff could not have maintained this action against it, for if properly selected such a corporation was held in that case not to be liable for the negligence of its servants when acting in the performance of their prescribed duties. See also *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836. Among the reasons given for this exemption it has

been said that, being a charitable institution rendering services to the public without pecuniary profit, if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged; or that, if an individual accepts the benefit of a public charity, he thereby enters into a relation which exempts his benefactor from liability for the negligence of servants who are employed in its administration, provided due care has been used in their selection. *McDonald v. Massachusetts General Hospital*, *ubi supra*; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Pow-*

In *Collins v. New York Post Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106, it was said that the law was too well settled in this state to permit a recovery against a charitable institution for a wrong committed by one of its surgeons, who performed the operation gratuitously.

In *Wilson v. Brooklyn Homeopathic Hospital*, 97 App. Div. 37, 89 N. Y. Supp. 619, it was held that, if the patient paid only for board and attendance, and not for the surgeon's services, the charity hospital was not liable for his negligence, in the absence of proof that it failed to exercise reasonable care and diligence in the selection and employment of the surgeon.

The fact that the institution receives pay from those who accept the benefit of the charity is immaterial upon this question, such amounts not being for private gain, but to enable it more effectually to accomplish the purpose for which it was founded. *Powers v. Massachusetts Homeopathic Hospital*; *Downes v. Harper Hospital*; *Parks v. Northwestern University*; *McDonald v. Massachusetts General Hospital*; *Collins v. New York Post Graduate Medical School*; *Ward v. St. Vincent's Hospital*; and *Conner v. Sisters of Poor*,—*supra*.

It would seem from statements made in a number of the cases that, upon proof that the institution failed to exercise reasonable care and diligence in the selection of its servants or agents, it would be liable for their negligence; and such was the actual holding in *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

In *Hewett v. Woman's Hospital Aid Asso.* post, 496, it was held that charitable associations were not immune from liability for negligent injuries to their servants.

In *Donaldson v. General Public Hospital*, 30 N. B. 279, plaintiff was accepted and taken into the hospital as a patient. It was known that he required care, nursing, and medical attention, but he was negli-

gently left without these for three days, by reason of which he suffered much pain, and lost his right eye. It was held that persons or corporations who take upon themselves to do acts of charity, or other public acts, gratuitously, must pay for the negligence of their servants, and that the funds of the hospital can be applied in satisfaction of a judgment for damages.

The general rule of nonliability seems to be applicable, although the injured party bears no contract relation with the institution, and was not at the time of injury accepting its bounty.

Thus, in *Noble v. Hahnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605, the plaintiff was injured on a public street by a collision between her vehicle and an ambulance belonging to the hospital. The court said there would seem to be no distinction whether the servant, he being competent for the service in which he was engaged, carelessly injures one while in the hospital or in the street. But the nonliability of the hospital was placed upon the ground that the hospital, in running its ambulance under a contract with the city and in response to a call from the police department, was performing a duty imposed upon the city as one of its governmental functions.

In *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, the hospital was held not liable to a person who entered the building upon an implied invitation to arrange for the removal of her grandchild, and who, upon leaving the hospital, tripped and fell down a stairway which she was directed by a hospital attendant to use, the unsafe condition of the stairway being due to the negligence of the superintendent.

In *Fordyce v. Woman's Christian Nat. Library Asso.* post, 485, it seems that the injured party was injured while walking along the public highway; but no importance was attached to this fact.

ers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, 303. But, whatever grounds may have been stated in support of these and other decisions which have held public charities exempt from actions caused by the negligence of attendants or servants, such an exemption may well rest upon the application of the rule of law which makes the principal accountable for the acts of his servant or agent. Accordingly the true inquiry is whether this rule applies to the defendants. They are not shown to have selected incompetent servants, and are conceded not only to have been ignorant of the conditions which caused the alleged injury, but to have given to the plaintiff no instructions; nor can there be imputed to them knowledge in fact of any order given by their agents to him.

But the case of *Foreman v. Canterbury*, L. R. 6 Q. B. 214, following the decision in the leading case of *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93, it was decided that there was no distinction as to liability for the negligence of servants whether they were employed by a corporation established for a public purpose, or by a private person or corporation. This doctrine was approved and followed in the cases of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, and of *Donaldson v. General Public Hospital*, 30 N. B. 279, where a public charity was held liable in tort for damages suffered by patients from the negligence of servants, though subsequently, by R. I. Pub. Laws 1880, p. 107, chap. 802, such institutions in that state are now exempt from this burden. The plaintiff's argument in effect asks us to follow the last two cases, which have been decided since our former decision in *Mc-*

Donald v. Massachusetts General Hospital, supra. But in this commonwealth the rule of liability enunciated by the principal case has not been so broadly applied, and neither cities nor towns, in the performance of authorized municipal acts independently of certain exceptions defined by our decisions, nor public officers, although liable in damages for personal acts of negligence which cause injury to the persons or property of others when discharging the duties of their office, are held liable for the misfeasance of their servants. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Benton v. City Hospital*, ubi supra; *Rome v. Worcester*, 188 Mass. 307, 74 N. E. 370; *Dickinson v. Boston*, 188 Mass. 595, 599, 1 L.R.A. (N.S.) 664, 75 N. E. 68, and cases cited; *Moynihan v. Todd*, 188 Mass. 301, 304-306, 108 Am. St. Rep. 473, 74 N. E. 367, and cases cited; *Haley v. Boston*, 191 Mass. 291, 292, 77 N. E. 888. See also 2 Dill. Mun. Corp. 4th ed. § 974. The reason for this rule is that acting for the benefit of the public solely in representing a public interest, whether by a municipality, or by a public officer, does not involve such a private pecuniary interest as lies at the foundation of the doctrine of *respondet superior*. While such officers may well be held liable for their personal negligence, it would be unreasonable and harsh to hold them responsible for the negligence of their servants or agents.

There would seem to be in principle no sound distinction between a suit for negligence by which personal injuries have been received, directly instituted against the charity by the person injured, where its corporate form renders such procedure possible or expedient, and the present case.

In *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, it was held that a charitable corporation was not liable for the negligence of its employees in throwing bundles from a burning building, while engaged in work for which the corporation was created, thereby injuring a person on the sidewalk. In this case the court said: "A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise."

In *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625, it appeared that Stephen Girard, by will, provided for a college for the education of orphans, and directed that a building be erected upon a separate square of ground in such a manner as to secure a safe and permanent income for the maintenance of the college. The will also provided that the income from the building should be used in keeping the building in repair, and the net residue should go to the

college, and should not at any time be applied to any other purpose. Plaintiff, an employee of a tenant in this building, was injured through the negligence of the operator of an elevator in the building. It was held that plaintiff was entitled to recover, and that the results of negligent acts of servants necessary to the management of the building must be regarded as an incident to the management and as chargeable among the items of costs of such management. The case was distinguished from the preceding case on the ground that here the trustee was acting under the terms of a will which provided for the protection of income from a source independent of the charity, and the act of negligence was committed by one having no connection with the charity, save only that he was assisting in the work of making income from property not used in any way for the direct purposes of the charitable trust.

The object of the charity is the same whether administered by trustees elected by a corporation, or selected and appointed under a deed of gift; and, even if the terms of the settlement are not referred to in the exceptions, the trust is stated to be perpetual, and if so its provisions can be enforced in equity. Under either form of administration, those who administer the trust act essentially in a representative, and not in a private, capacity; and such trustees are not within the rule which holds the master liable, because as we have said, in its application the servant is acting, not only under his orders, but for the benefit and in the furtherance of the master's business. *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 55, 38 Am. Dec. 339.

In no correct or just sense can it be said that the defendants were conducting a business, or engaged in an enterprise, from which they received, or could expect to derive, any monetary advantage, or private emolument. They were serving without compensation in the supervision of a home for indigent boys, which was established for the purpose of enabling them to become self-supporting and efficient members of society. Their duty to the plaintiff in the exercise of this function did not extend beyond the requirement of using reasonable care to select competent servants, and the demands of substantial justice are met if as charitable trustees they are not charged with the negligence of those so employed. *McDonald v. Massachusetts General Hospital*, *ubi supra*.

We are not unmindful that the remedy which the plaintiff may have against a fellow servant for the negligence, if any, which caused the accident may be wholly theoretical, and of little practical value; yet we deem it to be in accord not only with our own decisions, but with the weight of authority, to decide that the present action cannot be maintained, and that the ruling directing a verdict for the defendant was right. *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Powers v. Massachusetts Homoeopathic Hospital*; *Perry v. House of Refuge*; *Williamson v. Louisville Industrial School*; and *Fire Ins. Patrol v. Boyd*,—*ubi supra*; *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620, 621, and note (39 N. Y. S. R. 781); *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Eighmy v. Union P. R. Co.* 93 7 L.R.A.(N.S.)

Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

Exceptions overruled.

ARKANSAS SUPREME COURT.

FORDYCE et al., Appts.,

v.

WOMAN'S CHRISTIAN NATIONAL LIBRARY ASSOCIATION.

(— Ark. —, 96 S. W. 155.)

Charity—library.

1. A charitable trust attaches to property secured for its purposes by a corporation organized to maintain a library for the benefit of the members and of the multitude of people who visit the city, where anyone contributing a certain amount towards the purposes of the enterprise may become a member, and the funds are secured by membership fees and charitable contributions.

Patent—fee.

2. The vesting of a fee in the grantee of real estate is not prevented by the fact that the land was public and Congress authorized its purchase for the purpose of a public library, the patent, however, containing no conditions or limitations upon the character of estate conveyed.

Base fee—execution.

3. A base or conditional fee is subject to seizure and sale under execution against the one in whom it is vested.

Charity—execution.

4. The property of a charity cannot be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees.

Same—judgment—execution—recovery of possession.

5. That a charitable corporation has permitted a judgment to go against it for the negligence of its agent and its property to be sold under an execution does not prevent it from maintaining an action to recover possession of the property.

(McCulloch, J., dissents.)

(July 2, 1906.)

A PPEAL by defendants from a judgment of the Circuit Court for Garland County in plaintiff's favor in an action brought to recover possession of real estate. Affirmed.

The facts are stated in the opinion.

Note.—The liability of charitable institutions for personal injuries is treated in the note to *Farrigan v. Pevear*, ante, 481.

Messrs. Wood & Henderson and Ratcliffe & Fletcher, for appellants:

The association is not a public charitable association, and it is liable for the torts of its agents and employees, and its property, whether domicil or otherwise, is subject to execution therefor.

Old South Soc. v. Crocker, 119 Mass. 1, 20 Am. Rep. 299; Chapin v. Holyoke Y. M. C. A. 165 Mass. 280, 42 N. E. 1130; Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368; Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163, 15 N. E. 505; Presbyterian Congregation v. Colt, 2 Grant, Cas. 75; Robertson v. Bullions, 11 N. Y. 243; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; 2 Kent, Com. § 274; Foster v. Fowler, 60 Pa. 30; Overton Bridge Co. v. Means, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 300.

Mr. R. G. Davis for appellee.

Rose, Special Judge, delivered the opinion of the court:

On the 29th day of June, 1881, several ladies filed a petition in the Garland circuit court, praying that they might be incorporated under the name of the "Woman's Christian National Library Association for the purpose of establishing, providing, and keeping in the city of Hot Springs, Garland county, Arkansas, a library for the free use of the public generally, and of soliciting and receiving donations and aid for said purposes." The constitution presented with the petition was preceded by the following preamble: "We, whose names are annexed, desiring to form an association to organize a reading room and library for our own benefit, and that of the multitude of people who visit our city in search of health and pleasure, do pledge ourselves to be governed by the following constitution." Then follow provisions as to membership: Any lady might become a member by paying an initiation fee of \$2 annually and 25 cents monthly dues. Persons of either sex might become honorary members for life on payment of \$50; and anyone might become a "life patron" on payment of \$250. The object of the association was further stated as follows: "The object of this association shall be to provide books, newspapers, and magazines of such character as will afford instruction and diversion; but such books and papers as are demoralizing in their tendency or subversive of religion shall not be admitted; also to provide a suitable and attractive building where the literature of the association may be permanently lodged, and where suitable lectures on such sub-

jects as are not in the field of political or theological controversy and other entertainments not in conflict with the objects of the association may be given."

Having been duly incorporated, application was made by the association to Congress for leave to erect a library building on the government reservation at Hot Springs. This was refused. But Congress passed an act approved July 8, 1882, authorizing the association to purchase "for the uses and purposes of such association" lots 11 and 12 in block 127 in the city of Hot Springs. 22 Stat. at L. 155, chap. 282. These lots, having been previously appraised by the United States, were now entered by the association on payment of \$100, and a patent was accordingly issued by the President. The patent contains no limitation or condition except one forbidding the boring for hot water on the lots conveyed. Preparatory to building a house on these lots for the proposed library the association employed one Murray to excavate the rock on the mountain side, so as to secure a proper foundation; and while this work was in progress resort was had to blasting, whereby one Thomas had his leg broken by a shattered piece of rock thrown out into the street. To recover damages for this injury Thomas brought suit against the association in the United States circuit court held at Little Rock, in which he recovered a judgment for \$7,642 on the 21st of December, 1893. Execution having issued on this judgment, the lots were sold under it, and were bought by Wood & Henderson for \$5,000, and in due time they received the marshal's deed therefor. Wood & Henderson afterwards conveyed the lots to the appellants Fordyce & McKee. On the 21st of June, 1902, the library association brought an action in the Garland circuit court against Fordyce & McKee to recover the lots, alleging that the association was merely a trustee, holding them for a public and charitable use, having no beneficial interest that could be seized or sold under execution to satisfy a judgment against the association for the negligence or torts of its agent; and that the defendants intended to divert the property from its charitable uses, and to apply it to the uses of a street-car line. The defendants demurred. The demurrer was sustained, and the plaintiff appealed to this court, which reversed the judgment of the court below; but as there was not a full bench, and the judges were not agreed as to the grounds of reversal, the merits of the cause were not fully passed upon. See *Woman's Christian Nat. Library Asso. v. Fordyce*, 74 Ark. 621, 86 S. W. 417. On a second trial in the court below the plain-

tiff recovered a judgment for the lots and \$200 for damages by reason of their detention, and defendants appealed.

1. We are convinced that this is a case of a charitable trust. We are referred to the decision in *Old South Soc. v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299; but that is not in point. In that case the court found that a trust was declared for "the beneficiaries, of which were the grantees themselves, with 'such as they should associate to themselves.'" The court was influenced by the further limitation in the deed "to their heirs and successors," implying "that the grantor contemplated a permanence of association of the *cestuis que trust*." The court added: "Gifts for the erection of a house for public worship or for the use of the ministry may constitute a public charity, if there is no definite body for whose use the gift was intended capable of receiving, holding, and using it in the manner intended. To give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large, or some part thereof or an indefinite class of persons." Page 22, 119 Mass., page 307, 20 Am. Rep. In this case one of the objects of the association is to "organize a reading room and library for our own benefit and that of the multitude of people who visit our city in search of health and pleasure." This clause does designate an indefinite class of persons. It is plain enough that the phrase "for our own benefit" is not to be understood as confined to the persons who signed the petition for a charter, but was intended to embrace all persons who should thereafter contribute to the support of the library by becoming members of the association. This was also an indefinite class of persons. It certainly does not change the nature of the charity that the members of the association may also enjoy the privileges of the library along with other beneficiaries. It is clear from the rules as to the admission of new members that the object is to increase the utility of the association by an appeal to the public for an extension of its influence and for its support. The English statute of 43 Eliz. chap. 4, is in force in this state. In it schools and free schools are mentioned, but not libraries. The statute was, however, only remedial and ancillary, and did not affect, in any wise, the jurisdiction of the chancery court as it previously existed. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. ed. 450; *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432. That a free public library is a charity there has never been any doubt. *Duggan v. Slo-*

cum, 83 Fed. 244; *Pickering v. Shotwell*, 10 Pa. 23; *Cottman v. Grace*, 41 Hun, 345; *Fairbanks v. Lamson*, 99 Mass. 533; *Drury v. Natick*, 10 Allen, 169; *Jones v. Habersham*, 107 U. S. 189, 27 L. ed. 407, 2 Sup. Ct. Rep. 336. The importance of a public library at a great health resort where many invalids congregate in search of health, often despondent and sad hearted from the effects of disease, loneliness, and melancholy forebodings, cannot be questioned. We may suppose that of those who go there for pleasure the majority will not be indifferent to the pleasure to be derived from reading. A distinguished writer of the eighteenth century has said: "An author may be considered as a merciful substitute to the legislature. He acts, not by punishing crimes, but by preventing them."

A public library not only tends to the diffusion of knowledge, but also to public improvement in morals. The charter of the association in this case provides that demoralizing books shall not be admitted into the library; but, if that clause had been omitted, the result would have been the same. This principle of selection, in ordinary public libraries, operates automatically, since men and women having children to bring up, and many other persons having the public good at heart, will not patronize or help to support a library in which pernicious books form a part. It goes without saying that whatever contributes to the advance of public morals and that of civilization tends to the support of law and order, and the prevention of crime. The library association is organized purely for charitable purposes. It has no capital stock, no provision for making dividends or profits, and is as unselfish as any enterprise can be. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529. Whatever it receives from any source it holds in trust for the purposes mentioned in its charter; that is, for sustaining the library and "increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity. Its affairs are conducted for a great public purpose." *Ibid.*; *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 299. By our Constitution "buildings, grounds, and materials used exclusively for public charity" are exempt from taxation. Article 15, § 5. See also Kirby's Dig. § 6887. Further, in order to encourage institutions of that kind, and to diffuse their usefulness through all time, ample provision is made by statute for the incorpora-

tion of charities. Kirby's Dig. § 937. By our statutes cities of the first and second class are "empowered to establish and maintain public libraries" and to levy a tax for that purpose. Kirby's Dig. § 5543.

2. It seems clear that the patent to the library association conveyed an estate in fee simple. To create a limitation or a condition the intent must be clearly shown; and the mere expression of a purpose in a conveyance will not debase a fee. *Stuart v. Easton*, 170 U. S. 394, 399, 42 L. ed. 1082, 1084, 18 Sup. Ct. Rep. 650; *Wright v. Morgan*, 191 U. S. 55, 48 L. ed. 89, 24 Sup. Ct. Rep. 6. This question has been discussed; but we do not perceive its relevancy; for, if the patent conveyed an estate subject to a condition or limitation, there would have been an estate in the patentee until the limitation attached or the condition was enforced. A base or qualified fee during its continuance has all the incidents of a fee simple. It is descendible and assignable, and the owner, while his title continues, has the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, as though he held it in fee simple. 16 Cyc. Law & Proc. p. 603. Such an estate would be as liable to seizure and sale under execution as if it were a larger estate. In order to see whether the library association is a charitable one or not, we need not examine the patent; but we must look to its charter to discover to what uses its property is dedicated.

3. The authorities on the subject of liability of charities for the negligence of agents or employees are extremely divergent. There are at least four classes of cases: (1) Cases holding that the property of a charity cannot be sold under execution. Of these we shall speak presently. (2) Cases construing charities unfavorably, and assimilating them to private corporations organized for profit, as in the cases of *Presbyterian Congregation v. Colt*, 2 Grant, Cas. 75, and *Davis v. Central Cong. Soc.* 129 Mass. 372, 37 Am. Rep. 368. (3) Cases holding that trustees of a charity, though not answerable for the negligence of its agents, were liable for want of ordinary care in their selection. This seems to be a compromise between two irreconcilable principles. Such was the case of *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595. The case of *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, is not in point. In that case it was held that a hospital maintained by a railroad company for the free treatment of its employees, supported partly by the monthly contributions of all its employees and partly by the company, and not

maintained for profit, is a charitable institution; and that the company is not responsible for injuries caused by improper treatment by a physician or attendants employed in the hospital by the railway company, by which the plaintiff, an employee of the company, was injured, where the master had exercised ordinary care in selecting such physician or attendants. Various similar cases are to be found in the books; and several are cited in *Powers v. Massachusetts Homœopathic Hospital*, supra. They are all railway cases; and railway companies are not charitable corporations. If in any one of these cases the judgment of the trial court against the company had remained unreversed, and an execution issued upon it had been levied on the hospital buildings of the railway company, then the question now under discussion might have been presented; but such was not the case in any of them.

(4) Cases holding that on a judgment against a charitable organization the grounds and buildings of the defendant cannot be sold under execution, but that any of its unappropriated funds may be applied to the satisfaction of the judgment. Such was the case of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, decided on the authority of *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; though that was not a case of a charity, but was a suit against a public board, charged with the duty of keeping certain docks in order, for negligence in performing their public duties. As we shall see, no such suit could be sustained in this state. The decision in the *Glavin Case* seems also to be based on a compromise. The court said that the buildings and grounds of the hospital were "subject to so strict a dedication that it could not be diverted to the payment of damages," but "that funds which were applicable generally to the use of the hospital" might be so diverted. And yet it would seem plain that funds not invested in buildings and grounds would be as strictly dedicated to public uses as any other species of property. Charities must have funds on hand to meet expenses. They cannot live on the wind, and that which takes away the means of living takes away life. All sums received by a charity, from whatever source, "are held upon the same trust as those which are the gifts of pure benevolence." *McDonald v. Massachusetts General Hospital*, 120 Mass. 435, 21 Am. Rep. 529. "The donations, if any are ever made, must be used according to the terms of the gift." *Benton v. City Hospital*, 140 Mass. 17, 54 Am. Rep. 436, 1 N. E. 836. We are of opinion that in this state the property of a charity cannot be sold under execution issued on a judgment ren-

dered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees. It would be difficult to overestimate the benefits that have been derived, directly and indirectly, from charities having their origin in private benevolence. Our common school system and all laws for the relief of the poor and destitute in England and in this country have no other source. 2 Perry, Tr. § 691. Consequently charities are much favored in the law, and they are upheld wherever possible. Duggan v. Slocum, 83 Fed. 246; Ould v. Washington Hospital for Foundlings, 95 U. S. 313, 24 L. ed. 452. The same rule was applied in the Roman law. 1 Domat, title 1, §§ 2, 14. And it is from that law that our doctrine of charities is largely derived. 2 Story, Eq. § 1137. A hundred years ago Lord Eldon said: "It has been urged for the defendants, and two hundred years ago would have been urged with great effect, that no distinction ought to be made in the proceedings between a charity and an individual. But at this time it is much too late, with reference to a great many doctrines, to insist upon that; for the court does hold out relief to charities under circumstances in which it would not give relief against defendants in ordinary cases." *Atty. Gen. v. Jackson*, 11 Ves. Jr. 367. So in a charity case if the bill prays the wrong relief the court will give the proper relief. *Atty. Gen. v. Whiteley*, 11 Ves. Jr. 246. Thus, in *Atty. Gen. ex rel. Reid v. Stamford*, 2 Swanst. 591, a bill affecting a charity was dismissed; but the court of its own motion entered a decree establishing the charity. In this respect charity cases differ from all others. *Atty. Gen. v. Jeanes*, 1 Atk. 355; *Atty. Gen. v. Bucknall*, 2 Atk. 328. Being public utilities of a very high order, charities are intimately associated with the state, which exercises over them through its courts a watchful supervision, so that their property, funds, and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity, and for the best advantage of the charitable uses designated by the donor or donors. For these ends the chancery courts have an original and an inherent jurisdiction. *Vidal v. Philadelphia*, 2 How. 195, 11 L. ed. 233. If the estate is misapplied the remedy is not forfeiture, but a suit to enforce a trust. *Brown v. Meeting Street Baptist Soc.* 9 R. I. 186. It is the duty of the courts to correct all abuses in the management of the trust, and to preserve the property. *Stanley v. Colt*, 5 Wall. 119, 18 L. ed. 502. The trustees can always be required to account for the distribution of the funds, and they can be dealt with by the court for any bad

faith or breach of the trust. 2 Perry, Tr. §§ 712, 719. If a donor makes a gift for a particular charity, and appoints no trustee, the charity will not fail; for the court will appoint a trustee. *Reeve v. Atty. Gen.* 3 Hare, 191. So, if the devise is to a corporation not yet in existence, it will pass to one that may be afterwards organized. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. ed. 617. Devises for charitable purposes that are void at law are often sustained in chancery. 2 Story, Eq. § 1170. Where a literal execution of a charitable devise becomes inexpedient or impracticable the court will execute it as nearly as it can according to the original purpose. *Id.* § 1169. The court will supply all defects of conveyances where the donor has capacity to convey unless the mode of donation contravenes some statutory provision. *Id.* § 1171.

The chancery court has jurisdiction over the trustees of charities, as it has over all trustees, to see that they do not commit a breach of their trust, or apply the fund in bad faith, or to purposes that are not charitable. 2 Perry, Tr. § 719. So intimate is the connection between the state and organized charities that it is the duty of the attorney general to intervene in all cases where there is a violation of duty by the trustees that endangers or impairs the charity. *Id.* § 744. And in such cases strict rules of practice cannot be insisted upon. *Ibid.* A public charity is not within the rule as to perpetuities. *Biscoe v. Thweatt*, 74 Ark. 546, 86 S. W. 432. The doctrine of liability of the principal for the acts of his agent performed within the scope of his authority, as expressed in the maxim *Respondet superior*, is not of universal application. It does not apply either to the state or the Federal government. *Belknap v. Schild*, 161 U. S. 17, 40 L. ed. 601, 16 Sup. Ct. Rep. 443; *Broom, Legal Maxims*, p. 865. With us a municipal corporation is not liable in a civil action to one who is injured by reason of a defective street, although the statute requires that the municipality shall keep the streets in good repair. *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Ft. Smith v. York*, 52 Ark. 84, 12 S. W. 157. The same rule applies to counties. *Granger v. Pulaski County*, 20 Ark. 37. So of school districts and other quasi public corporations. *School Dist. No. 11 v. Williams*, 38 Ark. 454; *Collier v. Ft. Smith*, 73 Ark. 447, 68 L.R.A. 237, 84 S. W. 480. The reason given for the exemption of the property of cities, counties, and other public corporations from sale under execution is that they are public agencies of the state. The state itself is merely a trustee for the public good. It has no other excuse

for being. Counties, towns, school districts, and similar public bodies, being a part of the machinery of the state government, hold their property of whatever kind subject to the same trusts, so that it cannot be diverted to individual uses, the whole object of the government being to confer the greatest good on the greatest number. In this work charities are important helpers and coworkers, relieving the state of a large part of its burdens. In every community there are schools, colleges, hospitals, and churches that are fruitful in good works that could not be performed by the state with the aid of any number of policemen or that of a standing army. In their several ways charities are more efficient in promoting the public good than the state could be acting without their aid. Whatever privileges or exemptions may be granted to such charities by the state are not gratuities; for without schools, hospitals, churches, and libraries we should soon relapse into a state of semibarbarism, which would not be for the public good.

4. The immunity of the property of a charity from sale under execution rests on special grounds. The property of a corporation organized solely for charitable purposes is exclusively dedicated to public uses, as much so as the streets and alleys of a town or city; for this purpose the corporation is a mere trustee. *Benton v. City Hospital*, 140 Mass. 13, 18, 54 Am. Rep. 436, 1 N. E. 836. It is of primary importance to the public that the trust shall be perpetuated. the trustees or the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physician and the attendants in a hospital. If the doctrine of *respondeat superior* is applied to them it follows that, along with their other powers, they possess an implied power to destroy, by a wilful violation of their duties, by collusion, or by negligence, the public interests that they are selected to preserve. Any conclusion that tends to support that view must leave out of consideration the public; that is to say, the party most deeply interested. To say that the trustees may by their negligence destroy the charity is simply to say that they may do indirectly and by inadvertence what they cannot do directly. The doctrine that the principle of *respondeat superior* has no application in this class of cases when the trustees wilfully abuse their authority, and that it does apply in a single species of negligence, would seem to be merely the result of another effort to find a compromise. Nor do we think that an illogical compromise of 7 L.R.A. (N.S.)

that sort would tend to the public advantage. A judge or a jury might be convinced after a case of negligence had occurred that due judgment and discretion had not been used in the selection of experts and other agents, when perhaps they themselves, if put to it, in a similar case, would do no better, and might do worse; and it seems to us that, if our schools, churches, hospitals, and other charities could be sold out on such vague matters of opinion, about which men would naturally differ, the result would be extremely unfortunate. In the case of *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, the court, as to this question, decided that the charity was not liable, saying: "It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is, at best,—as I once before observed,—a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, specially contributed for a public charitable purpose, to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. The doctrine is hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and it was announced in the Year Book of that period."

This point was involved in *Heriot's Hospital v. Ross*, 12 Clark & F. 507. In that case Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purposes of a trust if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is that the governors of the hospital have illegally and improperly done the act in question; and therefore, because the trustees have violated the statute; therefore,—What? Not that they shall

themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below as to the damages must be reversed." Lord Campbell said: "It seems to have been thought that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. This is contrary to all reason and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would, in that case, be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. . . . Damages are to be paid from the pocket of the wrongdoer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it. No foreign or constitutional writer can be referred to for such a purpose." Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but, if he convert them to his own use, the law punishes him as a thief. How much better than a thief would be the law itself were it to apply the trust's funds, contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustees. The latter is legally responsible for his own wrongful acts. It is true that some of the courts have treated this case as having been overruled by that of *Mersey Docks v. Gibbs*; but that was not a case of a charity, but one of a public corporation supported by government funds. It is true that Lord Brougham in his remarks in the *Heriot's Hospital Case* speaks of charities and public corporations as if they were governed by the same rules; an error that has led to much confusion. In England the rules relating to charities and to public corporations were not the same. The case of *Mersey Docks v. Gibbs* related only to public corporations; and the decision in the *Heriot's Hospital Case* had never been overruled. Moreover, the decision in *Mersey Docks v. Gibbs* has never been the law in this state. With us public corporations and charities are, however, governed by the same rules as to the matter now under consideration, because the doctrine of *respondet superior* does not apply either to charities or to public corporations. The principle upon which the law proceeds in cases of this sort is well expressed in *Downes v. Harper Hospital*, 101 Mich. 556, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42. "If, in the prop-

er execution of the trust, a trustee or an employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary."

Various other cases to the same effect are cited in the opinion delivered in this cause on the former appeal. "A valid vested estate in trust [for charitable purposes] can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right as well as the duty of the sovereign, by its courts and public officers, as also by legislature (if needed), to have the charities properly administered." *Girard v. Philadelphia*, 7 Wall. 15, 19 L. ed. 57. "With regard to the liability of charitable corporations or their trustees for the negligence of agents or employees, there is some difference of opinion, but the decided weight of authority denies such liability; this on two grounds; first, that, if this liability were admitted, the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that, since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund or their agents or employees." 5 Am. & Eng. Enc. Law, 2d ed. p. 923.

5. Then the question arises whether the present suit is debarred by the judgment rendered in favor of Thomas under which the lands were sold. If a defendant permits a judgment to go against him which he might have successfully defended, he may still claim his homestead and other exemptions. Though a judgment is rendered against a railway company, yet its franchise or other property necessary to the operation of its road cannot be sold under execution, because that would interfere with the public good. *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; 1 Freeman, Executions, § 179. The fact that

a city or county is by statute liable to be sued does not necessarily imply that its property may be taken in execution. This has been repeatedly decided. *Highway Comrs. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Bussell v. Steuben*, 57 Ill. 35; *Hill v. Boston*, 122 Mass. 352, 23 Am. Rep. 332. The judgment is conclusive of the amount of the debt or demand, but it does not conclude the question as to the liability of any property to seizure under it. That is a question that may never arise. If it does arise it will be collateral and subsequent. The statute provides that corporations for benevolent purposes "shall have such powers of suing and being sued . . . as may be necessary to their efficient management and the promotion of their purposes." Kirby's Dig. § 943. This provision, so far from supporting the contention of the appellants, indicates with sufficient clearness that the efficient management and promotion of the purposes of the charity are to be kept steadily in view. If this were not the case there would be no difference between charitable corporations and those organized for purposes of private gain. But if the latter clause of the above section of the statute had been omitted the result, in our opinion would not be different.

It is familiar law that the property of a municipal corporation is not subject to execution, although it may be sued, and in a proper case judgment may be rendered against it. "It is the settled doctrine of the law that not only the public property, but also the taxes and public revenues, of such corporations cannot be seized under execution against them either in the treasury or when in transit to it." 1 Dill. Mun. Corp. § 100. Neither can such property be subjected to garnishment. *Burnham v. Fond du Lac*, 15 Wis. 193, 82 Am. Dec. 668. The reason is that "municipal corporations are instituted by the supreme authority of a state for the public good." Dill. Mun. Corp. supra. Such being the case, let us see where the doctrine of liability of the property of charitable organizations to levy and sale under execution would lead us. In every city of any considerable size may be found one or more hospitals organized and maintained by the city for charitable purposes and one or more hospitals maintained by private benevolence, under the control of trustees appointed or elected as the donors may direct or the statute may require. But a devise to a city for charitable purposes is valid. *McDonogh v. Murdoch*, 15 How. 367, 14 L. ed. 732; *Perin v. Carey*, 24 How. 465, 16 L. ed. 701. Let us suppose, then, 7 L.R.A. (N.S.)

that a city had two hospitals, one created and supported out of the municipal revenues and another dependent upon a charitable gift and the donations of private individuals under the control of the city as a trustee. According to the doctrine contended for in behalf of the appellant, the former could not be sold under execution because it belonged to the city, and the latter could be thus sold because the city was only a trustee; and this notwithstanding both were charities instituted "for the public good." Such a distinction cannot be supported except by ignoring the general public interests common to both of these cases. The question is not as to who holds the property in trust, which is merely a personal consideration, a matter of policy and expediency; but it relates to the objects for which all charitable issues are created, and on account of which they are highly favored by law. A discrimination based not on the character of the trust, but on the character of the trustee, would be false and misleading. The property of a public corporation, such as a railroad or bridge company, essential to the exercise of its corporate franchise and the performance of its duties toward the public, cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution, or in pursuance of an order or decree of court. *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, and note, and cases cited, 51 N. W. 240. *Ammant v. New Alexandria & P. Turnp. R. Co.* 13 Serg. & R. 210, 15 Am. Dec. 593.

Exemption laws apply to judgments rendered in favor of the state, though the state is not mentioned in them. *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34. We need not dwell further on these matters. Almost every point arising in this case was decided on full consideration. *Grissom v. Hill*, 17 Ark. 483, was a much stronger case than that now under consideration, since in that instance the property had been sold on a judgment under the mechanics' lien law in which it was specifically described and condemned. English, Dig. St. p. 715, § 12. Moreover, the mechanics' lien law is liberally construed. *Murray v. Rapley*, 30 Ark. 568; *White v. Chaffin*, 32 Ark. 69; *Anderson v. Seamans*, 49 Ark. 478, 5 S. W. 799. To hold that the judgment, whatever may be its form, prevents all inquiry as to the liability of property to be sold under it, would be to indulge in a technicality; but in dealing with charitable trusts "courts disregard all technicalities." 2 Perry, Tr. § 746. In the case of *Grissom v. Hill* there could be no doubt but that the trustees of the church had authority to erect a building for public worship; but the court held that they had

no power to charge the property of the charity with a lien that might destroy the charity itself. The facts in the case were these: Hill had conveyed a lot in a town to trustees for the benefit of a church. The deed contained in the habendum the following phrase: "But said lot of land is never to be sold, or to be used in any other way only for the use of a church, for the benefit of the said Protestant church." The lot was afterwards sold in a proceeding instituted by Grissom to enforce a mechanics' lien for work and materials furnished for the purpose of building a church on the lot, and was bought by him. Grissom entered into possession and excluded Hill and the trustees of the church. Hill filed a bill in chancery against Grissom and the trustees; setting up the above facts, and praying that the title of the trustees be declared forfeited and revested in him, and that the title of Grissom be set aside and declared void; and it was so decreed. Grissom alone appealed. The clause in the deed above mentioned cut no figure in the case whatever; and what was said in the opinion as to the effect of the deed was pure surplusage, because the trustees acquiesced in the decree rendered in the court below, and did not appeal. This the court said explicitly: "The trustees having acquiesced in the decree of the court below, all controversy as to their rights as between them and Hill must be regarded as at an end, and the questions to be determined upon this appeal arise between Grissom and Hill. . . . But whether this is technically an estate upon condition such as upon failure to observe the conditions on the part of the trustees the lot will absolutely revert to the donor, and thereby cut off, on account of the acts of the trustees, the beneficial interests of the *cestuis que trust*,—the denomination for whose use the trust was created,—it is not necessary to decide, as no one is representing or claiming anything for them on this appeal unless it be Hill. . . . That Hill who made the grant for the use of the church, and who was entitled to have the property appropriated to the charitable purposes of the grant, had the right to apply to equity to set aside the sale to Grissom, and divest his title and possession, there can be but little question. . . . On this appeal no other question is properly presented; and inasmuch as the appellant has no cause of complaint, the decree must be affirmed." The deed being, then, out of the way, the ground of the decision is clearly stated: "If the trustees could, by improvident contracts, involve the property in debt, and thereby subject it to be sold under execution, the intention of the donor might be defeated in 7 L.R.A. (N.S.)

that way as well as by a voluntary sale on their part; because the purchaser could appropriate the lot and church in either case to his own private purposes, and prevent the use of it for religious purposes; as it seems was done in this case. The trustees would hardly be allowed to do indirectly that which they have no power to do directly."

It may be said that under this ruling hard cases must occur. They will not, however, be so numerous as those arising under the law exempting towns, cities, and school districts from liability for the negligence or torts of their agents, committed within the scope of their authority. On the other hand, still harder cases would occur under the opposite rule, by which the will of charitable donors would be defeated, and the public interest would be thwarted. Very many of the greatest charities of the present day have grown from very obscure and feeble beginnings. If they had been sold out in their infancy for some trivial sum on account of the carelessness of an agent or the mistake of a trustee, thus preventing the constantly accumulating benefits of centuries, it could not be truthfully said that the public good was promoted by the sacrifice. Much of the time of our courts is rightfully taken up with the enforcement of contracts and the collection of debts; but the state, which is not exclusively a collection agency for creditors, has many other interests to look after; and the principle of *respondeat superior*, like other legal principles, has its limitations. The decision in Grissom v. Hill was rendered just a half century ago. It is not supported by all the authorities. Neither is any other view of this question supported by all the authorities; indeed, the diversity of opinion on this subject is probably not exceeded in any branch of the law. To attempt to reconcile the adjudications would be a hopeless task. Grissom v. Hill is sustained by many of the most respectable adjudications to be found in the books. We believe that the case was rightly decided; but if we thought otherwise we should think it inexpedient to reverse a rule of property so long acquiesced in. The legislature can change the rule if it likes; but it has shown no desire to do so. On the contrary, the tendency to foster and protect charities has become stronger. As stated in Grissom v. Hill, they were subject to taxation when that case was decided. Now they are expressly exempted by a constitutional provision. Const. art. 16, § 5. The discrimination is sharp and decisive, because the legislature is prohibited from passing any law exempting any other property than as provided in the Constitution. Id. § 6.

6. As to the allowance of \$200 by the

court below for damages for detention of the lots, the judgment must be modified by canceling this allowance for want of evidence to support it. Subject to this modification, the judgment is in all things affirmed.

McCulloch, J., dissents on the grounds stated in the report of this case on former appeal.

The opinion referred to was as follows:

I did not participate in the original consideration of this case, but on the petition for rehearing have considered it, and am unable to concur in the views of the majority of the court. I think that the judgment rendered against appellant establishing the liability is enforceable, and that the property in controversy was properly sold to satisfy the judgment. Appellant is a corporation organized for benevolent purposes under the provisions of subdivision 9 of chapter 31, Kirby's Dig. A section of the statute on that subject reads as follows: "Such corporation shall have such powers of suing and being sued, buying, holding, and selling property, real and personal, and of otherwise carrying out the purposes and objects of their organization, as are possessed by other corporations, and which may be necessary to their effective management and the promotion of their purposes." § 943. The preamble to the constitution recites that the purpose of the association is for "organizing a reading room and library for our own benefit and that of the multitude of people who visit our city in search of health and pleasure." The constitution provides, among other things, that "ladies may become members by signing the constitution and paying an initiation fee of \$2 annually and 25 cents monthly dues; that any gentleman who pays the sum of \$50 at any one time shall be entitled to honorary life membership in the association; that anyone who pays the sum of \$250 shall be constituted a life patron, and shall be entitled to all the privileges of membership except voting in business meetings; that gentlemen may become associate members of the association by the annual payment of \$5." The patent issued by the United States to appellant conveying the lots in controversy is absolute in terms, and conveys the title in fee simple, without reservation or condition, except a proviso in accordance with the form usually adopted in patents to lands in the vicinity of the celebrated Hot Springs, prohibiting the grantee and its successors and assigns "from ever boring thereon for hot water." I think that according to the decided weight of authority corporations organized as agencies purely for charitable or like purposes are not liable for torts of their servants. 17 L.R.A. (N.S.)

Jaggard, Torts, pp. 187, 188; 6 Cyc. Law & Proc. p. 975; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Powers v. Massachusetts Homoeopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

But we are precluded from inquiry as to liability of appellant by the judgment of a court of competent jurisdiction adjudging its liability. The only question is whether or not the judgment can be enforced against the property of appellant. It seems to me that the statute conferring upon such corporations the power to sue, and imposing upon them liability, is conclusive of the question of the right of a creditor to enforce payment of his debt out of the property of the corporation, after the liability has been established by a court of competent jurisdiction. The general rule is that all property is subject to sale under execution for payment of debt. Our statute so declares. Kirby's Dig. § 3228. This applies to corporations as well as individuals. Judge Thompson says: "The *jus disponendi* is involved in the very idea of property; and it is well said that, in the absence of some express legal exemption, 'it is an inseparable incident to property, legal or equitable, that it should be liable to the debts of the owner, as it is to his alienation.'" 6 Thomp. Corp. § 7847. Judge Freeman, in his work on Executions, vol. 2, § 172, states the general rule with reference to property subject to execution thus: "It is ordinarily sufficient to inquire whether the interest sought to be sold is real property, and, if so, whether the defendant in execution has a legal estate therein. These questions being answered in the affirmative, the property, or the defendant's interest therein, must be regarded as subject to execution, unless it falls within some exception hereinafter stated. . . . The right to subject real property to execution is not dependent upon the character or capacity of the persons, whether natural or artificial, to whom it may belong, except that they must be persons against whom a judgment may properly be enforced, and its payment coerced; and they must have a beneficial interest in the property, and not hold it merely upon some trust, public or private."

This leads us to a consideration of the question whether the appellant or its property, which was sold under execution, falls within any of the recognized exceptions to the general rule making all property of individuals and corporations subject to execution. This court held in Grissom v. Hill, 17 Ark. 483, that the trustees of a church, under a deed which provided that the "lot

of land is never to be sold, or to be used in any other way only for the use of a church," could not create a charge upon the lot by contract for the erection of a house thereon, so as to authorize the mechanic to obtain a lien and sell the lot in payment thereof. But in the case at bar the conveyance under which the library association obtained title contained no restriction, limitation, or condition. It is absolute in form, and conveys the title in fee simple. It is true that the act of Congress authorizing the patent to be issued upon payment of the appraised valuation of the lot recited the reasons therefor; but it imposes no conditions upon the use of the property. In the case of *Wright v. Morgan*, 191 U. S. 55, 48 L. ed. 89, 24 Sup. Ct. Rep. 6, where lands were patented to the city of Denver pursuant to an act of Congress, "to enable the city of Denver to purchase certain lands in Colorado for a cemetery" at the minimum price, "to be held and used for a burial place for said city and vicinity;" and where, by a subsequent act, the city was authorized to "vacate the use of said lands, or any portion thereof, as a cemetery, for a public park or grounds,"—it was held that the title was absolute, and that the city had the power to alienate the lands so patented. The court, speaking through Mr. Justice Holmes, said: "If the legal title was in the city, it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common-law condition, even when the word 'condition' is used, it needs no argument to show that there was no condition or limitation here. . . . Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a state, when the conveyance was absolute, and was made to a citizen or instrumentality of the state. We express no opinion upon the point. It is enough that it did not purport so to restrict the ordinary incidents of title. We should require the clearest expression of such an unusual restriction before we should admit that it was imposed,—especially in an ordinary sale for cash. Here the act probably meant no more than to explain the motive for a sale at the minimum price." The authorities on this subject are fully cited and exhaustively discussed by Mr. Justice White in *Stuart v. Easton*, 170 U. S. 383, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650, where it is held that a mere declaration of purpose contained in a patent did not have the effect of qualifying or limiting the estate granted thereby. It is not denied that, where the naked legal title to property is held in trust, it cannot

be sold under execution issued on a judgment against the trustee; but that rule does not apply here. The legal title, and the beneficial interest as well, were vested in the library association, the legal entity against which the judgment was obtained, and there is no beneficial interest separable from the corporate association. The public has no interest in the property or in its use, save such as the corporation, acting through its members and officers, might see fit to bestow from time to time. As is well said by counsel for appellees in their brief: "The association is not a mere agency. It is the thing itself, instituted and organized on its own motion, with all the powers pertaining thereto, which an individual would have if he should undertake such an enterprise." Churches and like associations and corporations, though in a limited sense agencies of the public, are governed by the ordinary rules of law controlling the rights of individuals and other corporations. 2 Kent, Com. § 274; *Robertson v. Bullions*, 11 N. Y. 243; *Presbyterian Congregation v. Colt*, 2 Grant, Cas. 75; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84. In *Presbyterian Congregation v. Colt*, supra, it was held that a church house was subject to execution; the court saying: "Churches are intended for the public benefit; but this is a part of the public interest that is committed exclusively to private enterprise, and governed by the rules and remedies that belong to private relations, and it may well be questioned whether it would be for the public benefit to allow them to disregard their contracts." Learned counsel for appellant has not cited us to a single authority holding that the property of an association of this kind cannot be sold under execution. None are cited in the opinion of the chief justice, and I have been unable to find any. Therefore I am persuaded that there are none, and that there is no substantial reason why the property of this association should form an exception to the rule that all property is liable to execution against the owner. The case of *Powers v. Massachusetts Homoeopathic Hospital*, supra, relied on, apparently, with much confidence in the opinion of the majority, merely holds that "a patient in a public hospital, chartered as a charitable corporation, although under private management, cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in its hospital,"—a doctrine in line with the decided weight of authority that such corporations are not liable in suits founded upon torts of its servants. Nor, to my mind, can any support to the views of the majority be found in the case of *Glavin v. Rhode Island*

Hospital, 12 R. I. 411, 34 Am. Rep. 675, where it is held that such a corporation is liable for torts committed by its servants. I am unable to see how, from a doctrine that such a corporation is liable in judgment for its torts, a theory can be worked out that its property is not liable to sale under execution issued upon the judgment.

I am therefore of the opinion that the property was legally sold under execution, and that the purchasers at the sale took a good title.

NEW HAMPSHIRE SUPREME COURT.

VERA M. HEWETT

v.

WOMAN'S HOSPITAL AID ASSOCIATION
et al.

(73 N. H. 556, 64 Atl. 190.)

Trial—inconsistent verdicts—setting aside.

1. The court will not interfere with verdicts against a master and in favor of an employee upon whose negligence the liability depends, where neither party asks to set aside the verdicts for mistrial, but each seeks to preserve all in his favor and reject the rest.

Same—general and special verdicts.

2. Judgment cannot be entered in favor of an employer against whom a verdict is rendered for negligence of his servant, who has obtained a verdict in his favor, on the theory that the verdict is general and controlled by the special verdict in favor of the servant, where there is nothing to indicate which verdict is general and which special.

Hospital—charity—liability for negligence.

3. That a hospital is conducted as a public charity without expectation of profit does not render it immune from liability for negligent injuries to its servants.

Master—misrepresentation as to age of servant—effect.

4. That at the time of seeking service an employee represents herself to be older than she is does not relieve the employer of its ordinary duty to her as its employee.

Same—apprentice.

5. That an apprentice nurse is working for the opportunity of learning the trade, and receives only small wages in addition, does not deprive her of the rights of an employee.

Hospital—duty to inform nurse.

6. A hospital, upon assigning an inexperienced nurse to attend a patient sick from a contagious disease, is bound to in-

form her of the dangerous character of the service.

Same—trust—negligent injury.

7. That a hospital is founded by property given in trust for that purpose does not exempt it from liability for negligent injury to its employees.

Negligence—question for jury.

8. Whether or not managers of a hospital exercise ordinary prudence in delegating a nurse to attend a patient whom they know to be suffering from a contagious disease, but of which fact the nurse is ignorant, is a question for the jury, where their conduct may be explainable upon a theory consistent with due care, or upon a theory showing the absence of due care.

Hospital—information of nurse—doubt.

9. The court cannot say, as matter of law, that a reasonable doubt in the mind of the attending physician as to the contagious character of the disease of a patient would justify the omission to inform the nurse assigned to the case that it might be of a contagious character.

(June 5, 1906.)

TRANSFER by the Superior Court for Merrimack County, after a verdict against the defendant hospital, of an action brought to recover damages for injuries to plaintiff which were alleged to have been due to defendants' negligence. Judgment on the verdict.

Plaintiff was in training in the defendants' hospital for the profession of nurse, and was to receive compensation at the rate of \$10 a month. Her service began when she was only nineteen years old. The superintendent placed her in charge of a patient whose malady the state bacteriologist had pronounced to be diphtheria, but which diagnosis from surrounding circumstances the superintendent doubted. Plaintiff was not informed of the suspected character of the disease, or instructed to take any precautions against contagion. She contracted the disease, and brought this action for the resulting injury.

Further facts appear in the opinion.

Messrs. John H. Albin and William H. Sawyer for defendants.

Mr. Henry F. Hollis, for plaintiff:

The real test of a charity is whether it is maintained for genuine charitable purposes as a purely benevolent undertaking, or whether it is maintained for the profit, advantage, and emolument of some person or persons connected with its management.

5 Am. & Eng. Enc. Law, 2d ed. p. 894; 15 Am. & Eng. Enc. Law, 2d ed. p. 759; Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163, 15 N. E. 505; Chapin v. Holyoke Y. M. C. A. 165 Mass. 280, 42 N. E. 1130;

Note.—The liability of a charitable institution for negligent injury to its employees or others is treated in the note to *Farrigan v. Pevear*, ante, 481.
7 L.R.A. (N.S.)

Texas & P. Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173.

Walker, J., delivered the opinion of the court:

The plaintiff's declaration combined three causes of action,—one against the hospital for its negligence in not notifying her of the danger of her situation in performing the duties of a nurse, one against Mrs. Russell for her personal negligence in inducing the plaintiff to assume the performance of those duties under the circumstances, and one against Mrs. Russell for professional malpractice in attending the plaintiff after she had contracted the disease of diphtheria. The jury returned a verdict against the hospital and a verdict for Mrs. Russell, finding substantially that, while the hospital was negligent as alleged, Mrs. Russell, its representative and manager, who actively directed the plaintiff to assume the danger complained of, was not negligent in that respect, and that she was not guilty of subsequent malpractice. If there is an apparent inconsistency between the first and second findings, a point upon which no opinion is expressed, neither party is in a position, as the case is here presented, to take advantage of it as a ground for setting aside one verdict and sustaining the other. If the supposed inconsistency existed, it would show that there had been a mistrial, and the result would be that both verdicts would be set aside and a new trial granted upon the first two issues raised in the declaration. The verdict upon the third issue in relation to Mrs. Russell's malpractice, having been fairly tried, would be unaffected by that result. But neither party moved in the superior court to have the verdicts set aside upon the ground of a mistrial, nor does either now urge that disposition of the case. Each seeks to preserve so much of the jury's action as is favorable to that side, and to reject the rest. Under such circumstances, both verdicts must stand, so far as this objection to them is concerned, even if they are inconsistent. If the parties are satisfied, the court will not complain. The defendant's suggestion that the verdict in favor of Mrs. Russell is a special verdict or finding that there was no negligence on the part of the hospital, and hence that it controls the general verdict against the latter (*Richardson v. Weare*, 62 N. H. 80; *Folsom v. Concord & M. R. Co.* 68 N. H. 178, 44 Atl. 134), is untenable, since no way is discoverable by which to determine that one of the verdicts is general or special rather than the other. If it is true that upon the evidence the actionable negligence of the hospital was also the actionable neg-

ligence of Mrs. Russell, and that a finding of her freedom from fault is necessarily equivalent to a finding that the hospital was not guilty, it is equally true, on the other hand, that the verdict of guilty against the hospital establishes the guilt of Mrs. Russell. The difficulty encountered is that there is nothing upon which to predicate the assertion that one of the findings is general and the other special. Both must stand or fall together.

The principal contention relates to the liability of the hospital, in an action of tort, for negligence. A motion was made in the superior court in behalf of the hospital that a verdict be directed in its favor. The motion was denied, subject to exception. Broadly stated, the question thus presented is whether there was any competent evidence from which it could be found that the defendant hospital was guilty of a breach of duty toward the plaintiff, which was the proximate cause of her injury. If there was, the case was properly one for the jury; if there was not, the defendant was entitled to a verdict, and its motion should have been granted. In support of the motion, it is urged that the corporate character of the defendant is such that it owed no duty to the plaintiff for the breach of which it can be held liable in an action of tort. Since the legal doctrine of negligence assumes as its basis or necessary premise the existence of a legal duty due from the alleged wrongdoer to the injured party, it is important to ascertain what the relations of the parties were and what resulting obligations existed between them. There can be little, if any, doubt that the hospital is what is known in the law as a charitable or eleemosynary institution. The purposes for which it was incorporated, according to the articles of association, were "to establish and maintain hospitals and homes, and otherwise aid and assist worthy and dependent women and children who wish to be under the care of women physicians and attendants." It has no capital stock, and no provision is made for a division of profits. Whatever property it owns is devoted to the support and management of the institution in the care of sick and dependent women and children, who pay for the benefits received according to their ability; and the money so received is used in paying the necessary expenses incident to such an institution. Its evident purpose is to aid and relieve the sick as economically as possible for the kind of attention provided, and not, like an ordinary business corporation, to earn or accumulate an income for division among its members. Indeed, it is not seriously contended that

it is not a charitable corporation, or that it is not entitled to all the immunities legally incident to institutions of that character. But it is insisted that the law does not exempt it from liability for its failure to use reasonable care for the safety of its employees or servants; in other words, that the law imposes the same duty upon it in this respect that it imposes upon individuals and business corporations. The vital question is whether this contention is sound.

The defendant corporation was formed under the general incorporation law, which authorizes five or more persons to associate together to form a corporation for "the establishment and maintenance of hospitals." Pub. Stat. 1901, chap. 147, § 1. Section 4 provides that "such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities, of other similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter." The chapter contains no express provision limiting or enlarging "the duties and liabilities" of hospitals, in any respect material to the present inquiry. If they are exempt from liability in cases of this character, the legislative intention to that effect, which determines their powers and duties, must be found inferentially from a consideration of the peculiar purposes they were formed to accomplish. Their powers and duties are the same as those of "other similar corporations." It should be noted in this connection that the defendant was not incorporated for the purpose of carrying out the provisions of an express trust in reference to property or money donated under a limited deed of trust. It holds its property under its charter for the general purposes of a hospital. It is a charitable institution whose powers and duties in the management and expenditure of its funds are unlimited, except so far as they are governed and defined by the general charitable purposes of its incorporation. It is therefore unnecessary to consider what its legal liability might be if it held funds upon a trust which expressly or by necessary inference exempted them from being appropriated to the payment of damages suffered through the negligence of its officers or servants. Many of the cases which either hold or state argumentatively that a charitable body is not liable for its torts proceed upon the theory that its funds are held upon a special trust, that to use them for the payment of damages in an action of tort against it would be an unwarranted diversion thereof, and that such an action is not maintainable, because it would be entirely futile. Such seems to be the doctrine of,

although not necessarily the holding in, *Heriot's Hospital v. Ross*, 12 Clark & F. 507. In that case Lord Cottenham says, with reference to the payment of damages for the tort of a charitable body (page 513): "It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." In *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 130, 109 Fed. 294, 302, it is said that, if this case "is rested upon a doctrine that under no circumstances can a trust fund be held liable for torts committed in its management, it stands alone in Great Britain;" and that doctrine is repudiated in the subsequent case of *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93. See also *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795. It would seem to be entirely unnecessary to discuss a proposition so barren of arguments in its favor. That a charitable institution has certain duties to perform toward those with whom it is associated, which it cannot violate with impunity, in the absence of some express exemption of a legislative character, is not debatable. The sanctity of its general trust fund or property does not make that result necessary or, on grounds of public policy, desirable. The liability of charitable corporations in actions of tort is frequently enforced. *Stewart v. Harvard College*, 12 Allen, 58; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Bishop v. Bedford Charity*, 1 El. & El. 697; *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795. Cases also like *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, which deny the liability of the defendant to a patient for the negligence of the attending physician or surgeon, seem to concede that, if the corporate officers have been negligent in selecting subordinate agents, the defendant may be liable for injuries occasioned by the negligence of the latter while attending to the corporate business. If the language of some courts is broad enough to deny the liability of charitable corporations in all actions of tort (*Perry v. House of Refuge*, 63 Md. 20, 52

Am. Rep. 495; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065), it cannot be regarded as a discriminating statement of the law upon that subject.

Since the defendant has no absolute exemption from being sued for some torts it may be guilty of, the question recurs whether its character as a charitable institution furnishes a sufficient reason for its exemption in this case. In other words, Why did it not owe in a legal sense the duty of a master to the plaintiff while employed in its affairs? Whether the general rule of *respondent superior* applies to it as to a business corporation or individual may be an interesting question, but it is not material to the present inquiry. If it owed the absolute, nondelegable duty of a master to the plaintiff, it cannot escape liability by showing that the negligent act which caused the plaintiff's injury was the act of a servant, or raise the question of its liability for the collateral negligence of its servant under the rule of *respondent superior*. Upon this assumption, cases holding that a charitable corporation is not responsible under that rule of law are not in point. A few examples are *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Fire Ins. Patrol v. Boyd*, 120 Pa. 634, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Coe v. Wise*, 5 Best & S. 440, 453; *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, 6 Clark & F. 894. Nor are cases in point that substantially deny the applicability of that rule to public or quasi public corporations exercising governmental powers, upon the ground that they are charitable corporations, like *Metcalf v. Hetherington*, 11 Exch. 257, and *Mersey Docks & Harbour Board Trustees v. Gibbs*, *supra*. The defendant does not perform governmental functions, and the reasons for the limited liability of municipal bodies for the torts of their servants have no application to corporations like the defendant. *O'Brien v. Derry*, 73 N. H. 198, 60 Atl. 843; *Wheeler v. Gilsun*, 73 N. H. 429, 3 L.R.A. (N.S.) 135, 62 Atl. 597. Its charity may be public, but it is in no proper sense an agency of the state.

The duties of the defendant to the plaintiff when she was employed to nurse a diphtheria patient had their inception in the contract of employment. She was engaged to do a necessary part of the work of maintaining a hospital for the sick. For this labor she was paid. If she was an apprentice receiving small remuneration in money, in consideration of the instruction and experience she received in practical nursing, 7 L.R.A. (N.S.)

she was none the less an employee of the defendant. An apprentice learning a trade occupies the position of a servant with reference to his employer, and obviously the latter's duty to inform him of the dangers of his occupation is greater than in the case of an experienced workman. While performing the necessary work of nursing in the institution, the plaintiff was not, like a patient, the recipient of the defendant's charity. *McDonald v. Massachusetts General Hospital*, *supra*; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Hearns v. Waterbury Hospital* and *Powers v. Massachusetts Homeopathis Hospital*, *supra*. She was doing the defendant's proper work, under its direction, and for its benefit in the discharge of its assumed duties. She was as much an employee of the hospital in respect to this particular work as she would have been if she had been a graduate nurse receiving full nurse's pay. The fact that, at the time she was employed, she represented herself to be older than she was, did not relieve the defendant of its ordinary duty to her as its servant. Her apparent youthfulness, general intelligence, and practical experience in nursing were facts for the consideration of the jury upon the question of the degree of care the defendant was bound to exercise. Whether she was in fact as old as she claimed to be, or appeared to be, was not a question of controlling importance. The finding of the jury that she was its servant or employee was amply supported by the evidence.

If she had been employed by an individual to attend a member of his family afflicted with smallpox of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part and suffered damage therefrom, it would not be seriously denied that he was guilty of actionable negligence in not informing her of the danger to which he exposed her. It was his duty arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew or under the circumstances ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. And this duty is a nondelegable one. *Hamel v. Newmarket Mfg. Co.* 73 N. H. 386, 62 Atl. 592; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 514, 57 Atl. 913. To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to relieve such corpo-

rations from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business. The necessity for such an exceptional holding is not apparent. Since the property of the defendant is held for the general purpose of maintaining a hospital, without other specific limitation, it is no more exempt from being appropriated to the payment of damages occasioned by the negligence of the hospital than is the property of an individual, which he holds for commercial or charitable purposes, for the consequences of his negligence. In conducting the affairs of a hospital, its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporation. Men in general are not uniformly careful. Experience shows that negligence—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits. It may, not inappropriately, be said to be necessarily incidental in the accomplishment of most practical results through the agency of man. The donors of the defendant's property for hospital purposes were not ignorant of this fact, and are presumed to have given the trust property knowing that it might be required for the liquidation of claims in tort, as well as for claims in contract, incurred in carrying out the purposes of the corporation. Indeed, its conceded authority to contract for the employment of nurses and other necessary agents would seem to include power to respond in damages for all breaches of such contracts, one essential or incidental element of which is its duty to exercise care as well as its duty to pay the stipulated compensation. No conditions were imposed upon the defendant, either by its charter or by the donors of its property, by which the contracts of employment it was obliged to make with its servants should have a different effect from that usually given to such contracts, or that the relations between it and its employees should be legally different from those usually subsisting between master and servant. There is therefore no substantial reason for holding that it did not owe the duty to the plaintiff of warning her of the dangers of her employment, under the law as applied to the ordinary relation of master and servant. In this respect, the legislature has not invested it, either expressly or inferentially, with peculiar powers.

The defendant further claims that the evidence was not sufficient to warrant a finding of negligence on its part. This position, stated in more specific language, is that the evidence is so meager and incon-

clusive that the court must hold that reasonable men acting as jurors could not reasonably draw the inference from the evidence that the defendant violated its duty to inform the plaintiff of the danger of her employment. It is not for the court to determine the weight of the evidence. Upon the assumption that the evidence for the plaintiff is true, the question for the court is whether it is logically and legally sufficient to support a finding by the jury in favor of the plaintiff upon a material issue. The weight and reliability of competent evidence is to be determined exclusively by the jury. It is unnecessary, upon this point, to review the evidence at length. It is sufficient to state that it tended to show that one of the patients whom the plaintiff nursed had a form of diphtheria, that a culture taken from this patient and examined by a bacteriologist contained diphtheria bacilli, and that Mrs. Russell, the physician in charge of the patient and manager of the hospital, was duly informed of the result of the examination. If the jury found these facts to be true, they were warranted in the conclusion that the hospital had notice of the contagious character of the patient's disease, and that it was its duty, acting as ordinarily prudent men would have acted under the same circumstances, to disclose the danger to the nurse, who was ignorant of its existence. Whether the hospital, through Mrs. Russell, used ordinary prudence in this respect, may be a debatable question upon the evidence reported. Her conduct may be explainable upon a theory consonant with due care, or upon a theory showing the absence of due care; and it is exclusively the province of the jury to determine which is the true one. As they have upon competent evidence adopted the latter theory, their finding is conclusive. The court cannot say that reasonable men could not come to that conclusion, or that a reasonable doubt in the mind of Mrs. Russell, in her diagnosis of the patient's disease, as to its true character, would justify her, who as the representative of the hospital was bound to exercise reasonable care for the plaintiff's safety, in omitting to inform the plaintiff that the disease might be of a diphtheritic character. The hospital might be bound to warn the plaintiff before Mrs. Russell had reached a satisfactory diagnosis. The motion to direct a verdict for the defendant was properly denied.

Certain exceptions were taken by the defendant to the charge to the jury and to the denial of requests to charge; but the foregoing discussion renders it unnecessary to further consider the points raised. Nor are the exceptions to the remarks of the

plaintiff's counsel in argument tenable. Counsel did not, so far as the case shows, exceed the limits of legitimate argument.

Exceptions overruled. Judgment on the verdicts.

All concur.

SOUTH CAROLINA SUPREME COURT.

MARTIN YOUNG, Appt.,
v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, Resp't.

(— S. C. —, 55 S. E. 765.)

Removal of cause—dismissal—second action.

The removal of a suit from a state to a Federal court does not confer upon the latter such exclusive jurisdiction that, upon its entering an order of discontinuance, plaintiff cannot institute a new action upon the same cause in the state court, laying the damages so low as to prevent a second removal.

(October 27, 1906.)

Case Note.—Right of plaintiff, after removal of action commenced in state court to the Federal court and its dismissal in the latter court without prejudice, to commence a new action in a state court upon the same cause of action: — With the exception of one decision and a few dicta which are subsequently referred to, the cases are unanimous in favor of the doctrine of *YOUNG v. SOUTHERN BELL TELEPH. & TELEG. CO.*, that the removal to the Federal court of an action commenced in a state court does not, in the event the action is dismissed in the Federal court, without a decision on the merits, upon the plaintiff's motion or upon his voluntary submission to a nonsuit, prevent him from commencing and maintaining a new action upon the same cause of action expressly so hold: *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183, Affirmed in 66 C. C. A. 673, 133 Fed. 1022; *McIver v. Florida, C. & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775; *Cleveland, C. C. & St. L. R. Co. v. Reese*, 93 Ill. App. 657; *Cleveland, C. C. & St. L. R. Co. v. Lawler*, 94 Ill. App. 36; *Foley v. Cudahy Packing Co.* 119 Iowa. 246, 93 N. W. 284; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969; *Adams Exp. Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903; *Stephenson v. Illinois C. R. Co.* 25 Ky. L. Rep. 442, 75 S. W. 260; *Stevenson v. Illinois C. R. Co.* 117 Ky. 855, 79 S. W. 767; *DeWitt v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2019, 79 S. W. 275; *Nipp v. Chesapeake & O. R. Co.* 7 L.R.A.(N.S.)

A PPEAL by plaintiff from an order of the Common Pleas Circuit Court for Charleston County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Bryan & Bryan for appellant.

Messrs. Smythe, Lee, & Frost and Hunt Chipley, for respondent:

The effect of removal is to transfer the cause of action, with all its incidents, from the state court to the Federal court.

Virginia v. Rives, 100 U. S. 316, 25 L. ed. 668; *Fisk v. Union P. R. Co.* 6 Blatchf. 362, Fed. Cas. No. 4,827; *Shaft v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 546, 23 Am. Rep. 138; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 260, 15 S. E. 562; *New York Silk Mfg. Co. v. Second Nat. Bank*, 10 Fed. 205; *Clark v. Chicago, M. & St. P. R. Co.* 3 McCrary, 591, 11 Fed. 357.

The amount of damages cannot be reduced to give jurisdiction to the state court.

Kanouse v. Martin, 15 How. 198, 14 L. ed. 660.

Defendant having invoked his right to remove the cause of action into the Federal

25 Ky. L. Rep. 2335, 80 S. W. 796; *S. F. Dana & Co. v. Blackburn*, 28 Ky. L. Rep. 695, 90 S. W. 237; *Krueger v. Chicago & A. R. Co.* 84 Mo. App. 358; *Fox v. Jacob Dold Packing Co.* 96 Mo. App. 173, 70 S. W. 164; *Fleming v. Southern R. Co.* 128 N. C. 80, 38 S. E. 253; *Hooper v. Atlanta, K. & N. R. Co.* 106 Tenn. 28, 53 L.R.A. 931, 60 S. W. 607; *Illinois C. R. Co. v. Bentz*, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317 (implied); *Texas & P. R. Co. v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 134. See also *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625, referred to in the reported case.

The ground upon which the doctrine rests, and the distinction between the commencement of a new action in the state court and the further proceedings in the state court in the original action, are well stated in the opinion in *Swift & Co. v. Hoblawetz*, supra, as follows: "It [the case of *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354] holds that a compliance with the act of Congress by a party entitled to remove a cause in a case that is removable under the act removes the cause and the subject-matter, notwithstanding the refusal of the state court to allow such removal; and that thereafter the state court has no jurisdiction in that case to proceed further therein. The state court having been wholly divested of jurisdiction in the case by the removal, it does not follow that when the Federal court's jurisdiction is divested by the termination of the cause, as on a dismissal without prejudice, the plaintiff cannot choose the forum in which he will bring an-

court, and having done so, the cause of action was transferred from the state to the Federal judiciary; the last-named tribunal alone retained the jurisdiction of this cause, and the state court had no jurisdiction to entertain a suit on the same cause of action for a reduced amount.

Baltimore & O. R. Co. v. Fulton, 59 Ohio St. 575, 44 L.R.A. 520, 53 N. E. 265; *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446; *Chesapeake & O. R. Co. v. Riddle*, 24 Ky. L. Rep. 1687, 72 S. W. 23; *Wagner v. Drake*, 31 Fed. 851.

Jones, J., delivered the opinion of the court:

The plaintiff commenced action in the court of common pleas for Charleston county on September 6, 1902, to recover \$10,000 damages for personal injury alleged to have been suffered by him through defendant's negligence. On September 19, 1902, a petition and bond for removal on the ground of diverse citizenship was duly filed and accepted, and subsequently the cause was actually transferred to the United States cir-

cuit court for South Carolina. On April 21, 1903, the United States court, on motion of plaintiff's attorney, passed an order discontinuing the cause on payment of costs. After payment of the costs, plaintiff, on April 24, 1903, upon new summons and complaint, brought this suit in the court of common pleas for Charleston county upon the same cause of action, except that the damages were laid in the sum of \$2,000. The defendant answered and the case was submitted to a jury at November term, 1904, and resulted in a mistrial.

Thereafter, in March, 1905, defendant on notice moved, before Judge Memminger, to dismiss all the proceedings in the cause on the ground that the court had no jurisdiction thereof, and that the jurisdiction of said cause is vested exclusively in the United States court. Judge Memminger granted the motion, and dismissed the case for want of jurisdiction upon the rule and reasoning stated in *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L.R.A. 520, 53 N. E. 265. That case held that, where a case has been properly removed from a

other action or case founded upon the same cause of action. . . . We hold, on the contrary, that a dismissal without prejudice or other final disposition of the case not upon the merits not only divests the Federal court of jurisdiction of that case but of the subject-matter of the suit, and that the plaintiff is at liberty to renew his cause in the state court, or in any court having jurisdiction of the subject-matter and of the parties."

The rule above stated applies even though the damages laid in the second action are for such a sum as to prevent the removal of the new action to the Federal court. *Texas Cotton Products Co. v. Stearnes*, 128 Fed. 183; *McIver v. Florida, C. & P. R. Co.*; *Cleveland, C. C. & St. L. R. Co. v. Lawler*; *Adams Exp. Co. v. Schofield*; *Krueger v. Chicago & A. R. Co.*; and *Hooper v. Atlanta, K. & N. R. Co.*—*supra*. In some of the other cases above cited in which the rule was applied it also appeared that the damages in the new action were laid at such a sum as to prevent the removal of the new action to the Federal court, though no comment was made on the fact.

In *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, Affirming 65 Fed. 129, after the removal of the original action against a railroad company for personal injuries to the Federal court and its dismissal in the latter court, the plaintiff commenced a new action upon the same cause of action in the state court, but, for the purpose of preventing the removal of the new action to the Federal court upon the ground of diverse citizenship, joined as defendants two of the em-

ployees of the company, and, after the expiration of the time in which the defendant was required to answer, discontinued the suit against the individual defendants. A petition for removal having been thereupon filed and granted, it was held by the Supreme Court that the removal was properly granted, notwithstanding that the time when the defendant was required to answer had expired.

In *Yawkey v. Richardson*, 9 Mich. 529, 81 Am. Dec. 769, also, the fraudulent attempt of the plaintiff to prevent the removal of the new action was frustrated. In that case it appeared that the plaintiff originally brought an action against a single defendant, a citizen of another state, who thereupon caused the case to be removed to the Federal court. Plaintiff then discontinued that action and brought a new action in the state court against the same defendant and another person, a citizen of his own state, for the same cause of action. The trial court afterwards permitted the plaintiff to discontinue as against the new defendant; but upon appeal the state supreme court, upon the ground that the plaintiff had undertaken to perpetrate a fraud, held that the discontinuance was improper, and, since a discontinuance against one, except when permitted by law, is a total discontinuance, reversed the judgment for plaintiff without granting a new trial.

It has also been held that the new action in the state court may be maintained although the action in the Federal court was not dismissed until after the commencement of the action in the state court. *S. F. Dana & Co. v. Blackburn*, *supra*. And the dismissal of an action in the Federal court,

state to a Federal court, the jurisdiction of the state court ends forever, unless perhaps the case is remanded with the consent of defendant; that the jurisdiction of the Federal court over the cause of action remains exclusive, even though the suit is disposed of in the Federal court otherwise than upon its merits. The reasoning by which this result is reached is based upon the court's view of the spirit and policy of the statute authorizing removal on the ground of a diversity of citizenship as resting upon the fact that litigation between citizens of different states must be more or less affected by local influences, and that such a policy applies as well to any renewal of the action after it has been disposed of in the Federal court as to the period of its pendency; and the further reason is given that a contrary rule would be productive of a very inconvenient practice and much abuse, in enabling a party to permit his case to be dismissed by failure to prosecute in the Federal court with the purpose of recommencing it in the state court, and thus entailing expense and trouble on the

defendant in causing it to be removed or submit to the jurisdiction of the state court. The only case cited in that opinion as directly supporting the same was *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446.

The supreme court of Georgia, however, in the case of *McIver v. Florida C. & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775, holds the contrary view, and declares that the *Cox Case* merely decided that after non-suit in the Federal court, a renewal of the action in the state court was not a part of the original case or on the same footing with it with respect to the statute of limitations. The Georgia supreme court quoted with approval the following forceful language of a writer in *Case and Comment*, of July, 1899, at page 228: "The possibility that a plaintiff might improperly permit the dismissal of a cause after removal for the purpose of beginning again in the state court, and thus compel the defendant to remove the cause again or else submit to the state court, is one ground of the Ohio decision. But the unnecessary trouble caused to a defendant by dismissing an action and

even after plea in abatement in the action in the state court, is sufficient to prevent the abatement of that action, unless it appears that it was brought for the purposes of vexation. *Wilson v. Milliken*, 103 Ky. 165, 42 L.R.A. 449, 82 Am. St. Rep. 578, 44 S. W. 660; *Harby v. Patterson* (Tex. Civ. App.) 59 S. W. 63.

Nor, where the action in the Federal court has been dismissed, may the action in the state court be properly abated until the costs incurred in the Federal court are paid. *Harby v. Patterson*, supra. The general question as to the effect of the dismissal of an action in the Federal court upon a pending action in the state court or *vice versa* is discussed in a note in 42 L.R.A. 459.

The case of *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L.R.A. 520, 53 N. E. 265, seems to be the only express judicial authority against the doctrine first above stated. That case and the case of *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446, upon which the Ohio court relied, are sufficiently discussed in the opinion in *YOUNG v. SOUTHERN BELL TELEPH. & TELEG. CO.* As there shown, the point was not involved in the Georgia case, and the *dicta* on which the Ohio court relied were subsequently withdrawn in *McIver v. Florida C. & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775. There was also a *dictum* in *Chesapeake & O. R. Co. v. Riddle*, 24 Ky. L. Rep. 1687, 72 S. W. 22, founded upon the Ohio case, against the doctrine sustained by the weight of authority; but this *dictum* also was expressly withdrawn in the subsequent case of *Stevenson v. Illinois C. R. Co.* supra. 7 L.R.A. (N.S.)

The case of *Kern v. Huidekoper*, supra, has been sometimes invoked in support of the contention that a new action will not lie in the state court; but, as pointed out in the opinion in *McIver v. Florida C. & P. R. Co.* supra, the *Kern Case* did not pass upon this question, but merely ruled that when a case has been removed from a state to a Federal court any action taken by the state court while the case is pending in the Federal court is *coram non judice* and void. That principle, of course, does not conflict with the doctrine that a new action may be maintained in the state court after the first action has been dismissed in the Federal court.

The doctrine first above stated presupposes that there is no objection arising from the statute of limitations, or other cause than the previous jurisdiction of the Federal court over the matter in litigation, to the maintenance of the new action in the state court. Whether the running of the limitation is suspended during the original action so as not to be available against the new action presents a distinct question which is not considered in this note. It is assumed for the purposes of this note that the original removal from the state to the Federal court was proper, and conferred jurisdiction of the original action upon the Federal court; and the cases falling within the scope of this note are therefore to be distinguished from cases like *Seeligson v. Texas Transp. Co.* 70 Tex. 198, 7 S. W. 708, involving the jurisdiction of the state court over the original action where the removal, or attempted removal, to the Federal court was improper and did not confer jurisdiction upon the Federal court.

suing anew is not confined to cases that have been removed from a state court. It does not, in other cases, prevent the plaintiff from commencing a new action after dismissing the former one, and the difference in respect to actions removed into a Federal court is only in degree. The distinction between reinstatement of an action and the bringing of a new action does not seem to have been much considered in this case. Because a case can be reinstated only by the court that dismissed it, it is said that 'by parity of reasoning' a state court cannot pass on the right of the plaintiff to recommence an action after it has been dismissed by a Federal court. But commencement of a new action, although for the same cause, is not a reinstatement, but a distinct and independent case. Exclusive jurisdiction of an action is a very different thing from exclusive jurisdiction of all possible actions for the same cause. An election to bring an action in one of two courts of concurrent jurisdiction is not usually irrevocable. After dismissal of the first one, the plaintiff has the same choice between the courts that he had originally. There seems to be no reason why this should not apply where the concurrent jurisdiction is in state and Federal courts. If bringing an action originally in the Federal court does not give it such exclusive jurisdiction of the entire cause of action as to prevent bringing any action therefor in a state court after the Federal suit is dismissed, why should this be the result of removing a suit from a state court into a Federal court? In either case, it is difficult to see why, after an action has been dismissed without prejudice to the right to bring a new action, the plaintiff has not the same election that he had in the beginning with respect to jurisdiction."

The supreme court of Georgia further declares: "The act of Congress provides that certain cases may be removed from the state court to the Federal court, but this does not mean that the cause of action is removed. The act refers in terms to suit, and not cause of action. Until the state court is absolutely deprived of jurisdiction of a particular cause of action it may take jurisdiction of, and pass upon, the same, with the exception above noted.—that, when the Federal court has taken jurisdiction, the state court cannot take any action in connection with the same so long as the cause is pending in the Federal court. But when that court denies to the plaintiff a hearing, or fails for any reason to pass upon the sufficiency of his cause of action, he may bring the same again in the state court and invoke an adjudication of that

court. And the fact that the new suit is for an amount which will prevent another removal to the Federal court will not invalidate the suit. If the plaintiff in the new suit voluntarily abandon a portion of his claim for damages, it does not seem that the defendant should complain. The policy of the laws of the United States is to compel persons having claims of small amounts to litigate in the state courts, and voluntarily giving up a portion of his claim for damages and being content to accept a sum less than the Federal court would entertain jurisdiction of would not seem to be contrary to the laws of the United States and its established public policy in reference to the jurisdiction of its courts."

The rule declared in the Georgia case and the reasoning by which it is supported appear to us to be correct. The Ohio case, so far as our investigation develops, is the only precedent in support of the view of the circuit court, while, on the other hand, several authorities besides the Georgia court support the contrary view. *Hooper v. Atlanta, K. & N. R. Co.* 106 Tenn. 28, 53 L.R.A. 931, 60 S. W. 607; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642. See also the following cases, which we have not examined, but which, from the syllabi in the Century Digest, seem to hold in opposition to the Ohio case: *De Witt v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2019, 79 S. W. 275; *Nipp v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2335, 80 S. W. 796; *Krueger v. Chicago & A. R. Co.* 84 Mo. App. 358; *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183. Affirmed by the circuit court of appeals, 66 C. C. A. 673, 133 Fed. 1022. Our attention has not been called to any decision of the United States Supreme Court which is decisive as to this question, and we have discovered no such case. In the case of *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625, the removal of a criminal case from the state to the Federal court did not operate to divest the state court of all jurisdiction thereafter to try the accused, although the indictment removed to the Federal court was in that court quashed; but, inasmuch as the crime was against the state, and not the United States, and prosecution could only have been begun in the state court, not being originally cognizable in the Federal court, the case is perhaps not conclusive, although there is similarity in view of the fact that the present suit for the sum of \$2,000, treated as a new and independent action, is only cognizable in the state court. But the case cited certainly shows an exception to the broad contention that a cause

or controversy removed from the state court to the Federal court is forever thereafter, until finally determined upon its merits, within the jurisdiction of the Federal court to the exclusion of the state court.

In reaching our conclusion we are mindful of the rule established in the United States Supreme Court that the jurisdiction of a Federal court acquired on removal from a state court cannot be ousted or divested by any change of conditions; that is, conditions in the pending suit, as, for example, when the parties become residents of the same state after removal to the Federal court on the ground of diverse citizenship (*Morgan v. Morgan*, 2 Wheat. 290, 4 L. ed. 242; *Clark v. Mathewson*, 12 Pet. 165, 9 L. ed. 1041), or, after the right of removal attached, an amendment in the state court allowing plaintiff to reduce the matter in dispute to less than the jurisdictional amount (*Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660), or when there is a change in the value of the subject of controversy after jurisdiction acquired (*Cooke v. United States*, 2 Wall. 218, 17 L. ed. 755), or by dismissal of the original bill involving the jurisdictional amount after the filing of a cross bill which did not involve the jurisdictional amount (*Kirby v. American Soda Fountain Co.* 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619). The present contention does not relate to a mere change of the conditions in a suit pending in a Federal court or within its control, but to a new action in the state court, having concurrent jurisdiction in the first instance subject to the right of removal, restored after the Federal court has discontinued the removed suit. It is not contended by respondent in this case that the order of discontinuance, not having therein the words "without prejudice," must be treated as a final adjudication so as to prevent a new suit in any court, as the case of *Dunham v. Carson*, 37 S. C. 269, 15 S. E. 960, shows that the failure to insert such words in the order of discontinuance did not make the order a decree on the merits; but the contention is that the removal gave the Federal court exclusive jurisdiction over the cause of action until adjudication on the merits. It is argued that the phraseology of the removal statute supports this contention. Section 629 of the Revised Statutes of the United States, after prescribing the proceedings necessary to removal, declares: "It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit, . . . and, the said copy being entered as aforesaid in the said circuit court of the United States, the cause shall then

proceed in the same manner as if it had been originally commenced in the said circuit court." Act March 3, 1875, chap. 137, § 3. 18 Stat. at L. 470, superseded by act August 13, 1888, chap. 866, § 1, 25 Stat. at L. 433 [U. S. Comp. Stat. 1901, p. 510].

It is contended that the word "cause" means more than "suit;" that it means "cause of action;" and that the cause of action is taken entirely out of the jurisdiction of the state court; and that the Federal court alone had jurisdiction thereof. We cannot accept this construction. The words "suit" and "cause" mean the same thing in the statute. In common usage, and very often in statutes and decrees, the words "suit," "action," "case," and "cause" are used interchangeably to indicate the same thing. Bouvier defines "cause" to be "a contested question before a court of justice; it is a suit or action." The suit, action, case, or cause in which the state court cannot proceed further is the matter removed to the Federal court. This is manifest from the context which requires that the cause shall proceed in the Federal court in the same manner as if it had been originally commenced there,—language appropriate in reference to a "suit," but wholly inappropriate in reference to the "cause of action," which is the legal right of the plaintiff invaded by the defendant's breach of corresponding duty, upon which the right of action arose when the invasion took place. The respondent's contention, therefore, receives no aid from the phraseology of the statute. On the contrary, the plain meaning is that the suit or cause after removal shall proceed in the Federal court, subject to the same rules which would govern if the suit or cause had been originally commenced there. If plaintiff had originally commenced the suit in the Federal court for \$10,000, and the same had been discontinued on payment of costs, we know of no rule which would prevent plaintiff's election to sue again in the state court for any sum, subject to the defendant's election to remove again, or to sue for such sum as gave the state court exclusive jurisdiction. This suit is for such a sum as in the policy of the removal statutes is such a case as should be tried exclusively by the state court.

This conclusion renders it unnecessary to consider the other question raised as to whether the defendant, by answering and going to trial and delaying this motion for about two years, has waived any right it may have had to make such motion.

The judgment of the Circuit Court is reversed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

MARCELLUS HARDMAN, Appt.,
v.

GODFREY L. CABOT.

(— W. Va. —, 55 S. E. 756.)

Highway—pipe line—additional burden.

1. A pipe line, laid in a public rural highway under proper authority, and used for supplying the public with natural gas for heating and illuminating purposes, though imposing an additional public service upon the road, is not a use in excess of the right of the public in such road, and

Headnotes by POFFENBARGER, J.

Case Note.—Gas-pipe line in highway or street as additional burden:—As the appropriation of land for the use of a public highway is for a specific purpose, and the public acquire thereby a mere right of passage, while the owner of the land still retains the fee, with the right to maintain ejectment or trespass, and is entitled to use the highway for his individual purposes in any way consistent with the public easement, the laying of gas pipes in a country road is held to be such an interference with the rights of the fee owner as to constitute an additional servitude, for which he is entitled to compensation. 2 Dill. Mun. Corp. 4th ed. § 691, note; Thornton, Oil & Gas, §§ 502, 505; Jones, Easements, § 491; Donahue, Petroleum & Gas, § 8, p. 92; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 389; Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 577, 8 L.R.A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640; Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713; Ward v. Triple State Natural Gas & Oil Co. 115 Ky. 723, 74 S. W. 709; Sterling's Appeal, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105.

HARDMAN v. CABOT seems to be the only case laying down a contrary rule.

But where a county has acquired the fee-simple title to land appropriated for a highway, an abutting owner is entitled to no compensation because of the laying of gas pipes therein, unless he suffers some special damage thereby. Ward v. Triple State Nat. Gas & Oil Co. supra.

As to the right to lay such pipes in city streets, there is some conflict among the authorities. The text-books, however, generally favor the doctrine that such use of a city street does not impose an additional burden. 2 Dill. Mun. Corp. 4th ed. § 691, note; 3 Abbott, Mun. Corp. § 870; Thornton, Oil & Gas, § 500; Jones, Easements, § 491.

Some of the cases holding such a pipe line an additional servitude on a country highway intimate that a different rule might apply in case of city streets.
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does not impose an additional burden upon the estate in fee in the land.

Same—urban and suburban roads.

2. In respect to the rights of the public in highways, held under valid dedications and acceptances, and the power of the legislature over the same, there is no distinction in this state between the streets of incorporated cities and towns and country roads.

Same—gas main—consent of authorities.

3. Certain rights of use in public highways, owing to their peculiar nature, are dependent upon the will of the authorities having control of the streets and roads, and can be exercised only with their consent and under such restrictions as they, in the exercise of their discretion, may see fit to impose. Among these the right to convey

Thus in Sterling's Appeal, supra, the court said: "As to streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail."

And the court, in McDewitt v. People's Natural Gas Co. 160 Pa. 367, 28 Atl. 948, in referring to this language, said: "These reasons are obvious. The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways for telegraph and other wires, and for other urban necessities or conveniences, gives to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys, to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes, it is acting not for its own profit, but for the public good. It is the representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like." It was therefore held that as by statute the transportation of natural gas was declared to be a public use, and as the company had received permission from the city to use the streets as a means of reaching customers, it might lawfully enter upon the streets to lay its pipes without liability to lot owners therefor.

In an earlier Pennsylvania case the right of a city, by ordinance, to confer upon a gas

natural gas for public use along a highway by means of pipes laid under the surface is included.

Same—natural person.

4. Permission to so use a public road may be granted, by a county court, to a natural person.

Same—effect of public use.

5. In a suit to enjoin the use of a public road, under permission therefor, granted by a county court for the purpose of conveying natural gas along the same by means of pipes laid under the surface thereof, for public consumption, as a means of producing heat and light, on the ground that the pipes are not maintained, and the gas conveyed by means of them, for such purpose, the plaintiff must allege and prove the fact; wherefore, the defendant may introduce evi-

dence to prove that the pipes are so maintained and the gas so conveyed, in resistance of the effect of the plaintiff's evidence, under his denial of the allegation of the bill.

Equity—allegation and proof.

6. In assailing a prima facie right or title by a bill in equity, the plaintiff must aver and prove facts sufficient to overcome it. Ordinarily, he cannot otherwise put the defendant to the proof of a perfect, indefeasible title or right.

(November 27, 1906.)

A PPEAL by plaintiff from an order of the Circuit Court for Calhoun County dissolving a temporary injunction which had been granted to restrain defendant from

company the right to lay its gas mains in the city streets without the consent of the owners of the fee to the center line of the street, and without just compensation being made to them, was denied. *Mallory v. Bradford*, 1 Pa. Dist. R. 670. The court referred to the *diotum* in *Sterling's Appeal*, but refused to follow it, saying: "If the laying of a pipe or gas line in a rural highway is a taking within the meaning of the Constitution, I am not able to see why the laying of the same pipe line is not such taking within the limits of a city or borough. Is not the right of a city or borough landowner just as sacred and as securely guarded by law as that of the rural owner? It may well be held that, under the police powers of municipalities, the landowner must yield a larger control over his property to the public authorities, this for the public good and on the theory, doubtless, that he will receive larger corresponding benefits and protection. But it does not seem to me that this doctrine can be justly carried so far as to permit councils, by ordinance, to turn over to a private corporation, organized for profit, the perpetual use of the property of a citizen. Suppose the defendant company, under the authority of such ordinance alone, lays its gas line upon a street of the city, and subsequently such street shall be lawfully vacated. What, then, are the rights of the parties? Surely, the complete control and right of possession to the land reverts to the owner, and it would therefore appear that the defendant company would be occupying the land of another with its gas lines without shadow or color of right. . . . I do not mean now to decide that a city or borough may not itself, by its proper officers, lay mains in its streets and furnish gas and water to its inhabitants, where it owns the plant. But, conceding that this may be done, it does not follow that such city or borough can confer such right upon a private corporation organized for profit."

In *Webb v. Ohio Gas Fuel Co.* 9 Ohio Dec. Reprint, 662, also, the laying of fuel gas pipes in a city street by a private corpora-
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tion, under authority of ordinance, is held to constitute an additional burden, for which the holders of the fee of the street are entitled to compensation, though abutting owners who do not hold the fee are held obliged to show special damage in order to be entitled to compensation. The court here said: "Ordinary sewers, and, perhaps, illuminating gas pipes, and some kind of water pipes, laid in public streets, comprise one class of urban servitudes, arising out of reasons of public health, convenience, and necessity. But how can a use such as the one at bar be brought within this doctrine? Here we have a corporation organized for the purpose of producing, transporting, and selling gas for fuel anywhere in the district named in its charter. For aught that appears, the city of Youngstown is—and the evidence tends to so show—only one of the stations in its system. It is, in fact, a private corporation, with some public features, organized not for one city alone, but for the entire district named, or any part of it, as it may select. How such an institution, contemplating the supply of fuel for manufacturing and other purposes, anywhere in said district, can be brought within the doctrine of urban servitudes, I am unable to see."

Where the fee-simple title is in the city, there can, of course, be no question of its right to use the street in any way that may subserve the public good.

Thus, in Illinois, where the fee title to streets is vested in the municipality, it is held to be the general doctrine that municipalities, under the power of exclusive control over their streets, may allow any use of them consistent with the public objects for which they are held, and that uses for the purpose of sewers, gas pipes, and water pipes are among those for which the use of streets may be granted.

But, as to this distinction between cases where the city owns the fee of the street and cases where it does not, *Dillon* (vol. 2, Mun. Corp. 4th ed. § 688, p. 818) says: "Whether the municipal corporation holds the fee of the street or not, the true doc-

placing a pipe line in a public highway. Affirmed.

The facts are stated in the opinion.

Messrs. **Mathews & Bell** and **Linn & Hamilton**, for appellant:

Abutters on a public suburban highway have a right therein distinct from that of the public, which the legislature cannot take away except to appropriate it to a public use upon payment of compensation.

Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 577, 8 L.R.A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066; **Indianapolis v. Croas**, 7 Ind. 9; **Haynes v. Thomas**, 7 Ind. 38; **Cox v. Louisville, N. A. & C. R. Co.** 48 Ind. 178; **Pettis v. Johnson**, 56 Ind. 139; **State v. Berdetta**, 73 Ind. 185, 38 Am. Rep. 117; **Dovaston v. Payne**, 2 H. Bl. 527; **Presbyterian Soc. v. Auburn & R. R. Co.** 3 Hill. 567; **Bloomfield & R. Natural Gaslight Co. v. Calkins**, 62 N. Y. 386, Affirming 1 Thomp. & C. 549; **Bloomfield & R. Natural Gaslight Co. v. Richardson**, 63 Barb. 437; **Sterling's Appeal**, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105; **Webb v. Ohio Gas Fuel Co.** 9 Ohio Dec. Reprint. 662.

The construction of a pipe line upon a highway is an imposition of an additional servitude upon the fee.

Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713; **Sterling's Appeal**, supra; 2 Hogg. Eq. Proc. p. 1118; **Bloomfield & R. Natural Gaslight Co. v. Calkins**, 62 N. Y. 386; **Jones, Easements**, § 491; **Donahue, Petroleum & Gas**, § 8, p. 92; **McKay v. Pennsylvania Water Co.** 6 Pa. Dist. R. 364; **Dallas v. Hallock**, 44 Or. 246, 75 Pac. 204; **Biddle v. Wayne Waterworks Co.** 190 Pa. 94, 42 Atl. 380; **Mason v. Harper's Ferry Bridge Co.** 17 W. Va. 396; **Varner v. Martin**, 21 W. Va. 534; **Pittsburg, W. & K. R. Co. v. Benwood Iron Works**, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453.

trine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining fee holder cannot complain."

In **Crooke v. Flatbush Waterworks Co.** 29 Hun. 245, the court, in determining the right to place water pipes in the streets of a city, distinguished the case of **Bloomfield & R. Natural Gaslight Co. v. Calkins**, 62 N. Y. 389, on the ground that that case related to rural highways, and said: "We cannot assent to the proposition that all the gas pipes, water pipes, and sewers laid down in the streets and avenues of the cities and villages of this state, by municipal or legislative authority, are additional burdens on the land, for which the owner of the ultimate fee is entitled to new and further compensation."

Mr. Walter Pendleton, also for appellant: Laying gas pipes in a suburban road is the imposition of an additional burden.

Thornton, Oil & Gas (1904) § 505; **Kincaid v. Indianapolis Natural Gas Co.** 124 Ind. 577, 8 L.R.A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066; **Bloomfield & R. Natural Gaslight Co. v. Calkins**, 62 N. Y. 386, Affirming 1 Thomp. & C. 541; **Sterling's Appeal**, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105; **Webb v. Ohio Gas Fuel Co.** 9 Ohio Dec. Reprint. 662; **Biddle v. Wayne Waterworks Co.** 7 Del. Co. Rep. 161; **Murray v. Gibson**, 21 Ill. App. 488; **Indianapolis, B. & W. R. Co. v. Hartley**, 67 Ill. 439, 16 Am. Rep. 624; **Board of Trade Teleg. Co. v. Barnett**, 107 Ill. 507, 47 Am. Rep. 453; **Consumers' Gas Trust Co. v. Huntsinger**, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640; **Columbia Conduit Co. v. Com.** 90 Pa. 307; **Goodson v. Richardson, L. R.** 9 Ch. 221; **Clippens Oil Co. v. Edinburgh**, 25 Rettie, 370.

Messrs. **Van Winkle & Ambler**, for appellee:

Means for transporting oil through pipes is "a tube highway, and is an internal improvement, and, as such, capable of exercising the power of condemning for public use."

West Virginia Transp. Co. v. Volcanic Oil & Coal Co. 5 W. Va. 382.

It is immaterial whether the fee in the street or road is in the public or in the abutting owner.

Guinn v. Ohio River R. Co. 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; **Spencer v. Point Pleasant & O. River R. Co.** 23 W. Va. 406.

The right to use rural highways for water pipes and sewers without compensation to abutting owners has been affirmed.

Bishop v. North Adams Fire District, 167 Mass. 364, 45 N. E. 925; **Lincoln v. Com.**

mate fee is entitled to new and further compensation."

And the court, in **Bloomfield & R. Natural Gaslight Co. v. Calkins**, intimates that the laying of gas pipes in city streets might be considered as a necessary incident to the public right to repair, improve, increase the value of property, and add to the wealth of a large local population; adding that they are usually constructed without objection, and do not ordinarily interfere with other rights which have been lawfully acquired and enjoyed, while they confer many advantages which counterbalance any supposed detriment or injury.

On the general question, What use of street or highway constitutes an additional burden? see note in 17 L.R.A. 474.

As to whether telephone poles and wires are an additional burden, see case note in 3 L.R.A. (N.S.) 323.

164 Mass. 1. 41 N. E. 112; Huddleston v. Eugene, 34 Or. 343, 43 L.R.A. 444, 55 Pac. 868.

Hardman is not entitled to damages in this state, unless he can show that his property was specially damaged over and above the damages inflicted upon any other property in like situation along the line, and unless he can show that his property was worth less after the line was built than it was before the line was built.

Arbenz v. Wheeling & H. R. Co. 33 W. Va. 1, 5 L.R.A. 371, 10 S. E. 14; Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. 1093; Spencer v. Point Pleasant R. Co. 23 W. Va. 437.

Poffenbarger, J., delivered the opinion of the court:

Marcellus Hardman feels aggrieved by the action of the judge of the circuit court of Calhoun county, in dissolving, in vacation, an injunction, which he had obtained, inhibiting and restraining Godfrey L. Cabot from locating, maintaining, and operating a gas-pipe line in a public road, running through the lands of said Hardman, under permission for occupation thereof, granted by the county court of said county, which pipe line was required, by said order of permission, to be placed under the surface of the road at least 2 feet.

Certain conclusions to which we have come, and which seem to be accordant with those of the trial court, render it unnecessary to discuss a number of questions, concerning which elaborate arguments are found in the briefs. This will be apparent to counsel from the following statement of principles and conclusions: Assuming for the present that the use to which the road is subjected, in the exercise of the privilege so granted, is within the purpose for which the road was dedicated to the public, and accepted by its authorities, and does not constitute an additional servitude upon the land, the title to which is in the plaintiff, subject to a right of use in the public for highway purposes, the important question arises whether such permission can be granted by a county court to a private individual, for the purpose of enabling him, by means thereof, to subvert the public interest by supplying the inhabitants of the community with natural gas for the purposes of heat and illumination. Express authority for granting such permits to incorporated companies organized for the purpose of transporting petroleum oil and natural gas is conferred upon county courts by § 24 of chapter 52 of the Code 1899 [Code 1906, § 2229]. It is earnestly insisted by counsel for the appellee that the authority con-

ferred by that section is broad enough to enable such tribunal to grant like permits or privileges to private individuals; and Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410, is cited as authority for the proposition. But it was carefully noted in that case that the act of the legislature authorizing the occupation of public roads by telephone companies, with the consent of county courts, was not amendatory of any chapter of the Code relating to corporations; wherefore this court was able to place a liberal construction upon the word "companies," used in the act. It may well be doubted whether chapter 113, p. 337, of the Acts of 1891, adding a new section to chapter 52 of the Code of 1899 [Code 1906, §§ 2207-2229], relating to corporations generally, falls within the line of that process of reasoning. But this is not conclusive. While we may not be able to say the word "companies," as used in chap. 52, § 24, Code 1899 [Code 1906, § 936], includes copartnerships or individuals, the spirit of that and other statutes may sustain the action of the county court.

It is far less important for us to know, and for the legislature to declare, what persons may make a certain use of a highway, than what may be lawfully done in it. All persons, both natural and artificial, are entitled to use public highways, and have equal rights in respect to them; but there is a limitation upon all as to the manner in which they may use them. Some of the uses that courts have deemed to be within the grant of the land for highway purposes are such in character as cannot be exercised with safety to the public, or without working prejudice to persons using the way in the ordinary modes, in the absence of regulation. To the end that proper rules and regulations may be established in every such case, persons desiring to exercise such powers must obtain permission to do so, and the permission is granted upon terms and conditions intended to prevent the use permitted from rendering the highway unsafe to other persons or producing an unreasonable restraint upon their privileges. To this class belong railways, telegraph and telephone lines, sewers, and water and gas pipes. The legislature, in expressly authorizing the use of highways, under permission of the county courts, by corporations engaged in the service of the public, for the location and operation of their gas pipes, has declared that such use is proper. Who may have it is a matter of no consequence, in so far as it affects the road, but of immense importance as regards the public. We are not to impute to the legislature an intention to allow corporations

greater rights in public highways than natural persons. That private persons may engage in public service, such as is usually carried on by corporations, has been declared by this court. *Lowther v. Bridgeman*, supra; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Watson v. Fairmont & Suburban R. Co.* 49 W. Va. 528, 39 S. E. 193. The legislature has expressly so declared, also, in § 1, chap. 44, p. 100, of the Acts of 1891, as to the transportation of petroleum oil.

That railroads, whether operated by steam or other motive power, and telegraph and telephone lines, do not impose additional servitudes, when located in highways, be they city streets or country roads, is abundantly settled by the decisions of this court. *Watson v. Fairmont & Suburban R. Co.* and *Lowther v. Bridgeman*, supra; *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L.R.A. 371, 10 S. E. 14; *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406; *McEl-downey v. Lowther*, 49 W. Va. 348, 38 S. E. 644. To hold the contrary, as regards pipe lines for conveying gas, water, and other supplies, would be most disastrous to cities, towns, and counties of this state, in which hundreds, possibly thousands, of miles of such pipes have been laid in the highways, without any thought on the part of the fee owner of any right in him to prevent it, until payment of compensation should be made. In the states of Indiana, Pennsylvania, and some others, such use of a highway is regarded and treated as subjecting the land to an additional servitude; but there is a great deal of high authority to the contrary, besides a lack of forcefulness in the reasoning upon which the decisions declaring the doctrine are based. In *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. 925, the court held that the public authorities might lay water pipes in a public highway without the payment of any compensation to an abutting landowner, although the highway, of which he owned the fee, was thereby subjected to an additional public use. This decision was based upon the doctrine announced in *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264, and *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7. In the latter of these two cases, which involved the right to compensation for a supposed additional servitude, resulting from the location of a telegraph line in a public highway, the court said, at page 81 of 136 Mass., at page 12 of 49 Am. Rep.: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then-known vehicles, or of using it in the then-known methods, for

either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travelers, to some extent, limited by those privileges necessary for its use. . . . The discovery of the telegraph developed a new and valuable mode of communicating intelligence." In another part of the opinion it said: "It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleaning the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. . . . Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the traveled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes." The theory of incidental use, thus repudiated, was that pipes could be used only for the purposes of the highway, such as supplying it with light and water, and draining it. The court held the additional public use was not an additional burden upon the land. See *Watson v. Fairmont & Suburban R. Co.* supra, for approval of some of the principles declared in said case. The Indiana, Pennsylvania, and other decisions denying the power of the legislature to authorize such use of rural highways make a distinction between such highways and streets of cities and towns. This court recognizes no such distinction. *Lowther v. Bridgeman*, supra. Some of them assign as a reason for the additional-servitude doctrine that such an occupation of the land would ripen into title by lapse of time. As it is under permission, not title or claim of title, it is difficult to see how it could be adverse. In the case of streets, the exercise of such right is universally recognized, and held not to impose any additional burden. *Elliott, Roads & Streets*, § 405.

That the surface, the use of which is granted for highway purposes, includes more than the visible part of the land, has been often declared by the courts, and is affirmed by constant experience. Excavations, fills, and the laying of deep foundations for bridges are necessary. *Danforth*,

J., said, in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 161, 43 Am. Rep. 146: "The public purpose of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water pipes, and upon it posts for lamps." In *Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104, Lord Justice Bramwell said: "'Street' comprehends what we may call the surface; that is to say, not a surface bit of no reasonable thickness, but a surface of such thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets." What has just been said, it must be observed, assumes that the grantee of this permission will use the pipe line in the service of the public. Upon the evidence adduced, the circuit court has necessarily found that such is the intention, and the evidence seems to amply justify the finding. The defendant testifies that he has 30 miles or more of gas mains, of which this pipe will form a part, used in distributing natural gas, and that he is supplying a number of private customers. It seems not to be contested that he is supplying the people of the town of Brooksville and vicinity; and he says if he is unable to lay the large line in controversy he will be obliged to obtain gas from some place other than his Leaf Bank field, in order to give his customers down the river an adequate supply; and further, that some of his customers in that section are complaining of the lack of an adequate supply. Lack of capacity to give his customers an adequate supply of gas by means of the 6¼-inch pipe, which is already laid over the plaintiff's land at some distance from the public road, seems clearly to be the cause of his effort to put in the 10-inch pipe on the road. His testimony is not as full and definite as it might be, but we think it sufficiently discloses the public nature of the business in which he is engaged and the necessity of the use of the road to enable him to successfully prosecute it.

His right of occupation of the road for the purpose and in the manner aforesaid is denied in the argument, on the ground that no notice of his application to the county court for the privilege or franchise was given in the manner prescribed by the statute; but the bill does not charge failure to give such notice. As will be shown herein, the plaintiff is bound to show that the defendant's occupation of the road is wrongful, in order to sustain the injunction, and, under well-settled principles and rules of equity practice, he must allege whatever it

is necessary to prove. But, aside from this, such notice would only have given him an opportunity to be heard before the granting of the privilege, and he has had the equivalent of that in the hearing given him upon his motion, after the permit had been given, to revoke the same, upon which hearing the court modified its order and curtailed the privilege to such an extent as it thought any body was entitled to have it restricted, by requiring the defendant to put his pipe 2 feet under the ground, instead of 18 inches, as prescribed in the first order. The statute requiring notice of such applications does not confer any judicial powers upon the tribunals to which they apply, nor vest in any citizen the right to prevent or control action, otherwise than to the extent of being heard in opposition, by remonstrance or otherwise. *Benwood v. Wheeling R. Co.* 53 W. Va. 465, 44 S. E. 271. However, we do not decide that he is precluded by the hearing on his motion to revoke from having such relief, if any, as he is entitled to by reason of the granting of the permit, without notice having been given, if it was so granted. This matter is not in the case. Since, in using the road as aforesaid, by permission of the county court, the defendant has not taken, and is not attempting to take, any of the land of the plaintiff, it is quite clear that some of the principles enunciated in *Charleston Natural Gas Co. v. Lowe* and other condemnation suits are not applicable, and much of the argument in the briefs of counsel for the appellant need not, therefore, be responded to. Whether his property has been, or will be, injured by a rightful occupation of the road is an entirely different matter. For that he is not entitled to an injunction, as has been emphatically asserted by a number of decisions of this court, unless the injury is so great as to amount to a virtual taking of the property. *Watson v. Fairmont & Suburban R. Co.* 49 W. Va. 528, 39 S. E. 193; *McEldowney v. Lowther*, 49 W. Va. 348, 38 S. E. 644; *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29; *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L.R.A. 371, 10 S. E. 14; *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406; *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396. By these decisions he is limited to his action at law for compensation in damages.

In his answer Cabot did not aver that his use of the road was permitted for a public purpose. On the motion to dissolve, he tendered, and was permitted to file, over the objection of the plaintiff, an amended answer, setting up this fact. Before doing so, he had taken depositions to prove it. On

objection to the reading of the depositions for that reason, the court gave leave to re-take them. Thereupon the parties filed a stipulation by which the plaintiff waived the right to require the depositions to be retaken and consented to the reading thereof. It is here assigned as error that the court considered this evidence and founded its decree thereon, because the objection to the filing of the amended answer has not been waived and is insisted upon, and, without said amended answer, there is no allegation of the fact which the testimony proves. Well-settled principles deny the right to file the amended answer, upon the facts disclosed by the affidavits, tendered with it. But the evidence is admissible without any affirmative allegation of the fact. The defendant's occupation and use of the road is not the occupation and the use of the plaintiff's land, for it is covered by the grant out of said land to the public of the right to use, and the permission given to the defendant confers upon him no right in excess of that which the public has in respect to the land. Hence, in order to sustain his injunction it is incumbent upon the plaintiff to show that, in granting to the defendant the privilege which he had, the county court, in some way, exceeded its authority. This might have been done by alleging and proving that the purpose for which the privilege was granted, and the use to which the road was thereby subjected, were not public in their nature, or, possibly, but we do not so decide, by failure to give the notice of the application. In this ruling we apply nothing more than elementary rules of pleading and practice. The defendant has the *prima facie* right. Anyone who seeks to deprive him of that must overcome it with proof, and must lay a basis for his proof in his pleadings. The occupant of land is not compelled to make a disclosure of his title merely because somebody challenges his right to it. He who seeks to set aside a deed on the ground of fraud or a defect of any kind, be it apparent upon the face of, or found in some matter *dehors*, the instrument, and to be established by proof *alunde*, must allege that defect, as well as prove it, in order to invalidate, or obtain relief against, the deed. That the defendant has the *prima facie* right is apparent, and not disputed. The road is a public one, having been under the control of public authorities and used by the public for half a century or more, and the county court granted a privilege in it which it had a right to grant for aught that has been shown by the plaintiff. "Every averment necessary to entitle a plaintiff to be entertained in a court of equity must be contained in the bill." Van-7 L.R.A.(N.S.)

bibber v. Beirne, 6 W. Va. 168; *Eib v. Martin*, 5 Leigh, 141; *Parker v. Carter*, 4 Munf. 273, 6 Am. Dec. 513. And the plaintiff must assert his claim with reasonable certainty. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

Seeing no error in the order complained of, we affirm it.

IOWA SUPREME COURT.

UNITED STATES STANDARD VOTING MACHINE COMPANY

v.

A. N. HOBSON.

(— Iowa, —, 109 N. W. 458.)

Certiorari—facts—consideration of.

1. Facts not appearing in the return to a writ of certiorari, nor in any other manner which would enable the court to take notice of them, are not to be considered in determining the propriety of the writ.

Same—injunction suit—answers—effect.

2. The filing of answers in an injunction suit in which a restraining order has been issued to prevent the carrying out of a contract does not defeat the right of defendants to apply for a writ of certiorari to annul the injunction.

Same—right of appeal.

3. The right to appeal from an order restraining performance of a contract for voting machines does not defeat the right to apply for a writ of certiorari to annul it on the ground that it was in excess of jurisdiction and therefore void, where the election at which the machines were to be used would pass before the appeal could be heard.

Equity—control of election—jurisdiction.

4. There is no right on the part of voters and taxpayers to injunctive relief against the use of voting machines at elections, and therefore the court has no jurisdiction of suits seeking such relief.

Elections—voting machines.

5. The use of voting machines is not prohibited by a constitutional provision that all elections shall be by ballot.

Same—statutory regulation—effect.

6. The approval for use at elections of a voting machine on which the whole ticket can be voted as a unit is not annulled by the passage of a statute striking the circle from the Australian ballot.

(October 24, 1906.)

Note.—The right to invoke the power of equity to protect one's right to vote is discussed in the opinion in the case of *Shoemaker v. Des Moines*, 3 L.R.A.(N.S.) 382, and the general subject of the power of equity to interfere in matters preceding the election is discussed in the note to that case.

PETITION for a writ of certiorari to annul an order restraining the use of voting machines at an election. Order annulled.

Statement by the Court:

This is a proceeding by certiorari to annul that portion of an order entered by the defendant as judge of the thirteenth judicial district holding the district court in and for Winneshiek county, granting a temporary injunction at the suit of one H. C. Hjerleid, plaintiff, in an action brought in equity against Winneshiek county, the board of supervisors, and the auditor of said county, and the United States Standard Voting Machine Company, as defendants, by which the defendants in that action (except the voting machine company, which had not at that time been served with notice) were enjoined and restrained from the use at the election in November, 1906, in said county, of voting machines, sold or contracted to be sold or furnished to said county by the voting machine company. The other portion of the restraining order, of which no complaint is made in this proceeding, enjoined and restrained the same defendants from paying for said machines either in cash, warrants, or bonds, or in any other manner, or from issuing warrants, orders, or bonds in payment therefor. The allegations of the petition in the injunction suit, so far as material to the determination of the question whether the portion of the restraining order complained of was proper, were, in brief (as appears by the return made by the defendant in this proceeding to the writ of certiorari issued from this court), that plaintiff, Hjerleid, was a resident, voter, and taxpayer of Winneshiek county; that on or about the 8th day of June, 1906, the defendant, the United States Standard Voting Machine Company presented to the defendant board of supervisors its written proposal to sell on trial to the defendant county certain voting machines, to be used at the November, 1906, election; that said proposal was accepted and adopted by the defendant board of supervisors; that subsequently a certain agreement in the nature of a contract between the voting machine company and the defendant county was approved by the defendant board of supervisors and signed by the chairman thereof under the authority of the said board; that, in securing the adoption of the written proposal and the contract above referred to, certain representations were made by the voting machine company which were false and fraudulent, in that the contract was not, as understood by the board of supervisors, an

embodiment of the written proposal, but amounted to an absolute barter-sale contract with a guaranty, and not a conditional contract as intended by said board, and that the board of supervisors never passed any other resolution or adopted any other contract than that authorizing the use of United States Standard voting machines on trial at the November, 1906, election in said county; that the alleged contract above referred to was absolutely void, for the reason that there is no law authorizing the use at elections in Iowa of voting machines, and that title 6, chap. 3a, of the Code of Iowa (Supplement of 1902), is unconstitutional; that the commissioners appointed under and by virtue of the authority conferred by § 1137c of chapter 3a, title 6, of the Code of Iowa (Supplement of 1902), has not approved said machines since the enactment of the constitutional amendment relating to biennial elections, nor since the acts of the thirty-first general assembly of Iowa in relation thereto, and that such approval was necessary to authorize the defendant board of supervisors to enter into any contract for the purchase of such machines; that § 1137e of said chapter 3a (Supplement of 1902), relating to the use of voting machines, and providing that one ballot may be placed in each party column or row containing only the words "Presidential Electors," preceded by the party name, and that a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors, is unconstitutional and violative of the constitutional amendment with reference to biennial elections, in not affording to the individual voter an opportunity to pass personal choice upon each and every candidate for office; that the voting machines referred to in the proposal and contract were inadequate and their use illegal, and not in conformity with the requirements of the laws of the thirty-first general assembly with reference to elections, inasmuch as their construction permitted the use of so-called party levers, which substantially nullified the effect and purpose of the statute removing the circle from the official ballot; that plaintiff was a duly qualified voter, and the use of said machine for voting purposes was not a vote or voting by ballot, and that their said use at said election would be unconstitutional and would nullify such election, causing great expense and trouble to the people of said county, including the plaintiff; and that by the terms of the contract above referred to it was provided that the defendant county would, at its meeting in November, 1906, pay to the defendant the

voting-machine company for said machines the sum of \$17,550, and that, unless restrained by injunction, the defendant voting machine company would deliver to defendant county the said twenty-seven voting machines, and the said county would, in pursuance of said contract, accept said machines and pay to the defendant voting machine company the purchase price thereof, and the property of the plaintiff and of the other taxpayers throughout said county would be taxed to raise funds for the payment of said sum, and, unless restrained, the said machines would be used at said November election, making it impossible thereafter to replace the parties defendant *in statu quo*, and plaintiff would be remediless at law to recover his loss or protect his said rights, and that plaintiff had no plain, speedy, and adequate remedy at law.

Messrs. Read & Read, J. K. Macomber, and Frank Keiper, for plaintiff:

The matter being a political one, the defendant was without jurisdiction to restrain the board of supervisors of Winneshiek county from using voting machines in holding elections.

Shoemaker v. Des Moines, 129 Iowa, 244, 3 L.R.A. (N.S.) 382, 105 N. W. 520; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 47 L.R.A. 393, 54 S. W. 494; Fletcher v. Tuttle, 151 Ill. 41, 5 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683.

Voting by machine is voting by ballot, within the meaning of the constitutional requirement.

Detroit v. Inspectors of Election, 139 Mich. 548, 69 L.R.A. 184, 102 N. W. 1029; Lynch v. Malley, 215 Ill. 574, 74 N. E. 723.

Messrs. E. R. Acres, N. Willett, and C. N. Houck, for defendant:

A writ of certiorari will not lie where the party has the right of appeal.

Davis County v. Horn, 4 G. Greene, 94; Fagg v. Parker, 11 Iowa, 18; Independent School District v. District Court, 48 Iowa, 182; Ransom v. Cummins, 66 Iowa, 137, 23 N. W. 301; State v. Schmidt, 65 Iowa, 556, 22 N. W. 673.

The district court being a court of general jurisdiction, every presumption will be indulged in favor of its jurisdiction; and such jurisdiction can be taken away only by express words or irresistible implication.

Sterritt v. Robinson, 17 Iowa, 61; Waples v. Marsh, 19 Iowa, 381.

A taxpayer may maintain an action of injunction to restrain illegal official action which would increase the amount of taxes which he has to pay or diminish a fund to which he has contributed; and such is the well-settled rule in this state.
7 L.R.A. (N.S.)

Snyder v. Foster, 77 Iowa, 638, 42 N. W. 506; Brockman v. Creston, 79 Iowa, 587, 44 N. W. 822; Shoemaker v. Des Moines, 129 Iowa, 244, 3 L.R.A. (N.S.) 382, 105 N. W. 521.

An injunction may be issued to restrain official action which would be illegal or unlawful.

Kinne. Pl. & Pr. § 1074; 1 Dill. Mun. Corp. § 55; Hospers v. Wyatt, 63 Iowa, 264, 19 N. W. 204; Searle v. Abraham, 73 Iowa, 507, 35 N. W. 612; Brockman v. Creston, 79 Iowa, 587, 44 N. W. 822; Hanson v. Hunter, 86 Iowa, 722, 48 N. W. 1005, 53 N. W. 84; Cascaden v. Waterloo, 106 Iowa, 673, 77 N. W. 333; Moffitt v. Brainard, 92 Iowa, 122, 26 L.R.A. 821, 60 N. W. 226; Anderson v. Orient F. Ins. Co. 88 Iowa, 579, 55 N. W. 348; Goetzman v. Whitaker, 81 Iowa, 527, 46 N. W. 1058.

An injunction will be maintained where to dissolve it would result in a denial of justice to plaintiff.

Code, § 4369; Joseph v. McGill, 52 Iowa, 127, 2 N. W. 1007; Stewart v. Johnston, 44 Iowa, 435; Sinnett v. Moles, 38 Iowa, 25; Fargo v. Ames, 45 Iowa, 494; Kelley v. Briggs, 58 Iowa, 332, 12 N. W. 299; Johnston v. Chicago, M. & St. P. R. Co. 58 Iowa, 537, 12 N. W. 576; Walker v. Stone, 70 Iowa, 103, 30 N. W. 39; Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co. 76 Iowa, 702, 39 N. W. 691; Huskins v. McElroy, 62 Iowa, 508, 17 N. W. 670.

A ballot is a bit of paper having printed or written thereon the designation of an office and the name of a person to fill it; and the person casting it has a right to do so in secrecy.

Taylor v. Bleakley, 55 Kan. 1, 28 L.R.A. 683, 49 Am. St. Rep. 233, 39 Pac. 1045; Davis v. Brown, 46 W. Va. 716, 34 S. E. 839; Words & Phrases, under heading "Ballot." Briabin v. Cleary, 26 Minn. 107, 1 N. W. 825; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97; Shannon's Code 1896 (Tenn.) § 1265; People ex rel. Budd v. Holden, 28 Cal. 123.

Per Curiam:

In a motion submitted with the case, the defendant asks that the petition for a writ of certiorari be dismissed, and the writ be quashed; but in the main the grounds urged in the motion are such as may be considered in passing upon the merits of the case, involving the legality of defendant's action in making the portion of the order which restrains the county of Winneshiek and its board of supervisors and auditor from using the voting machines referred to in the action of the board at the November election. It is urged, however, that the

plaintiffs in this action, having subsequently appeared in the injunction suit as defendants, filed an answer therein, and otherwise raised issues of law and fact, have a plain, speedy, and adequate remedy by appeal. With reference to the filing of the subsequent pleadings in the injunction suit, to which reference is made in the motion to dismiss the petition and quash the writ, it is sufficient to say that, whatever may have been the effect of such action on the part of the defendants in the injunction suit, the facts do not appear by the return, nor in any other manner, such as would enable us to take notice of them, and therefore they need not be considered. But, even if they were to be considered, we cannot see that they would affect the present proceedings, for the injunction suit was still pending, and the portion of the order restraining the county and its board of supervisors and auditor from carrying out the contract with the voting machine company, by accepting the machines and paying therefor under the terms of the alleged contract, was still in force. The voting machine company was still in court for a proper purpose, regardless of the validity of that portion of the restraining order questioned in this proceeding.

As to the ground of the motion involving the claim that the plaintiffs cannot maintain this certiorari proceeding, because they have a plain, speedy, and adequate remedy by appeal from the order granting the temporary injunction, it is enough to say, briefly, that in our judgment the right to appeal does not preclude plaintiffs from questioning the validity of the portion of the order complained of, on the ground that it was made in excess of jurisdiction and is therefore void and should be annulled. It is provided in Code, § 4154, that "the writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded its proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy, and adequate remedy." It is contended in behalf of plaintiff that "other plain, speedy, and adequate remedy" is only a limitation of the power to issue the writ where the tribunal exercising judicial functions is alleged to be "otherwise acting illegally," and that it has no application to a case where an inferior tribunal is alleged "to have exceeded its proper jurisdiction." But we think that the correctness of this view need not be passed upon, in view of our conclusion that the remedy by appeal is not such plain, speedy, and adequate remedy as to preclude the right to test the

validity of the order in question, as against the complaint that it was made without jurisdiction. Of course, the writ of certiorari is not available to correct mere irregularities or errors in the proceedings of the lower court. It may be that illegality of action, where the court has jurisdiction, may sometimes be tested by certiorari, and, in such a case, the want of a plain, speedy, and adequate remedy by appeal may be important. But, where the action complained of is in excess of the jurisdiction of the court, it is doubtful whether the remedy by appeal is ever plain, speedy, and adequate. Certainly, in this case an appeal would neither have been speedy nor adequate, for it would have postponed any test of the validity of the order prohibiting the use of voting machines at the November election of this year until long after the election had been held. In a case involving an injunction to test the title to an office, when the term of office would probably expire before the appeal could be heard and decided, this pertinent language was used in *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L.R.A. 393, 54 S.W. 494, with reference to a writ of prohibition, serving the same purpose, as we understand it, that is served by the writ of certiorari under our procedure: "It is also contended by learned counsel that relators had their remedy by motion to dissolve, and by appeal on final judgment. Prohibition is an extraordinary remedy, and will not lie where the party claiming it has adequate remedy by ordinary means. But the ordinary means that will defeat the application for this extraordinary writ must be sufficient to afford the relief the case demands. If the relators should await to follow the course pointed out by their adversaries, it would, in all probability, be a year before their appeal could be heard and decided, and it would be perhaps two years, if the cause took its regular course without advancements, both in the trial and appellate courts." In our own cases, we find nothing to indicate that an appeal is a speedy and adequate remedy, where the question is as to want of jurisdiction to make the order complained of. Indeed, it is a justifiable inference, from those cases where the question of the adequacy of the remedy by appeal has been considered, that such remedy would not preclude resort to certiorari, if the jurisdiction of the subject-matter were the question involved. See *State v. Schmidt*, 65 Iowa, 556, 22 N. W. 673; *Abney v. Clark*, 87 Iowa, 727, 55 N. W. 6; *Callanan v. Lewis*, 79 Iowa, 452, 44 N. W. 892. We are clear that, in this case at least, the remedy by appeal, to which plaintiff might have resorted, was not such a

speedy and adequate remedy as to preclude his resort to this proceeding by certiorari.

On the merits of the case, as made by the return to the writ, the position strongly relied upon for plaintiff is that the lower court had no power or authority, under the allegations of the petition for injunction, to interfere with the use of voting machines at the November election, 1906, as provided for by the board of supervisors. And to this broad proposition we shall now direct our attention, without attempting to follow the course of argument mapped out by counsel on either side. The right to vote is a political, and not a civil, right, and a court of equity will not exercise its extraordinary power of injunction to protect a mere political right as distinct from a civil right. The plaintiff in the injunction case, as a taxpayer, could no doubt have relief by injunction to prevent the board of supervisors and the county auditor, defendants in that action, from attempting to carry out a contract which would impose an unlawful indebtedness upon the county; but, as a taxpayer, he had no interest in the question whether or not the November election in the county should be held by means of voting machines, and, as a voter, he had no interest in the method of conducting the election which would entitle him to control that method by the assistance of a court of equity. Some remedy at law he would, no doubt, have, if his right to vote were interfered with; but a court of law would not give him relief as against a mere anticipated wrong. It is to be noticed that the want of jurisdiction of the lower court to grant relief in equity was not on account of the want of right of the plaintiff in the injunction suit to maintain the action, but on account of the absence of any equitable right to relief on the part of anyone; and therefore the want of jurisdiction did not grow out of the incapacity of the particular plaintiff, but out of the incapacity of any plaintiff, to have such remedy. Therefore the question is not as to the capacity of the plaintiff to sue, but the power of the court to give the attempted relief.

That courts of equity cannot interfere by injunction to protect a claimed political right is too well settled to require extended discussion. A few references to illustrations found in adjudicated cases will show the reasonableness and propriety of this rule. In *Fletcher v. Tuttle*, 151 Ill. 41, 25 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683, the question was as to the jurisdiction of a court of equity to grant an injunction to prevent the giving of election notices, or the certifying of nominees for districts created by an apportionment act which was claimed

to be unconstitutional; and the court, holding that an injunction could not be granted for the protection of a political, as distinguished from a civil or property, right, used this language: "The complainant is a legal voter and a candidate for a particular elective office, and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner, and also his right to be such candidate, to have the election called and held under the provisions of a valid law, and to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. The rights thus asserted are all purely political; nor, so far as this question is concerned, is the matter aided in the least by the attempt made by the complainant . . . to litigate on behalf of other voters, or of the people of the state generally. The claims thus attempted to be set up are all of the same nature and are none the less political." And, further, the court says: "The extraordinary jurisdiction of courts of chancery cannot therefore be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer charged with political administration has disobeyed, or threatens to disobey, the mandate of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy; but his remedy must be sought in a court of law, and not in a court of chancery." In the case of *State ex rel. McCaffery v. Aloe*, supra, already referred to, involving the right of a court of equity to enjoin the entrance of a person to office and to declare his title invalid, this language is used: "The real and only purpose of the suit in the circuit court was to bar the entrance to the office of board of election commissioners by injunction, and to obtain a decree of a chancery court, declaring relators' title to the office invalid. This is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons who have rights of that nature which have been violated, and ample means are afforded in those courts for the vindication of such rights and the redress of their wrongs." And, after saying that the powers of a

court of chancery cannot be invoked to protect by injunction purely political rights, the court continues: "No such jurisdiction has ever been conceded to a chancery court, either in the Federal or state judiciary. The political rights of a citizen are as sacred as are his rights to personal liberty and property; but he must go into a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on *ex parte* hearing. Neither in England nor America has this power been suffered to extend to political affairs." Without further quotation, it will be sufficient to cite the following additional cases supporting the general proposition that a court of equity cannot interfere, by injunction, to protect political rights: *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Shoemaker v. Des Moines*, 129 Iowa, 244, 3 L.R.A.(N.S.) 382, 105 N. W. 520. The conclusion is inevitable that, so far as the order of the lower court restrains the use of voting machines authorized by the board of supervisors to be used at the November election, it is beyond the jurisdiction and power of the court to make, and is void.

But by way of illustrating the kind of questions which a court of equity would be compelled to pass upon and make determinative of the method of conducting elections, if the power which the lower court has attempted to exercise were held to be within its jurisdiction, we may refer to a few of the most important grounds presented to the lower court for granting a preliminary injunction. It is urged that the statute (Acts 28th Gen. Assem. p. 19, chap. 37; Code Supp. 1902, §§ 1137a-1137u) authorizing the use of voting machines is unconstitutional because of the provision in the state Constitution (article 2, § 6) that "all elections by the people shall be by ballot." In other words, the lower court was asked to interfere with a policy of the state declared by the legislature, unquestioned for six years, and in accordance with which elections have already been held in some of the counties and will doubtless be held in many more, whatever the result of the determination of the lower court on final hearing may be; for the action of that court can only be binding on parties to the suit, and the state of Iowa, under whose authority the county of Winneshiek acted in adopting voting machines, is not, and cannot be, a party to that suit or any other, for the determination of the question. If such power exists in a court of equity, then the method of conducting elections provided for under this or any other law may be interfered with

and set aside. It has been held, however, that voting by such a machine is voting by ballot. *Detroit v. Inspectors of Election*, 139 Mich. 548, 69 L.R.A. 184, 102 N. W. 1029; *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723. Without elaborating the discussion, it is enough to say that the constitutional provision was intended to require and protect the secrecy of the ballot with the general purpose of guarding against intimidation, securing freedom in the exercise of the elective franchise, and reducing to a minimum the incentives to bribery. *Ex parte Arnold*, 128 Mo. 260, 33 L.R.A. 386, 49 Am. St. Rep. 559, 30 S. W. 768, 1036, and see cases referred to in those above cited. In no case, so far as we can discover, has the use of a voting machine been held unconstitutional. In Massachusetts the supreme court divided on the question whether a vote cast by means of such machine was a "written vote," within the language of the Constitution of that state, and three judges held that it was. Under the Constitution of Rhode Island requiring voting by ballot, it was held that a provision for voting machines was constitutional; the court saying: "The primary meaning of 'ballot,' which signified a little ball, is not the one intended, but the broader meaning which has been substituted for the word by reason of the change in the mode of voting from little balls to that of a paper vote." [*Re McCutnamany Voting Machine*, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716.] We see no merit in the contention that the provision for use of voting machines is unconstitutional, and that an election in that method would be invalid.

It is urged by counsel that the machine adopted by the board of supervisors has not been approved by the commissioners provided for in Code Supp. 1902, §§ 1137c, 1137d. But they admit that the commissioners did approve of this very machine; the real claim now made being that such approval was prior to the recent constitutional amendment providing for biennial elections, and prior to the enactment of the recent statute (Acts 31st Gen. Assem. p. 30, chap. 44) striking the circle from the Australian ballot. The biennial election amendment makes no change in the method of conducting elections, and the statute referred to does not amend or repeal the provisions as to the use of voting machines. We see no reason for saying that a vote cast by means of an authorized machine will not be as valid and effectual as one cast by Australian ballot in accordance with the latest statute on the subject.

It is claimed that the machine adopted has not sufficient capacity for the number

of candidates to be voted for in 1908, when presidential electors must be chosen; but this suit relates to the election of 1906, and the lower court was not called upon to determine the sufficiency of the machine for 1908. So far as the validity of the order preventing the use of the machine at the coming election is involved, it is wholly unnecessary to discuss the validity of the contract between the county and the voting machine company. That is left for determination in the lower court. The use of the machine under the adoption thereof by the board of supervisors for trial (the validity of which is not questioned) cannot possibly fasten upon the county any contract which the board of supervisors had no authority to make, or did not in fact make.

In conclusion, we need only reaffirm the proposition already announced, that the lower court had no power or jurisdiction to interfere with the use at the coming election in Winneshiek county of voting machines duly authorized to be used. And especially should there be no such interference where the plain purpose of the suit is not to secure a valid election, but to determine contract rights as between the county and a voting machine company, which rights can be fully adjusted in proper proceedings without prohibiting the conducting of a public election by methods authorized by law.

The part of the order of the lower court brought before us for review is therefore annulled.

LOUISIANA SUPREME COURT.

ARTHUR A. SPERIER, Individually and as
Tutor, Appt.,
v.

LUTHER D. OTT.

(116 La. 1087, 41 So. 323.)

Unlawful arrest of child—recovery by parent.

1. A parent cannot recover damages for mental shock and distress on account of the unlawful arrest and prosecution of minor children on a charge of malicious mischief. **Same—injury to mother's health.**

2. Not being liable for such shock, the

Headnotes by LAND, J.

Case Note.—Parent's mental anguish as element of damages, at common law, for personal tort to minor child: — SPERIER v. OTT seems to be the first case to pass on the question of the right of a parent to recover for mental suffering caused by the false arrest of his minor child. But the analogous question, referred to in the opinion, of the right to consider the parent's mental anguish in estimating the damages recoverable by him for physical injury to a 7 L.R.A. (N.S.)

defendant is not responsible for its alleged consequences on the health of the mother. **Same—action by child.**

3. The action is maintained as to the demand of the two minors for exemplary damages for unlawful arrest, and for malicious prosecution.

(May 7, 1906.)

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division "E," in defendant's favor in an action brought to recover damages for alleged false imprisonment. Reversed in part.

The facts are stated in the opinion.

Messrs. E. Howard M'Caleb and Nicholas Eugene Humphrey, for appellant:

Fright and mental anguish are legitimate causes for damages, under the jurisprudence of this state.

Graham v. Western U. Teleg. Co. 109 La. 1069, 34 So. 91; Lindsey v. Tioga Lumber Co. 108 La. 476, 92 Am. St. Rep. 384, 32 So. 464.

Negligence which occasions fright and causes serious personal injury is actionable.

Stewart v. Arkansas Southern R. Co. 112 La. 764, 36 So. 676.

Mr. Robert O'Connor, for appellee:

Damage must be the proximate or immediate cause of injury or death.

Sherman v. Vermillion Parish, 51 La. Ann. 886, 25 So. 538; Dwyer Bros. v. Tulane Educational Fund, 47 La. Ann. 1232, 17 So. 796.

The rule giving courts and juries great discretion in allowing and assessing damages not apparent applies exclusively to cases involving breach of contract.

Graham v. Western U. Teleg. Co. 109 La. 1070, 34 So. 91; Lindsey v. Tioga Lumber Co. 108 La. 469, 92 Am. St. Rep. 384, 32 So. 464; Downing v. Morgan's L. & T. R. & S. S. Co. 104 La. 522, 29 So. 207.

Land, J., delivered the opinion of the court:

This is a suit for damages grounded on the alleged unlawful and malicious arrest and incarceration of two minor sons of the plaintiff, without a warrant, at the instance

minor child resulting from negligence has been discussed in a number of cases, all of which have denied the right. *Flemington v. Smithers*, 2 Car. & P. 292; *Bube v. Birmingham R. Light & P. Co.* 140 Ala. 276, 103 Am. St. Rep. 33, 37 So. 285; *Covington Street R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725; *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586; *Hartford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372; *Oakland R. Co.*

of the defendant. The petition alleges that the only pretext for such arrest was that said children, with a number of others, had carried away a few pieces of old and decayed boards from an abandoned shanty which was being demolished by the defendant. The petition further alleges that the plaintiff offered to restore said boards, besides paying any value that defendant might place on them, at the same time protesting that the children were innocent of the violation of any law or ordinance, and had acted under the belief that they were at liberty to take the boards, since the men, women, and children of the neighborhood were doing the same thing. The petition further alleges that on the next day the defendant made an affidavit charging said two children and others with malicious mischief, and subsequently threatened to charge them with larceny if a moneyed settlement was not made, and that finally his children were tried and acquitted.

It is alleged that the boys, aged thirteen

and eleven years respectively, were arrested by a police officer and placed in a patrol wagon in the presence of their mother, "who was so shocked and affected thereby that she became ill as the result, and suffered both bodily and mental pain and anguish from the time of said arrest until the 7th of March, following, when petitioner was compelled to remove her to the Louisiana Retreat, where she continued to suffer, and where on the 18th day of March she died of a hemorrhage of the brain after seven weeks of the most excruciating bodily pain and mental anguish."

The petition further alleges that, at the time of the arrest, the wife and mother was in perfect health, and that the shock then received by her and her subsequent suffering and death were the direct result of the unlawful and malicious acts of the defendant.

The petition alleges damages to the husband in the sum of \$10,000 and to his nine children in the sum of \$10,000, occasioned by the death of the wife and mother.

v. Fielding, 48 Pa. 320; Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; Ohio & M. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519; St. Louis Southwestern R. Co. v. Gregory (Tex. Civ. App.) 73 S. W. 28; Houston & T. C. R. Co. v. Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80.

The theory of most of these cases is that the parent's right of action for injury to his child is based on his right to the child's services and the pecuniary loss he has sustained because of the injury, and hence that his recovery must be limited to compensation for such pecuniary loss only.

Thus, in *McGarr v. National & P. Worssted Mills*, 24 R. I. 447, 60 L.R.A. 122, 96 Am. St. Rep. 749, 63 Atl. 320, where an instruction that damages may be awarded for loss of the child's society was held erroneous, the court said: "In an action of this sort the proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, less its support and maintenance, together with the necessary costs and expenses incident to the care and cure of the child. . . . But the jury are not at liberty to consider the fact that the plaintiff has been deprived of the comfort and society of the child, nor can they consider any physical or mental suffering or pain which may have been sustained by the parent by reason of the injury to the child. . . . The measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein."

In some cases, however, the courts have given as a reason for refusing damages for 7 L.R.A. (N.S.)

the parent's mental suffering that such damages are too remote and too difficult to estimate.

A distinction has sometimes been made between a wrong which results from negligence merely and one which results from a wilful act.

For instance, in *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341, where it was held that in assessing the damages in an action by a father for the abduction of a minor child the injury to his feelings as a father by losing his child might be considered, the court said that such a case was very different from a case of injury arising from an act of mere negligence.

And in *Stowe v. Heywood*, 7 Allen, 118, which was an action by a father for harboring and secreting his minor daughter and persuading her to remain absent from her home, the plaintiff was held entitled to recover damages for his mental suffering, though evidence thereof distinct from and in addition to that showing the nature and extent of the principal injury was held inadmissible.

And damages for injury to the parent's feelings were allowed in *Trimble v. Spiller*, 7 T. B. Mon. 395, 18 Am. Dec. 189, in case of an assault and battery upon a minor child. The court said there was no distinction between such a case and that of seduction. It is well settled that in case of seduction the parent's mental anguish may be an element of damages, and therefore such cases have not been included here.

But in *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633, it is held that wounded feelings of a parent cannot be taken into consideration in assessing damages for an assault and battery upon his minor son; and the court in this case distinguished an action for seduction as being *sui generis*.

The petition further alleges damages to the children as heirs of the mother, in the sum of \$5,000, for bodily pain and mental anguish by her suffered.

The petition further alleges damages to the husband in the sum of \$500 for medical and funeral expenses. The petition finally alleges that petitioner was entitled to recover the sum of \$2,500 as exemplary damages for the wanton and malicious acts of the defendant.

Plaintiff's petition was dismissed on an exception of no cause of action, and he has appealed. On the face of the petition the two minor sons of the plaintiff were the parties injured. The mother was a third person, and if she had lived could not have recovered for mental distress and shock. This very question was decided in *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586, in well-considered opinions, in which all the justices agreed that a father could not recover damages for mental shock and anguish caused by the mutilation of his minor son in a railroad accident. Slidell, Ch. J., dissenting on another point, concurred in the opinion of the court that the father could not recover damages for mental suffering, and, after stating the general rule that actions for injury to the person are personal, said: "Moreover, let us bear in mind the difficulty which would result from recognizing the mental suffering of the third party as an element of damage. Where is any but an arbitrary limit to be found in extending its benefit? Could an action for damages on that ground, if allowed to the father, be refused to the mother, the brother, the sister?"

The general jurisprudence on the same subject is thus stated: "As a general rule, the right of recovery for mental suffering resulting from bodily injuries is restricted to the person who has suffered the bodily hurt. Mental distress caused by sympathy for another's suffering is not a recoverable element of damages. A parent cannot recover for mental distress and anxiety on account of physical injury sustained by a child, nor can a parent recover damages for anxiety for the safety of his or her child placed in peril by the negligence of another. Similarly, it has been held that a husband's mental suffering caused by his wife's condition cannot be shown to increase the amount of damages." 8 Am. & Eng. Enc. Law, 2d ed. p. 664.

Hence, we are of opinion that the petition discloses no cause of action, in so far as damages are claimed for the consequences of the mental shock suffered by the mother.

The petition, however, discloses a cause of action for exemplary damages in favor

of the two minor children, who were arrested and prosecuted for malicious mischief. Under the allegations the arrest was unlawful and the prosecution was malicious.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed as to the minors, Lawrence and Alexander Sperier; and it is now ordered that, as to the demand of said minors for exemplary damages, the exception of no cause of action be overruled, and this cause be remanded for further proceedings according to law; and it is further ordered that as thus amended the judgment appealed from be affirmed; costs of appeal to be paid by the defendant and appellee.

Nicholls, J., absent.

ILLINOIS SUPREME COURT.

ISAAC WOODS, Plf. in Err.,
v.
PEOPLE OF THE STATE OF ILLINOIS.
(222 Ill. 293, 78 N. E. 607.)

Gas—larceny.

1. A gas consumer who, by false connections, carries gas consumed on his premises around the meter so that it is not registered, may be prosecuted for larceny, notwithstanding a statute providing for the punishment of persons tampering or making false connections with gas pipes so that gas might be consumed without being registered by a meter.

Same—degree of crime.

2. To determine the degree of the crime of one who, by means of false connections, conveys gas around his meter and consumes it upon his property without having it measured, the taking during each day is not to be regarded as a separate offense, but the value of the gas wrongfully consumed during the period during which the false connection is in use at one time will be considered.

Same—value of property.

3. The selling, and not the cost, price, is to be considered in determining the value of gas stolen, for the purpose of fixing the degree of the crime.

(June 14, 1906.)

Case Note.—When larceny deemed continuous:—This question may arise in those jurisdictions where the degree or manner of punishment is made to depend upon the value of the property stolen.

Thus, in *Lacey v. State*, 22 Tex. App. 657, 3 S. W. 343, it appeared that lumber of the value of \$23.50 had been taken by a series of thefts extending over several nights. It

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of grand larceny. Affirmed.

Statement by **Hand, J.:**

The plaintiff in error, with James Woods and Thomas Light, was indicted by the grand jury of Cook county for the crime of larceny. The indictment contained three counts. The first count charged the larceny of illuminating and natural gas from the People's Gaslight & Coke Company. The second count was, in substance, the same as the first, and the third count charged defendants with larceny as bailees. James Woods was not arrested, and on the trial in the criminal court of Cook county Thomas Light was acquitted and the plaintiff in

error was convicted, and, the property taken having been found by the jury to exceed \$15 in value he was sentenced to the penitentiary for an indeterminate period, and he has prosecuted a writ of error from this court to reverse said judgment.

It appears from the evidence that the plaintiff in error was a dancing master, and from March, 1903, to December, 1904, conducted a dancing academy in a building located at 3947 Michigan avenue, in the city of Chicago, which building was to be lighted and heated by gas furnished through meters located in said building under and by virtue of a contract between the plaintiff in error and said light and coke company; that at regular intervals during said period the plaintiff in error or his employees re-

was held that each night's theft constituted a complete and distinct offense, and, there being no evidence that the lumber taken during any one night was of the value of \$20 or over, the state would not be permitted to construct a felony (grand larceny) out of two or more misdemeanors (petit larceny).

In *Scarver v. State*, 53 Miss. 407, the court said: "It is true that, where there is one continuing transaction, the thief may be convicted of the final carrying away, although there may have been several distinct asportations in the view of the law; but where there are successive larcenies, each complete and distinct, and not constituting one continuous transaction, the mere retention and possession by the thief of the fruits of his petit larcenies does not make him guilty of grand larceny."

In *Cody v. State*, 31 Tex. Crim. Rep. 183, 20 S. W. 398, the court said the general rule was that property taken at one time and one place constituted one transaction and one offense; but, when several articles or things in bulk were taken by continuous acts, there being one purpose, one impulse, the act was one, without regard to time. This exception to the rule was illustrated by the case of one driving a wagon to a fence and carrying cotton by successive basketfuls from a pile in a field 30 yards off to his wagon, which he fills and drives away; and by the case of one breaking into a store at night and carrying out by successive trips as much goods as he wishes. In both such cases it was said that the amount stolen would be the amount taken in the aggregate.

In *Weaver v. Com.* 27 Ky. L. Rep. 743, 86 S. W. 551, it was held that, if the articles were taken as the result of a single purpose or impulse, though the asportation was at intervals the better to suit the thief's convenience, the degree of the offense would not be lessened by the fact that he could not or did not carry away all the articles at one load; but, if he took at one time certain articles of less aggregate value than \$20, and later determined to and did take others, also

of less value than \$20, but altogether being of the value of \$20 or more, nevertheless the two larcenies could not be added together so as to sustain the charge of grand larceny.

In *Monoughan v. People*, 24 Ill. 340, the proof showed that 4 sheep were stolen on the same night from three different parties, but no more than 2 were taken at one time and from the same owner. The court said: "It was not proper for the jury to aggregate the value of the property stolen at several times for the purpose of finding the value of the property stolen to be over \$5. A party may be guilty of several larcenies, but, if the value of the property taken at any one time amounts to less than \$5, he is not liable to be sent to the penitentiary."

In *Flynn v. State* (Tex. Crim. App.) 83 S. W. 206, it appeared that defendant, by successive orders for beer, during an hour or an hour and a half, induced the prosecutor to hand him \$80, which he appropriated. It was held that this was such a continuous act as to constitute it one theft.

In *King v. Petrie*, 1 Leach, C. C. 294, it appeared that the prosecutor's servant had at different times purloined his master's property to a very considerable amount, but it did not appear that he had ever taken to the amount of 40 shillings at any one particular time, death being the punishment for stealing this amount from a dwelling house. It was held that property stolen must not only be, in the whole, of such a value as the law requires to constitute a capital offense, but it must be stolen to that amount at one and the same time; that a number of distinct petit larcenies cannot be combined so as to constitute grand larceny; nor can any distinct number of grand larcenies be added together so as to constitute a capital offense.

But in *Rex v. Jones*, 4 Car. & P. 217, it was held that, if the servant stole the articles one at a time, no one article being of the value of £5, but carried them out of the house all together, the articles amounting in all to more than £5 value, it was a capital offense.

In *Rex v. Birdseye*, 4 Car. & P. 386, it ap-

moved the meters, and by rubber hose connections caused the gas to pass from the gas-service pipes of said light and coke company in said building direct to the gas burners in said building, where it was ignited and burned by the plaintiff in error for illuminating and heating purposes without being registered; his scheme being to remove the meters and substitute the rubber hose connections each month immediately after the meter reader had visited said premises and read the meters, and to allow said rubber hose connections to remain in place for about twenty days, or until about ten days before the reader of meters would return to said building, when he would replace the meters, and allow them to remain in position until the meter reader had read them, when he would again remove said meters, and substitute the rubber hose connections therefor; that some time prior to the 14th day of December, 1904, he substituted for the rubber hose connections a system of pipes, which were concealed in the walls of the building and which connected the gas burners within the building with the regular service pipes of said light and coke company which entered said building, and which concealed pipes were fitted with a stopcock, which, when turned, prevented the gas flowing through the meters and caused the same to flow direct to the gas burners, where it was ignited and used for illuminating and heating purposes in said building. The larceny of plaintiff in error was discovered by the inspectors of the light and coke company on the evening of December 14, 1904, at which time gas was passing through the concealed pipes in the wall to the burners in the building and being consumed in large quantities for illuminating and heating purposes without being

registered. The plaintiff in error at that time admitted gas had been passing through said concealed pipes for three or four days prior to December 14th, and the evidence shows that the plaintiff in error had used gas for lighting and heating purposes in said building, admitted through the said rubber hose and without the same passing through the meters and being registered, for stated periods of about twenty days in each month from April, 1903, to December, 1904. There is therefore no question but that the plaintiff in error was properly convicted, if the taking of gas in the manner above described constitutes the crime of larceny, and no reversible error was committed on the trial.

Messrs. John E. W. Wayman and Elijah N. Zoline for plaintiff in error.

Mr. Frank Crowe, with Messrs. William H. Stead, Attorney General, and John J. Healy, for defendant in error:

The stealing of gas from day to day, or from month to month and during a certain portion of each succeeding month, constitutes one continuous act of larceny, and the amounts stolen during the whole period of time of such continuous taking may be added together in fixing the value of the total amount taken.

Queen v. Firth, L. R. 1 C. C. 172, 11 Cox, C. C. 234; Reg. v. White, 6 Cox, C. C. 213; Ferens v. O'Brien, 15 Cox, C. C. 332; State v. Wellman, 34 Minn. 221, 25 N. W. 395; State v. Martin, 82 N. C. 672; Com. v. Shaw, 4 Allen, 308, 81 Am. Dec. 706; Reg. v. Bleasdale, 2 Car. & K. 765.

The statute of frauds against a gas company (1 Starr & C. Anno. Stat. § 234, p. 1288) does not take the act of larceny of gas out of the operation of the general law,

peared that the prisoner, having taken the first article, returned in about two minutes and took the second, and then returned in half an hour and took the third. It was held that the taking of the first and second articles was one continuing transaction, but that half an hour was too long a period to admit of that construction, and the taking of the third article was, therefore, a distinct offense.

Queen v. Firth and Reg. v. Bleasdale, cases in point, are sufficiently set out in **WOODS v. PEOPLE**.

It is obvious that the question here discussed may also be raised by plea of former acquittal or conviction when defendant is arraigned under another indictment for the larceny of goods other than those named in the first indictment and not taken at the precise time.

In Hudson v. State, 9 Tex. App. 151, 35 Am. Rep. 732, the question was thus raised, and it was held that, when various articles

are stolen at the same time and place, the transaction is not divisible, but is one transaction; and that a prosecution for the theft of a portion of the articles so taken would bar a prosecution for the theft of another portion of the same articles whether the property belonged to or was in the possession of the same person or different persons. But the court said: "If a thief should enter the room of one lodger at a hotel, and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts, and each might be prosecuted separately, and a conviction or an acquittal for the one would be no bar to the prosecution for the other."

In Weaver v. Com. supra, it was held that whether the offense was one, or whether it was a series of offenses, must be determined by the nature of the transaction; and this question should be submitted to the jury.

and does not preclude a prosecution and conviction for stealing gas.

Reg. v. Firth, 11 Cox, C. C. 234; Reg. v. White and Ferens v. O'Brien, supra.

The uniform selling price of gas in supply of a general demand is the market value; and in fixing the value the material question is its selling price to the consumers in the district where it is supplied.

State v. Hathaway, 100 Iowa, 225, 69 N. W. 449; *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40; 1 Wigmore, Ev. § 463; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 673, 46 L. ed. 382, 22 Sup. Ct. Rep. 240; *Searle v. Lackawanna & B. R. Co.* 33 Pa. 63; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. 55; *Watts v. Sawyer*, 55 N. H. 38; *Carr v. Moore*, 41 N. H. 133; *Kountz v. Fitzpatrick*, 72 Pa. 386, 13 Am. Rep. 687.

Hand, J., delivered the opinion of the court:

The first contention made by plaintiff in error is that the offense made out against him by the evidence falls within the special statutory crime created by § 117 of the Criminal Code (1 Starr & C. Anno. Stat. 2d ed. ¶ 234, chap. 38, p. 1288), and not under § 167 of the Criminal Code (Starr & C. Anno. Stat. 2d ed. ¶ 305, chap. 38, p. 1316), which defines the crime of larceny; and that he should have been prosecuted for a violation of said § 117, and not for the crime of larceny. We do not agree with such contention. The law is well settled that gas used for illuminating and heating purposes may be the subject of larceny. *Com. v. Shaw*, 4 Allen, 308, 81 Am. Dec. 706; *State v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Reg. v. White*, 6 Cox, C. C. 213. In the *Shaw Case* it was said (page 309, 4 Allen, page 706, 81 Am. Dec.): "There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes which belonged to them, and that the defendant severed a portion of that which was in a pipe of the company by taking it into her house and there consuming it. All this, being proved to have been done by her secretly and with an intent to deprive the company of their property and to

appropriate it to her own use, clearly constituted the crime of larceny."

Section 117 of the statute above referred to does not undertake to punish a person who unlawfully abstracts gas from the pipes of a gas company; but that section of the statute was passed with a view to protect gas, water, or electric meters from being tampered with or false connections being made with gas or water pipes or electrical conductors, so that gas, water, or electricity might be consumed or utilized without passing through or being registered by a meter. The crime of larceny and the crime created by that section of the statute are therefore entirely separate and distinct offenses, and the doctrine announced in *Stoker v. People*, 114 Ill. 320, 2 N. E. 55, and kindred cases relied upon by plaintiff in error has no application to the case at bar. The plaintiff in error might have been guilty of a violation of said § 117 without obtaining any gas from said light and coke company. The two offenses are not the same, and the evidence which would support a conviction for a violation of said § 117 of the statute would not necessarily even tend to show the plaintiff in error guilty of larceny. The trial court did not, therefore, err in holding that the plaintiff in error was not entitled to his discharge on the ground that he was being prosecuted for the wrong offense.

It is next contended that, conceding the plaintiff in error was guilty of larceny, the evidence does not show him to be guilty of grand larceny, as it is said there is no evidence in the record that the value of the gas converted by him to his own use at any one time exceeded in value the sum of \$15. The correctness of this contention depends upon whether the evidence shows the plaintiff in error to have been guilty of a continuing offense. If the gas abstracted on each day is a single and complete offense, then the contention of the plaintiff in error would be correct, as the evidence failed to show that more than \$15 worth of gas was consumed at 3947 Michigan avenue during any one day while the plaintiff in error was in possession of said premises. On the contrary, however, if it be the law that all the gas which was consumed by the plaintiff in error during any one period while the service pipes of said light and coke company were connected with the burners in said building by said rubber hose or the concealed pipes should be treated as one continuous taking, then clearly the evidence shows the plaintiff in error to have been guilty of grand larceny. In 2 Bishop on Criminal Law, 7th ed. p. 799, it is said: "Illuminating gas may be the subject of larceny; and the asportation is sufficient where the prisoner,

receiving gas of a gas company, diverts some of it to his burners without its passing the meter to be measured, the means employed being to use a pipe running directly from the entrance to the exit pipe. While the pipe remains thus connected there is held to be one continuous taking."

The above statement of the law is based mainly upon *Queen v. Firth*, L. R. 1 C. C. 172, which was an indictment for larceny for abstracting gas from a gas main by means of a pipe which drew off the gas from the main without allowing it to pass through the meter. The prisoner had for several years supplied a portion of his manufactory with gas which was thus abstracted, and it appeared the gas obtained was burned during the day at a large number of burners and was turned off at night. It was ruled there was but one taking, and therefore but one offense. In support of that conclusion the learned judge who delivered the opinion referred to *Reg. v. Bleasdale*, 2 Car. & K. 765, as a clear authority on the point, in which case the prisoner was indicted for stealing coal from the mines of a number of different landowners. The taking of the coal had continued for a number of years, and all the coal was taken through one shaft, and it was objected that there were a number of different takings and that the charge should be restricted to one special act. Erle, J., held that the taking was one continuous act. Also *Queen v. Shepherd*, L. R. 1 C. C. 118, was referred to, where the question was whether damage done by the prisoner to a number of trees should be considered as one single act. The question was left to the jury, who found the act was continuous. The prisoner was convicted and the conviction was affirmed. The writer of the opinion further illustrated his view that the taking was a continuous one, by the following illustrations: He said: "Take the case of a granary at a railway station, and a man bringing two wagons close to the granary and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. Another case might be suggested of a man at work in a house, stealing, on different days, out of different rooms, and taking one article out of one room and another out of another at intervals of a quarter of an hour or an hour, or longer, all during the same job of work. I should rather suppose that this would be one continuous act and might be included in one indictment."

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The trial court in this case instructed the jury "that, if they believe from the evidence beyond a reasonable doubt, that the defendants, or either of them, are guilty of stealing gas as charged, and that they, or either of them, had been stealing gas for any number of days continuously prior to the 14th day of December, 1904, in fixing the value of the property stolen you may add together the various values of the amounts of gas stolen from day to day during the time preceding the discovery of the false connections, if any, on the 14th day of December, that such takings from day to day were continued. That is, you may judge, from all the surrounding facts and circumstances as shown by the evidence, how long the said gas, if any, had been unlawfully taken through said false connections prior to the 14th day of December continuously, and you may add together the total sum of the various amounts taken on the different days continuously before the said 14th day of December."

This instruction left the question of whether the taking was continuous, and from day to day, to the jury, and authorized them, in fixing the value of the stolen property, in case they found the taking was continuous and from day to day, to add together the various amounts taken on the different days continuously before the 14th day of December, under which instruction the jury found the plaintiff in error had continuously taken gas to an amount in value in excess of \$15. We are of the opinion the findings of the jury were amply supported by the evidence, and that they were not misdirected as to the law by the court.

It is finally contended that the court erred in directing the jury that in fixing the value of the gas stolen, if any, they should be guided by the selling price of the gas in question to consumers in the district in which the gas was abstracted, and not by the cost value of the material from which the gas was made. We are of the opinion the court did not err in so instructing the jury. The ordinary test of the value of the property is the price it will command in the market if offered for sale, which in this case was the selling price of gas to consumers in the vicinity where the plaintiff in error wrongfully converted the gas of the light and coke company to his own use.

Finding no reversible error in this record, the judgment of the Criminal Court of Cook County will be affirmed.

Petition for rehearing denied October 10, 1906.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CLARENCE F. FRENCH
v.

RICHARD A. JONES.

(191 Mass. 522, 78 N. E. 118.)

Street railway—sale—right of purchaser.

1. That a statute providing for receiver's sale of the property of a street railroad company contains provisions contemplating the continued operation of the road by the purchaser does not prevent a purchaser from becoming the absolute owner of the property, and therefore entitled to remove the tracks from the street.

Same—duty to continue operation.

2. No duty to continue the operation

of a street railroad purchased at receiver's sale is imposed by a statute providing that the purchaser shall take the property subject to the same duties and liabilities of the original company, where it also provides that, upon failure for sixty days to organize a company to operate the road, the right of the company to do so shall cease.

Mandamus—street commissioner—petition to tear up street.

3. A street commissioner who has refused to permit the tearing up of a street for the purpose of removing the rails of a street-railway system therefrom, actuated merely by the hope that someone will operate the road, without considering the only questions within his power, as to the interference of the tearing up of the street with public travel and its effect upon the pavement, may be compelled by mandamus to hear and determine such questions.

Case Note.—Character and extent of relief by mandamus against an officer vested with discretion who has rendered a decision upon a ground not within his discretion:

—The mere circumstances that an officer vested with discretion has rendered a decision adverse to the relator upon a ground, or for a reason, not within the domain of his discretion, furnishes no exception to the general rule that mandamus will not lie to interfere or control the discretion of a public officer. It does not necessarily follow, however, that a writ may not issue in such a case commanding a decision in favor of the relator. When, as in *FRENCH v. JONES*, the original decision, though formally based upon a ground beyond the officer's discretion, does not show that the discretion vested in him was in fact exercised in favor of the relator and that but for the officer's misapprehension his decision would have been in the relator's favor, the writ is undoubtedly to be confined, as it was in that case, to a command to act with an added direction not to permit the ground upon which the original decision was rendered to influence the new decision. In most of the cases of this kind the writ does not even include an express direction to this effect, though it is, of course, clearly implied.

Thus, in *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321, the writ was allowed to require a circuit-court clerk to consider and pass upon the sufficiency of an attachment bond, but was denied to command him to approve the bond, though it appeared that he admitted the sufficiency of the bond in all other respects, but declined to approve it solely because it was not signed by a solvent resident of the county, residence within the county not being by law required of sureties on such bonds. The court said that, if the clerk refused to consider the sufficiency of a bond tendered for his approval, either for no reason, or for an assigned insufficient reason, mandamus would lie, "not to compel him to approve the bonds; that is a matter

of his own enlightened judgment. It will lie to compel him to consider and pronounce on the sufficiency of the bond. This involves an inquiry into its form . . . and whether the sureties tendered are sufficient. This is a duty cast on him which he alone can perform, and suitors who may be required to give such bonds have the clear legal right to demand its exercise."

So, in *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749, mandamus was allowed to compel a town board to assemble and audit the account of the commissioner of highways, which it had refused to audit upon the ground that no authority had been given that officer to incur such account, a conclusion which the court held to be erroneous. In this case the trial court had directed that the writ should command the board to "audit and allow the claim of the relator," but the appellate division modified this order by striking out the words "and allow," and by inserting in the place thereof "on the merits." Such an order, of course, necessarily implied that the board should disregard the erroneous ground of their first decision, and was also equivalent to commanding them to exercise a discretion, and refusing to permit them to allow the claim.

Again, in *People ex rel. McKown v. Green*, 50 How. Pr. 500, the court granted a peremptory writ to compel a city comptroller to pass upon the sufficiency of a bond with sureties, given by a contractor for the performance of a contract to do certain public work for the city, where that officer had refused to approve the same, not because it was not in proper form, or the sureties were insufficient, but on the ground that there was a deficiency in the assessed value of the property along the line of the proposed work; but refused "to compel him to determine the question of sufficiency in a particular way; otherwise the judgment of the court would be substituted for that of the comptroller."

But the Wisconsin court has declined to

Street—permit to tear up—refusal.

4. A street commissioner cannot refuse to permit the tearing up of a street to remove rails therefrom merely because he hopes that someone may be found to continue the operation of the railway.

Same—mandamus to compel issuance of permit.

5. One who has purchased the rails of a street railway imbedded in the street, knowing that, under the municipal ordinance, he cannot remove them without authority from the street superintendent, cannot compel the issuance of such permit by mandamus, since the officer has a discretionary power to issue it or not according to its effect upon the interests of the public in the street.

(May 16, 1906.)

interfere, even to this extent, where relief has been sought by mandamus against a public officer clothed with discretion. In *State ex rel. Comstock v. Joint School Dist. No. 1*, 65 Wis. 631, 56 Am. Rep. 653, 27 N. W. 829, the writ was refused to require the board of a school district to admit the child of a nonresident to its public school, where the board refused to do so unless the relator should first pay a tuition fee, which he declined to do. The court said: "Because it is so absolutely in the discretion of the respondent school district to refuse the admission of appellant's son to the privileges of its school, the writ of mandamus cannot properly go to compel it to admit him; and it is quite immaterial if the district has refused to admit him on untenable grounds. The absolute power to deny him admission, without assigning any reason therefor, still remains to the district. Were this court to adjudge that the district cannot lawfully exact tuition fees as a condition of admitting appellant's son to its school, still it could not properly send the writ of mandamus to the district, ordering it to do so, for the writ might be defeated by an unconditional refusal of the district to admit him; or it might admit him, and immediately thereafter expel him. If the district has no power to charge tuition fees to nonresident scholars, the only mandate the court could consistently send would be that, if the district should, in the exercise of its discretion, admit the scholar, it should do so without requiring him to pay tuition fees. It is scarcely necessary to say that the writ of mandamus performs no such office, and cannot properly be issued in any such case. The books abound with cases which assert and enforce the rule that mandamus will not lie to control the exercise of discretion or official judgment."

Only one case can be found in which a writ was granted to compel an officer clothed with discretion to render a decision in the relator's favor, upon the ground that the former had decided against the latter 7 L.R.A.(N.S.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of mandamus to compel the superintendent of the streets of Waltham to issue a permit to petitioner to tear up the surface of a street to remove rails therefrom. Granted.

The fact are stated in the opinion.

Messrs. Powers & Hall, for petitioner:

Rails laid in the streets are personal property, which, under proper circumstances, the owner may remove.

Lorain Steel Co. v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646; *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 397, 65 N. E. 835; *State ex rel. Little v. Dodge City, M. & T. R. Co.* 53 Kan. 329, 24 L.R.A. 564, 36 Pac. 755; *Jersey City & B. R. Co. v. Jersey City*

for a reason beyond the domain of his discretion, in which it did not appear that the officer had exercised his discretion and would have rendered a decision in the relator's favor but for his consideration of the matter beyond the scope of his discretion. In *State ex rel. Dalrymple v. Stockwell*, 7 Kan. 103, a district-court clerk was compelled to approve the bond filed by an elector of the county for the purpose of contesting the election relocating the county seat, it appearing that the clerk had refused to approve the bond because "not made out in compliance with the statutes relating to appeal in contest cases," although it did not appear that the sufficiency of the sureties was admitted by the clerk, and the court itself was compelled to take testimony upon that question before satisfying itself of their sufficiency. This cannot be characterized by any other name than a usurpation of the power lodged with the clerk to pass upon the sufficiency of such bonds. It is true that the clerk rendered a decision against the relator upon a ground not within the scope of his discretion; but, nothing more appearing, *non constat* that if he had confined himself within the legitimate field of his decision, he would have decided in relator's favor.

As before stated, it does not necessarily follow that, where an officer clothed with discretion has made a decision based upon an erroneous ground, he will not be compelled to render a decision in favor of the relator. And those decisions which grant such relief against such officer might at first glance seem to be opposed to the principle recognized in *FRENCH v. JONES*, and to support the relator's contention in that case, that the officer should be required to render a decision in his favor because he had given an improper reason for his previous decision. But a closer analysis of these cases will make it clear that none of the courts deny the efficacy of the rule that the discretion of a public officer cannot be controlled by mandamus; though they evident-

& H. Horse R. Co. 20 N. J. Eq. 61; Citizens' Coach Co. v. Camden Horse R. Co. 33 N. J. Eq. 267, 36 Am. Rep. 542; Brooklyn C. R. Co. v. Brooklyn City R. Co. 32 Barb. 358; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961.

The physical property of such company may be taken on execution whenever its use for corporate purposes has been abandoned or the corporation has ceased to exercise its franchise.

Freeman, Executions, 3d ed. §§ 126a, 179; Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271; Benedict v. Heineberg, 43 Vt. 231.

The respondent has no discretion absolutely to refuse the permit.

A writ of mandamus may be granted to

compel the issuing of a license for opening the streets.

Com. ex rel. Bell Teleph. Co. v. Warwick, 185 Pa. 623, 40 Atl. 93; State ex rel. National Subway Co. v. St. Louis, 145 Mo. 551, 42 L.R.A. 113, 46 S. W. 981; State ex rel. Bell Teleph. Co. v. Flad, 23 Mo. App. 185; *Pereira v. Wallace*, 129 Cal. 397, 62 Pac. 61; State ex rel. Baltimore, C. & P. B. R. Co. v. Latrobe, 81 Md. 222, 31 Atl. 788; *Wilmington v. Addicks* (Del. Ch.) 47 Atl. 366; *People ex rel. O'Brien v. Keating*, 55 App. Div. 555, 67 N. Y. Supp. 413; *People ex rel. Ziegler v. Collis*, 17 App. Div. 448, 45 N. Y. Supp. 282; *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505; *New York ex rel. New York Electric Lines v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880.

ly differ somewhat from some of the cases just reviewed in their conception of what constitutes a ministerial act. In these decisions the relief is granted, not because the circumstances furnish an exception to the general rule, but because the officer who refuses to act has, in fact, not only exercised and exhausted his discretion, but has decided all questions properly within its scope in favor of the relator, and bases his refusal entirely upon some matter which should not have been considered by him at all; and that therefore, in view of his decision upon those matters which he was right to take into account, there remains to him but a mere ministerial duty to do that which his own judgment has shown him to be his next duty. In short, these cases "only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion." *State ex rel. Moody v. Barnes*, 25 Fla. 298, 23 Am. St. Rep. 516, 5 So. 722.

Thus, in *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167, mandamus was awarded commanding the Secretary of the Interior to issue a patent for land claimed by a pre-emptor, where it appeared that all the proceedings had been gone through, the right of the applicant affirmed, and the patent fully executed and recorded, but its delivery was refused because it had been discovered that the land conveyed by the patent belonged to a town site. The court reasoned that this was an insufficient ground for refusing to deliver the patent, and that the Secretary of the Interior was charged with a mere ministerial duty to deliver the patent.

And in *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25, mandamus was granted to compel a commissioner of patents to issue a patent, where it appeared that the commissioner had decided in favor of the applicant's right, and had adjudged that the patent should issue, but refused the actual issuance there-

of because an appeal was taken to the Secretary of the Interior, who reversed the commissioner's decision, which officer the court held had no jurisdiction in the matter. The court therefore directed the patent to issue in accordance with the commissioner's decision, and held the mere issue of the patent to be a ministerial matter only, since all deliberation had ceased, the right of the applicant had been adjudged, and there was nothing to be done but to deliver the patent. The court said: The commissioner of patents "had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature, and to countersign it were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse."

And in *Gilchrist v. Collector*, 5 Hughes, 1, Fed. Cas. No. 5,420, it was held that mandamus would lie to compel a collector of a port, to whose absolute discretion the granting of clearances to vessels was left by act of Congress, to grant a clearance, where he refused to do so solely because so instructed by the Secretary of the Treasury, and he himself admitted that, if he had had no other rule of conduct than the act itself, he would have cleared the vessel.

So, in *Thomas v. Armstrong*, 7 Cal. 286, a peremptory writ of mandamus was allowed against a board of supervisors to compel them to renew a ferry license, where it appeared that by statute everyone to whom a license to keep a ferry had been granted, and who had kept the same in accordance with law, was entitled to have his license renewed; that the plaintiff, who had been operating a ferry, applied to the supervisors for the renewal of his license, and made the necessary proof that he conducted the ferry according to law; and that the supervisors

The respondent's refusal was absolute, and was not based on the failure to observe the required conditions. Under those circumstances, the existence of such a condition will not prevent the granting of a writ of mandamus commanding the respondent to act on the fulfilment of the condition.

Nourse v. Merriam, 8 Cush. 11; *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387; *People ex rel. Osterhout v. Perry*, 13 Barb. 206; *High*, Extr. Legal Rem. 2d ed. § 88.

The discretion of a public officer is ordinarily not to be exercised arbitrarily or capriciously, but reasonably and in good faith; and when these limits are exceeded the courts may interfere.

Virginia v. Rives (Ex parte Virginia) 100 U. S. 313, 25 L. ed. 667; *Zanone v. Mound*

City, 103 Ill. 552; *Re Prickett*, 20 N. J. L. 134; *State ex rel. Moody v. Barnes*, 25 Fla. 298, 23 Am. St. Rep. 516, 5 So. 722; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 226; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 338; *McCarthy v. Street Comrs.* 188 Mass. 338, 74 N. E. 659; *Com. v. Hampden County Justices*, 2 Pick. 414.

Where the duty of the officer is to receive evidence and render a decision thereon, and he erroneously refuses to do so on some ground not within his discretion, the writ will direct him to consider the evidence and render some decision.

Dodge v. Essex County, 3 Met. 380; *Nourse v. Merriam*, supra; *Osborn v. Lenox*, 2 Allen, 207; *People ex rel. Johnson v. Delaware County*, 45 N. Y. 196; *People ex rel.*

refused his application upon the sole ground that his franchise had been sold on execution. To quote from the opinion: "If it were a case in which there was any doubt, and the supervisors had exercised their discretion, and had determined on testimony that the ferry had not been properly kept, there would be no authority to interfere with their determination; but when they act under a mistake of law their orders may be reached and the error corrected by mandamus."

And in *Daniels v. Miller*, 8 Colo. 542, 9 Pac. 18, the writ was issued to a clerk of court requiring him to approve an appeal bond, where he admitted that the bond was good and sufficient, but based his refusal to approve it upon a ruling of the trial court that the order appealed from was not appealable.

So, in *Illinois State Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201, mandamus issued to the Illinois state board of dental examiners commanding them to issue to the relator, without examination, a license to practise dentistry, though by law such examiners were required to issue licenses without examination only to regular graduates of reputable dental colleges; where it appeared that to an inquiry by the relator why no license was issued to him, the secretary of the examiners replied that the matter had been referred to the national association of dental examiners, and that no license could issue until such association had decided in regard thereto. The court said that, as the board had not refused to grant the license upon the ground that the relator's college was not reputable, but solely upon the ground that it should be referred to another organization upon whom no authority was conferred by law, it would be presumed that the members regarded that college as reputable. "They had no discretion as to any other matter than the character of the college issuing the diploma, as to its being reputable or not reputable. When that matter was decided and out of the way their judicial or discretionary power was exhausted. The duty to issue the li-

cense was then a mere ministerial one, and its performance could be enforced by mandamus."

And in *Indiana* the rule is well established that mandamus will lie to compel the approval of a bond by an officer clothed with the duty of approving the bonds of other officers, where he refuses to approve a bond with sufficient sureties for the sole reason that the officer offering the bond was not elected to the office that he claims. The court here held that these officers were mere ministerial officers, and, in respect to the approval of bonds, had no discretion other than to determine whether the security offered was sufficient. *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *Copeland v. State*, 126 Ind. 51, 25 N. E. 866. The same result was accomplished in *State ex rel. Taylor v. Warrick County*, 124 Ind. 554, 8 L.R.A. 607, 25 N. E. 10, where the refusal to approve a good and sufficient bond was based upon the ground that the officer tendering it had been elected by means of a corrupt agreement entered into by him and another officer.

To the same effect is *Harwood v. Quinby*, 44 Iowa, 385, in which mandamus issued to compel the trustees of a township to certify to the county treasurer that a railroad company had in all respects complied with the statute in relation to a certain tax voted by the township to aid in the construction of the railroad, where the reason given for the refusal to act was that certain documents, required by law to be filed with the county treasurer before the amount of the tax should be paid over, had been fraudulently obtained. The discretion of the trustees was limited to the duty of determining whether the road was completed, and whether the documents in question had been presented to the county treasurer. The court thought that the trustees were seeking to justify their action by reason of something they had no right to take into consideration, and arbitrarily refused to certify as by law required to do, which was "not judicial discretion or anything like it."

In *State ex rel. Cameron v. Shannon*, 133

First Nat. Bank v. Herkimer County, 56 Barb. 452; State ex rel. Doxtador v. Bailey, 6 Wis. 291; Keough v. Holyoke, supra; Gullick v. New, 14 Ind. 93, 77 Am. Dec. 49; Mobile Mut. Ins. Co. v. Cleveland, 76 Ala. 321; State ex rel. Rutledge v. St. Louis School Board, 131 Mo. 505, 33 S. W. 3; Virginia v. Rives (Ex parte Virginia), 100 U. S. 339, 25 L. ed. 676; Reg. v. Fawcett, 11 Cox, C. C. 305; People ex rel. Ziegler v. Collis, and People ex rel. O'Brien v. Keating, supra; Re Refusal of License, 72 N. Y. S. R. 822, 38 N. Y. Supp. 425; State ex rel. Cameron v. Shannon, 133 Mo. 139, 33 S. W. 1137; State ex rel. Johnston v. Lutz, 136 Mo. 633, 38 S. W. 323; State ex rel. Bell Teleph. Co. v. Flad, supra; Thomas v. Armstrong, 7 Cal. 286; State ex

rel. Eastman v. Warren County, 17 Ohio St. 558; Harwood v. Quinby, 44 Iowa, 385; Deehan v. Johnson, 141 Mass. 23, 6 N. E. 240. Mr. Charles E. Stearns for respondent.

Sheldon, J., delivered the opinion of the court:

The first question presented in this case is whether the petitioner has become the absolute owner of the rails and tracks laid by the street railway company and now lying on and imbedded in the surface of one of the public streets. He purchased all the property of the company at a sale properly made by duly appointed receivers of the company, and the receivers made a proper transfer to him. It is provided by Rev. Laws, chap. 112, § 12, that "a receiver of the

Mo. 139, 33 S. W. 1137, a peremptory writ was awarded to compel a city comptroller to approve the relator's bond as superintendent of waterworks, where the respondent's refusal to approve the bond was based upon the contention that the relator had not been legally appointed to such office, and that the form of the bond had not been approved by the city counselor, such approval not being made a prerequisite by law. In this case there was no claim made by the respondent that the bond was insufficient either in amount, or in sureties, or that it was not in legal form. The court said: "The bond seems to be in proper form, and the sureties entirely responsible for the amount of its penalty; and, as no sufficient reason is shown by the return why respondent should not perform an act purely ministerial and which he alone is clothed with power to perform, the demurrer must be sustained and peremptory writ awarded."

And in State ex rel. Johnston v. Lutz, 136 Mo. 633, 38 S. W. 323, mandamus issued to compel the state board of health to issue to the relator a certificate to practise medicine and surgery, which had been refused him upon the ground that the medical college from which he had received his diploma had not complied with the resolution of such board requiring medical colleges to furnish the board with a list of its matriculates and the basis of their matriculation, where it appeared that the relator had graduated before the college had received notice of such resolution. The state board of health was, by law, required to issue certificates to anyone who could furnish satisfactory proof of having received a diploma from a medical school in good standing. The court conceded that, if the certificate had been refused upon the ground that the relator's college was not of good standing, mandamus would not lie to compel the board to issue it, as that was a question within the judgment and discretion of the board to determine.

So, in State ex rel. Stokes v. Camden County, 35 N. J. L. 217, mandamus was ordered to require the board of chosen free-

holders to accept from the relator an official bond, where no objection was made to the sufficiency of the bond, to the amount of the penalty, the ability of the sureties, or any other such matter, but it was rejected solely on the ground that the relator had not been duly elected to the office which he claimed. Here the court deemed the rejection of the offered bond for this reason to be equivalent to an absolute refusal to accept any bond from the relator.

And this principle seems to have been also recognized in Re Prickett, 20 N. J. L. 134, where mandamus was refused to compel the township committee to accept the bond tendered to them by the relator as constable, upon the ground that the relator had failed to establish his election to the office by proper and sufficient proof, in view of the fact that the respondents denied the relator's election, and had refused to accept the bond for that reason. The court said that, even if there were no dispute about the relator's election, mandamus could not be granted "in the shape applied for. We never direct in what manner the discretion of an inferior tribunal shall be exercised; . . . though in a proper case we will require such tribunal to proceed to a decision; to the end that that decision may be reviewed in due course of law. Nor will I say that in a clear case of an election to office and where the constable offered the most unexceptional securities (as it is admitted was done by Prickett), but which the committee unreasonably and capriciously rejected, that this court would not issue an alternative mandamus and ultimately compel a reception of the bond."

And in People ex rel. Ziegler v. Collis, 17 App. Div. 448, 45 N. Y. Supp. 282, a peremptory writ was granted requiring the commissioner of public works to issue to the relator a permit to repair a vault under the sidewalk in front of his premises, where the permit had been refused because the applicant would not pay a fee therefor not required by law. To quote from the opinion: "The situation then was as follows: The commissioner of public works had de-

property of a street railway company may, by order of the court, sell and transfer the road and property of such company, its locations and franchises, on such terms and in such manner as the court may order. The purchasers from such receiver, and a corporation organized under the provisions of the following section, if such road has been transferred to it, shall hold and possess said road, all its rights and franchises and all property acquired in connection therewith, with the same rights and privileges and subject to the same duties and liabilities as the original street railway company; but no action shall be brought against such purchaser or such new corporation to enforce any liability incurred by said original corporation, except debts and liabilities owing from said original corporation to any city or town within which the road is operated and taxes and assessments for which said original corporation is liable under the statutes relating to street railways, which shall be assumed and paid by said new corporation. The provisions of this section shall not impair the powers of the holders of an outstanding mortgage to enforce their rights by suit or otherwise."

Section 13 of the same chapter provides that the purchasers at such a sale shall

within sixty days thereafter organize a corporation for the purpose of holding, owning, and operating the street railway purchased, and that, if they fail to organize such a corporation in the manner therein prescribed, all rights and powers to operate the road shall thereupon cease. The respondent contends that the petitioner, never having organized or intended to organize such a corporation, and never having intended in any way to operate the street railway or cause it to be operated, but having made his purchase for the purpose only of removing and selling the rails, was not such a purchaser as is contemplated by the statute, and did not acquire any right to the property. We think, however, that the title of the property sold by the receivers did pass to the petitioner. It may be granted that the sections of the statute to which we have referred contemplate the continued operation of a street railway which has been sold under the authority that they give. But no such requirement is made in terms; and the provision in § 13, that, upon failure to form a corporation to hold and operate the railway, the right and power to operate it shall cease, is far from being tantamount to a provision that the purchasers shall suffer the further penalty of being deprived of the

termined that the relator was entitled to the permit upon payment of a sum of money which the commissioner deemed right to exact. But it appears that he was without right to exact any sum. That legal question, being decided adversely to the commissioner's contention, entitled the relator to the permit upon the strength of the commissioner's decision. Whatever of discretion the commissioner had in the premises had been exercised. His decision to grant the permit had been made. He withheld it because he thought the law made it his duty to exact a fee. A mandamus proceeding, therefore, pointed the way for a speedy and effective determination of that legal question, and, because it happened to be determined adversely to the commissioner's view, it is now urged that by mandamus the court attempted to control the commissioner's discretion. Not so. The commissioner exercised such discretion as he had, and said so, and, the court having decided that the exaction of . . . [a fee] was without lawful authority, it necessarily followed that a peremptory writ should issue." But see the New York cases reviewed above.

In *Com. ex rel. Century Co. v. Philadelphia*, 176 Pa. 588, 35 Atl. 195, mandamus was allowed to compel the comptroller of the respondent city to sign warrants for the payment of a certain sum for dictionaries contracted for by the board of education, where the comptroller based his refusal upon matters without his discretion, viz., that no contract had been entered into between the

city and the relator as required by law; that the binding of the dictionaries was unsuitable for a book destined for public-school use; and that the relator was paying a very large commission to the agent who had secured the contract for it. The court said that the comptroller's "grounds of objection, set out at length in his answer, show that none of them was founded on matters within his discretion. Had any of them been valid, the court would not review his decision in regard to the facts, but, when, admitting all the facts, none of the reasons is sufficient, the courts, and not the official, must determine the rights of the parties. This is the rule even in cases of discretion vested in strictly judicial tribunals (*Johnson's License*, 156 Pa. 322, 26 Atl. 1066; *Gross's License*, 161 Pa. 344; *Gemas's License*, 169 Pa. 43, 32 Atl. 88), and *a fortiori* must it be the rule where the discretion, though ample and exclusive, is reposed in a tribunal or an official who is only quasi judicial within prescribed limits."

To the same effect is *People ex rel. Workman v. Board of Education*, 18 Mich. 400, where a writ of mandamus was allowed to compel the respondent board to admit the relator's child into a public school under their control, from which the child had been excluded because of his negro blood. The court admitted that the board was "vested with large powers to make rules and regulations respecting the schools and the attendance of pupils therein," and it was contended for the respondent that the exclusion

property which they have bought and paid for. The receivers have full power to make the sale; it is their duty to do so when ordered by the court which has appointed them; they have no right or duty to inquire into and no means of ascertaining the motives or intentions of bidders or purchasers. We are of opinion, accordingly, that the petitioner is the absolute owner of the property in question.

But his right to remove the rails and other materials which are imbedded in the surface of the public street, and for that purpose to break and dig up the street, depends upon other considerations. It has been decided by this court that these rails and materials remain personal property. *Lorain Steel Co. v. Norfolk & B. Street R. Co.* 187 Mass. 500, 73 N. E. 646. But they were laid by a street railway company in pursuance of a location granted to it and accepted by it and with the obligation to operate its road and thus to perform certain public duties; and they cannot be removed without digging up the surface of the street and making the public highway, at any rate partially and temporarily, impassable. The petitioner does not contend that he has any right to remove the rails if he or the voluntary association which he represents is

under any duty to operate this line as a street railway; and accordingly it becomes necessary to determine whether he is now under such a duty.

A street railway company, like a railroad corporation, has no power to alienate its franchise without permission of the legislature. *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700. Our earliest statute upon this subject provided that "no street railway corporation shall sell or lease its road or property unless authorized so to do by its charter or by special act of the legislature." Stat. 1864, chap. 229, § 24, p. 161. And "any alienation either in fee or for the period of its corporate existence or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and meaning of this prohibition." Gray, J., in *Richardson v. Sibley*, *ubi supra*. And subject to certain limitations not material to the decision of this case, the same prohibition has since remained in force (Pub. Stat. chap. 113, § 56; Stat. 1897, chap. 269, p. 241, Rev. Laws, chap. 112, §§ 85 et seq.), except that in 1900 power was given to the receiver of a street railway company to make such a sale of its

of the child was in exercise of this discretion. This argument was not specifically noticed by the court, and the only reference to it is found in the following language: "The application for the writ did not show affirmatively that the child possessed the necessary qualifications for admission to the school. It shows, however, that the father applied for his admission and offered to submit him to all the rules, examinations, and regulations of the board with regard thereto, and was refused because of the child's color. The board having made this the sole objection, the relator, if this fails, is presumptively entitled to the writ."

From this review of the authorities, it may be laid down as a general rule that, if the officer against whom the relief is sought is clothed with discretion in regard to the act which he has refused to perform, and of which performance is sought to be compelled, and he has failed to exercise that discretion for a reason which the court holds to be invalid because beyond the domain of the officer's discretion, a writ of mandamus will be granted to compel him to exercise his discretion in a proper and legal manner, sometimes with an express direction to disregard the improper basis of his previous decision,—a direction necessarily implied in those cases where it is not expressly included in the writ granted; but a writ will be refused to command him to do the particular act in the performance of which he is called upon to exercise such discretion,—that is, he will not be required to make a

decision in the relator's favor; but if he has exercised and has exhausted his discretion, and has thereby decided all the questions which come properly and legally within his discretion in the relator's favor, and has refused to perform the act for a reason neither legally nor properly within the scope of his discretion, the writ will lie to compel him to do the specific act which his own judgment has shown him he should do, upon the ground that the act remaining to be performed by him is a mere ministerial duty.

It is apparent that this note is confined to those cases where it is sought to have a writ of mandamus issued against an officer clothed with discretion, commanding him to make a decision in the relator's favor, upon the ground that his decision against the relator was based upon a reason beyond the domain of his discretion. A different question is, of course, presented where the officer against whom the relief is sought offers no reason for his nonperformance other than that, in regard to the matter in controversy, he is clothed with discretionary power, with which, for that reason, it is claimed that the court cannot interfere. Nor are those cases included where relief by mandamus is sought from an abuse of discretion, as distinguished from a case in which the officer's decision rested upon a ground entirely outside the domain of his discretion.

road, property, locations, and franchises as is here in question. Stat. 1900, chap. 381, p. 322, Rev. Laws, chap. 112, §§ 12-14. The petitioner's rights accordingly depend upon the provisions of these sections.

The respondent contends that as it is expressly provided by § 12 that the purchasers at such a sale "shall hold and possess such road, all its rights and franchises, and all property acquired in connection therewith, with the same rights and privileges and subject to the same duties and liabilities as the original street railway company;" and by § 13 that they shall within a limited time organize a corporation for the purpose of holding, owning, and operating the street railway,—they are under the same obligation to operate the railway and to carry passengers as rested upon the original company; and that this obligation can be terminated only by an order of the board of aldermen or selectmen ordering the street to be cleared of the tracks under Rev. Laws, chap. 112, § 36, or revoking the location under Rev. Laws, chap. 112, § 32. *Springfield v. Springfield Street R. Co.* 182 Mass. 41, 48, 64 N. E. 577. But under the last clause of § 13, *ubi supra*, the petitioner has now no right or power to operate a street railway over these tracks; and we cannot construe the statute as continuing the existence of this duty after its performance has been forbidden by the very terms of the statute. The language of these sections is indeed mandatory; but, looking at the object to be attained, the realization of all the property of an insolvent corporation for the payment of its debts, considering the fact that the penalty imposed for the failure of the purchasers to organize a corporation and operate the railway is merely the loss of the right and power to carry on such operation, and the practical impossibility of continuing to operate a railway whose gross receipts are insufficient to meet its operating expenses, we are of opinion that the petitioner is not now under any duty to use these tracks for the operation of a street railway.

We have, then, the case of an owner of personal property which is so imbedded in the surface of a public way that it cannot be removed without breaking and digging up the surface. This way is situated in Waltham; and the ordinances of that city provide that "no person, unless authorized by law, shall break or dig up any part of any street, or erect thereon any staging for building, place thereon any lumber, brick, or other building materials, without a written license from the superintendent of streets. Any person intending to erect or repair any building upon land abutting up-

on a street shall give notice to the superintendent of streets, who may, at the owner's request, set apart such portion of the street as he may deem expedient for such use. Such person shall, when required by the superintendent of streets, construct and maintain a suitable sidewalk along the obstruction, and shall, before the expiration of his license, remove all rubbish and restore such street to its former condition, to the satisfaction of the superintendent of streets. Every person so licensed shall, in writing, agree to indemnify the city against all damage or loss to the city accruing from the doing of any act or thing under such license, and sureties may be required in the discretion of the superintendent of streets, any every person who, when so licensed, shall obstruct or render unsafe any public street or sidewalk, shall guard the same by a proper fence or railing and by lights during the nighttime, subject to the approval of the superintendent of streets. Such license may be revoked at any time by the superintendent of streets." Without a license granted by the superintendent of streets under this section, the petitioner cannot break or dig up any part of the way, and so cannot remove these rails. They have a value for a resale of more than \$6,000; but they are valueless to the petitioner unless they can be removed. The operation of a street railway line over these tracks never has produced, and there is no reason to believe that it ever could produce, sufficient income to pay the bare expenses of operation. The petitioner has made proper application to the respondent, who is superintendent of streets of the city of Waltham, for a license to take up these rails, and the respondent has refused and refuses to grant it. It has been found at the hearing before a single justice of this court that the respondent's refusal to issue the license did not result from the exercise of his judgment or discretion as to the proper care of the streets, or from the adverse determination of any question connected with such care or with the protection of the public travel, but from a desire to keep the rails in the streets in the hope that some person or corporation would operate street cars over them; and that the rails could have been removed and could now be removed without any permanent injury to the street or unreasonable disturbance of public travel. The petitioner asks this court to issue a mandamus commanding the respondent to grant such a license to the petitioner.

The office of superintendent of streets in Waltham is created by the charter of that city (Stat. 1893, chap. 361, § 36, p. 1002), which provides that he "shall have the pow-

ers of a road surveyor and all the powers of road commissioners not herein otherwise conferred." He is charged with the duty of seeing that the streets are kept safe and convenient for travel; and he is to exercise his best judgment and discretion for the performance of this duty. He is vested with the power of determining in any particular case whether or not a license shall be issued to authorize the digging up of any part of a street or the erection thereon of any staging for building, the placing thereon of any building materials, or the temporary use of any portion of the street for the erection or repair of buildings abutting thereon. Many occasions may arise when either public or private interests, or both, would be seriously affected by his issuing, or refusing to issue, such a license; and it is for him to consider in each case the nature and magnitude of the interests involved, the extent and probable duration of any interference with public travel, and the effect which may be produced upon the structure or paving of the way, and to determine whether or not, in view of all the circumstances, and in the proper exercise of his discretion as a public officer charged with the care of the streets, the license asked for ought to be granted. This he has not done in the case at bar, but has refused to issue the license prayed for merely from a hope and desire which ought not to have influenced his decision. He has not heard and determined the petitioner's application in the manner in which he ought to have heard and determined it; and we have no doubt that a mandamus may properly issue to compel him to do so. *Osborn v. Lenox*, 2 Allen, 207; *Dodge v. Essex County*, 3 Met. 380; *Nourse v. Merriam*, 8 Cush. 11. It was his duty to hear and consider this application without regard to other considerations than those which we have stated, and not to base his action upon any such desire as has guided him. *People ex rel. Johnson v. Delaware County*, 45 N. Y. 196; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 42 L.R.A. 113, 46 S. W. 981. He has a right to refuse to grant the license asked for if, in the proper exercise of his judgment and official discretion, he decides that it ought not to be granted; but he has not the right to refuse it merely for a reason which lies outside the scope of his duty. Similar questions have often arisen in other jurisdictions; and, so far as we are aware, this doctrine always has been maintained. *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505; *Re Refusal of License*, 72 N. Y. S. R. 822, 38 N. Y. Supp. 425; *People ex rel. First Nat. Bank v. Herkimer Coun-*

ty, 56 Barb. 452; *People ex rel. Osterhout v. Perry*, 13 Barb. 206; *State ex rel. Eastman v. Warren County*, 17 Ohio St. 558; *Zanone v. Mound City*, 103 Ill. 552; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *Harwood v. Quinby*, 44 Iowa, 385; *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321; *State ex rel. Johnston v. Lutz*, 136 Mo. 633, 38 S. W. 323; *State ex rel. Cameron v. Shannon*, 133 Mo. 139, 33 S. W. 1137; *State ex rel. Moody v. Barnes*, 25 Fla. 298, 23 Am. St. Rep. 516, 5 So. 722; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 328; *Thomas v. Armstrong*, 7 Cal. 286; *Reg. v. Fawcett*, 11 Cox, C. C. 305; *King v. Cumberland Justices*, 4 Ad. & El. 695.

But the petitioner contends that he is entitled to a mandamus commanding the respondent to issue the license prayed for. He contends that in acting upon such an application the superintendent of streets performs a purely ministerial duty, that his discretion goes no further than to see that proper indemnity is given to the city against any damage or loss, and that proper precautions are taken against accident, and to determine whether sureties shall be required from the licensee. But we have been referred to no authority in the statutes or ordinances for such a contention; and we are not aware that support can be found for it in any judicial decision. It has, indeed, been held that one who has an absolute and paramount right to do an act which necessarily involves the digging up of public streets may by mandamus compel the officers who are charged with the care of the streets to allow him to exercise that absolute right in a proper manner and with suitable safeguards. *Com. ex rel. Bell Teleph. Co. v. Warwick*, 185 Pa. 623, 40 Atl. 93; *State ex rel. National Subway Co. v. St. Louis*, supra; *State ex rel. Baltimore, C. & P. B. R. Co. v. Latrobe*, 81 Md. 222, 31 Atl. 788. In the case at bar, however, no such absolute right can be found to exist. The petitioner bought the property with full notice of its character and position, and knowing that his power to remove it depended upon his ability to obtain a license from the superintendent of streets. It well may be that this officer cannot refuse a license upon wholly immaterial reasons or for mere wantonness or caprice; and that is all that was decided in *People ex rel. O'Brien v. Keating*, 55 App. Div. 555, 67 N. Y. Supp. 413; *People ex rel. Ziegler v. Collis*, 17 App. Div. 448, 45 N. Y. Supp. 282, and *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, ubi supra. And it may be that he would not have the right to shut his eyes to proved facts, and rest a decision upon an alleged failure to find such facts, as

was held in *Stockton & V. R. Co. v. Stockton*, *ubi supra*, though there might be a practical difficulty in reviewing his action in such a case. But none of these decisions support the petitioner's present contention.

We are of opinion that the correct rule to be followed in such a case as this was declared in *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387. It appeared in that case that the petitioner had been duly elected collector of taxes for the city of Holyoke, but the board of aldermen denied his right to the office, claimed that another person had been elected, and upon that ground refused to accept the petitioner's official bond; and it was held that he was entitled to a writ of mandamus, declaring that he had been duly elected, and commanding the board of aldermen to consider the bond presented by him, and to accept or reject it as it might or might not be found to be satisfactory to them and in the form required by law; but that, although the board had put their refusal to accept his bond directly upon the ground that he had not been duly elected, yet they could not be required to accept his bond, for the reason that the bond must be in such sum as they should require and with sureties to their satisfaction. It is true that in that case the record of the board of aldermen had subsequently been amended by adding the statement that their refusal to accept the bond was for other reasons also; but the court, in its opinion (page 408 of 156 Mass., page 387 of 31 N. E.), declined to pass upon the validity of this amendment, and rested its decision upon the general ground which has been stated. The same doctrine is affirmed in the well-reasoned opinion of the court in *State ex rel. Baltimore, C. & P. B. R. Co. v. Latrobe*, 81 Md. 222, 31 Atl. 788, relied on by the petitioner, in which it is expressly declared that whenever the performance of a duty is dependent upon the exercise of judgment and discretion on the part of the person to whom its performance is assigned, that judgment and discretion will not be interfered with or controlled by the writ of mandamus, and this for the reason that there is no warrant of law justifying the substitution of the judgment of the court for the judgment and discretion of the individual exclusively intrusted with the performance of that particular duty. To the same effect are *Lunt v. Davison*, 104 Mass. 498; *Rice, B. & F. Mach. & Iron Co. v. Worcester*, 130 Mass. 575; *Deehan v. Johnson*, 141 Mass. 23, 6 N. E. 240; *Provident Sav. Life Assur. Soc. v. Cutting*, 181 Mass. 261, 92 Am. St. Rep. 415, 63 N. E. 433; *Rice v. Highway Comrs.* 13 Pick. 225; *Re Ipswich*, 24 Pick. 343; *Re 7 L.R.A. (N.S.)*

Prickett, 20 N. J. L. 134; *High, Extr. Legal Rem.* §§ 80, 88, 91, 92, 97.

It is not necessary to consider in detail the different requests for rulings which were made by the petitioner. They are all disposed of by what has been said. In our opinion the petitioner is entitled to have a writ of mandamus issue, commanding the respondent, as he is superintendent of streets of the city of Waltham, to hear and determine the petitioner's application without regard to any hope or desire that some person or corporation will operate street cars over the tracks in question, but exercising in the manner hereinbefore stated his sound discretion as an officer charged with the care of the streets, in view of the fact that the petitioner is the owner of the property in question and is not under any duty to use it for the operation of street cars.

So ordered.

MONTANA SUPREME COURT.

ED. TANNER, Respt.,
v.

J. R. BOWEN, Appt.

(— Mont. —, 85 Pac. 876.)

Assignment—satisfied claim—effect.

Payment by a livery-stable keeper, to whom a horse has been loaned for use, of a claim by the owner against himself and his bailee for the value of the horse, which was killed by the negligence of the latter, will preclude further proceedings against the bailee upon the owner's claim, although the stable keeper takes an assignment of it for the purpose of enforcing the primary liability of the bailee.

(April 16, 1906.)

Case Note.—Effect of assignment of a claim *ex delicto* to one against whom it was asserted, to enable him to maintain an action thereon against a third party: — It is apparent from the opinion in the foregoing case that the decision was based upon the ground that the plaintiff was attempting to recover by virtue of the assignment of the claim that originated in favor of the owner of the horse, and that that claim had been satisfied, and therefore could not be asserted as the basis of an action. This position is opposed to the decision in *Rindge v. Coleraine*, 11 Gray, 157, where a suit to recover for injuries to a horse, caused by a defective highway, was brought against a town by the bailee of the horse in the name of the owner, whom the bailee had paid in full with the agreement that a suit might be brought against the town in the name of the owner, but at the risk and for the ben-

APPEAL by defendant from a judgment of the District Court for Teton County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of a horse. Reversed.

The facts are stated in the opinion.

Mr. E. S. Bishop for appellant.

Holloway, J., delivered the opinion of the court:

The facts disclosed by the record are that John H. Devlin was the owner of a certain horse, and let it to the plaintiff, Tanner, who was a livery-stable keeper at Conrad, Teton county, for use in his livery business. The defendant, Bowen, hired a team and buggy from Tanner on December 1, 1904, to drive to Chouteau, and the Devlin horse and

another were furnished to him by Tanner. Bowen made the trip with the team to Chouteau, and on the following morning it was ascertained that the Devlin horse had died. Devlin asserted a claim for the value of the horse against both Tanner and Bowen, and demanded a settlement for the same from each. Upon the trial it was made to appear that Tanner admitted Devlin's claim, acknowledged his own liability, paid to Devlin the value of the horse in satisfaction of Devlin's claim, took an assignment of Devlin's cause of action as against Bowen, and as such assignee brought this action to recover from Bowen the value of the horse, alleging in his complaint that the death of the horse was caused by negligence on the part of Bowen. The answer denies any negligence

of the bailee. It was there held that such an arrangement did not bar the action. The court said: "As to this proceeding, it is objected that it operates as a payment and discharge of the defendants. But we think that it is not to be so held. Such was not the design of the parties; but, on the contrary, Baldwin [the bailee] was to have the right to prosecute a suit in the name of Rindge [the owner] to recover these damages for his own use, which is inconsistent with the idea of discharging the defendants. The only ground for giving such effect to the arrangement between Baldwin and Rindge is that it must necessarily result therefrom. The court does not adopt that view of the case."

Another case, apparently in direct conflict with *TANNER v. BOWEN*, is *Buchholz v. Damick*, 101 N. Y. Supp. 17, where the driver of an express wagon, having failed to secure a receipt from the defendant, to whom certain goods were delivered, was compelled by the express company to make good the amount which it had been obliged to pay to the consignor for the value of the goods, and took an assignment of their claim for the goods against the consignee. In an action on this assigned claim, the trial court found that the goods had been delivered, and gave the plaintiff judgment for the amount. On appeal it was contended by the defendant that, as a matter of law, the plaintiff could not recover on the assignment. The court, in holding that the action might be maintained, said: "If it be said that the assignment was made after Podworsky [the consignor] had been paid and had nothing to assign, we reply, even if that be conceded, that the plaintiff was then entitled to be subrogated to the rights of the express company and of Podworsky."

Several other cases, however, hold with *TANNER v. BOWEN*, that one against whom a claim *ex delicto* is asserted cannot, by paying the amount of the claim and taking an assignment thereof, acquire a right of action over against a third person upon the assigned claim. Thus, in *Upham v. Dickinson*, 38 Mich. 338, where one of the parties

to a joint trespass paid the claim of the injured party and took an assignment of his right of action against the other trespassers, it was held that when one joint wrongdoer satisfied the claim of the party injured, he could not take an assignment of the right of action and recover upon that assignment from his cotrespassers. And where one of a board of directors of an insurance company paid a judgment taken against the board jointly for the misappropriation of funds, in *Boyer v. Bolender*, 129 Pa. 328, 15 Am. St. Rep. 723, 18 Atl. 127, it was held that he could not enforce contribution against his fellow directors; nor would an assignment of the judgment to his son be effective for that purpose, when it appeared that the son was a mere straw man, and the real actor was the father.

The principle upon which the decision in *TANNER v. BOWEN* rests, and the distinction which serves to limit the operation of that principle between an action based upon the claim originally accruing to the owner of the property and the attempted assignment thereof, and an action based upon a claim accruing directly to the plaintiff, are well illustrated by the opinion in *Simpson v. Mercer*, and *Williams v. Mercer*, reported together in 144 Mass. 413, 11 N. E. 720. It there appeared that a constable satisfied a judgment recovered against him for conversion under a writ, and took an assignment of such judgment, together with any right of action the judgment creditor might have, against the person who placed the writ in the constable's hands and whose agent, with the permission of the constable, seized the property in question. The constable thereafter, by virtue of the assignments, brought an action against such person in the name of the judgment creditor. It was held that such action would not lie, for the reason that the claim upon which it was based was extinguished by the satisfaction of the judgment. The constable, however, having brought another action in his own name to recover from such person the sum paid by

on Bowen's part. A verdict was returned in favor of the plaintiff, a judgment entered thereon, and from the judgment and an order denying him a new trial, the defendant appealed.

The only error assigned in the brief of appellant is that the court erred in refusing to instruct the jury to return a verdict for the defendant as requested by him. In discussing his alleged error, counsel for appellant makes three distinct contentions, only one of which it will be necessary to consider. It is said that plaintiff, Tanner, having paid to Devlin the amount of Devlin's claim in satisfaction of the same, thereby discharged Bowen from liability. As to whether Tanner was in fact liable might be a question, but this liability was admitted. The payment by Tanner to Devlin and the attempted assignment of Devlin's cause of action operated as a complete satisfaction of Devlin's claim and a release of Tanner from any further liability. In *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, it is said: "The validity and effect of a release of a cause of action do not depend upon the validity of a cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not." The principle underlying this decision is that if, when the release was given, Devlin was asserting against Tanner a liability for the same act for which Tanner now asserts the liability of Bowen, the two causes of action are the same and the release of one discharges the other. The decision above is referred to with approval, and the doctrine there announced is again asserted, in *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344, and numerous other cases are cited in support of the conclusion reached. 1 Cyc. Law & Proc. p. 317.

him to satisfy the judgment against him, it was held that that action would lie, the parties not being in *pari delicto*.

Where the charter of a city provided that judgments for certain torts, taken against the city and a person or corporation jointly, should be enforced against the city only, when they could not be enforced against the other defendant, it was held, in *Campbell v. Pope*, 96 Mo. 474, 10 S. W. 187, that the fact that the city paid such a judgment and took an assignment thereof in order to keep it alive did not amount to a satisfaction so that it could not thereafter be enforced against the codefendant. This case is not necessarily opposed to the principle enunciated in *TANNER v. BOWEN*, as the court distinctly held that it was only the special provision of the charter that took the case out of the general rule.

Another case which may be noted, although not strictly in point, is *Crook v. 7 L.R.A. (N.S.)*

If Devlin, instead of merely presenting his demand against Tanner and Bowen separately, had sued each, as he might have done, and had recovered a judgment against each, and if Tanner had then paid the judgment against himself and had taken an assignment from Devlin of the judgment against Bowen, the situation would not have been different from that which is presented by this record; and under those circumstances it is quite clear that the judgment against Bowen could not have been enforced. A case directly in point is *Gross v. Pennsylvania, P. & B. R. Co.* 65 Hun, 191, 20 N. Y. Supp. 28. The plaintiff recovered separate judgments against the Pennsylvania, etc., Railroad Company, and the Central New England, etc., Railroad Company for an injury caused by the negligent acts of those companies. The New England company paid the judgment against it and took an assignment of the judgment against the Pennsylvania company. The Pennsylvania company then moved the court to cancel the judgment against it. In reversing the trial court for refusing this motion, the supreme court of New York said: "It is claimed by the assignee of the judgment that, as between it and the defendant [the Pennsylvania company], it was the negligence of the latter that caused the injury, . . . and that hence it is not precluded from recovering indemnity or contribution from its co-tortfeasor. This may well be, but has no effect on this application. On this motion, the Central New England, etc., Company has but the same rights as its assignor, the plaintiff. As the plaintiff could not collect anything from the defendant after satisfaction by the other company, his assigns cannot."

Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of

Gruell, 82 Iowa, 736, 47 N. W. 1081, where the owner of a horse which had been killed by the negligence of the hirer's servant secured a judgment against the hirer, and, in satisfaction of that judgment, took an assignment of the hirer's right to recover over from the servant "on account of damages sustained . . . by reason of said above judgment." His right to maintain an action against the servant by virtue of that assignment was denied upon the ground that it was not an assignment of the cause of action against the servant for his negligence in allowing the team to run away, but merely of the damages sustained by reason of the judgment.

Cases in which a joint tortfeasor, having paid the full claim, seeks to enforce contribution or compel indemnity from his co-tortfeasors, present a different question from that raised where an assignment of the injured party's claim is relied on.

a thing in action; the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment," etc. If, then, when Devlin assigned his pretended cause of action against Bowen to Tanner, he (Devlin) had been paid by Tanner for all damages sustained by him, under the circumstances of this case the defense of payment or satisfaction could have been interposed by Bowen; and when these facts were developed upon the trial, the defendant's request for an instruction for a verdict in his favor should have been granted. Devlin, having been paid and satisfied by Tanner, did not have any cause of action against Bowen which he could assert in court himself, and, of course, if he could not assert it, his assignee could not.

The judgment and order are reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Brantly, Ch. J., concurs.

Milburn, J., not having heard the argument, takes no part in the foregoing decision.

NEW YORK COURT OF APPEALS.

RAY JOHNSTON, Respt.,
v.

JAMES C. FARGO, President of American Express Company, Appt.

(184 N. Y. 379, 77 N. E. 388.)

Contract—exempting master from liability for negligent injury.

A contract by an employee relieving the employer from liability for injuries due

Case Note.—Validity of contract exonerating master in advance from liability for negligent injuries to servant:—There is some conflict of authority upon the point, but the weight of authority is clearly in accord with the doctrine declared and applied in *JOHNSTON v. FARGO*. There is, perhaps, an opportunity to make a distinction bearing upon this point between an injury due, as in the *JOHNSTON CASE*, to the neglect of a personal duty resting upon the master, *e. g.*, the duty to provide proper appliances or a safe place in which to work, and the duty resting primarily upon other employees for the neglect of which the master is not actually or morally responsible, but which may be legally imputed to him either because the negligent employee was not technically a fellow servant of the injured employee within the common-law fellow-servant rule, or because the fellow-servant rule has been modified by a local statute. The 7 L.R.A. (N.S.)

to the latter's negligence is against public policy and void.

(April 3, 1906.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga County Court which affirmed a judgment of the Municipal Court of Syracuse in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Willard A. Glen, for appellant:

The consideration expressed in the contract was sufficient.

Re *New York, L. & W. R. Co.* 98 N. Y. 447; *Bissell v. New York C. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369; *Cowenhoven v. Ball*, 118 N. Y. 231, 23 N. E. 470; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Re Clark*, 168 N. Y. 427, 61 N. E. 769.

There is nothing in its terms contravening public policy.

What public policy is, or should be, is not a matter of private opinion, but rather a matter for the legislature to determine.

Richardson v. Mellish, 2 Bing. 229; *Michigan C. R. Co. v. Hale*, 6 Mich. 243; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281; *Myrard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Bissell v. New York C. R. Co.* supra.

The courts of the state adopt rules so flexible that railroads and corporate carriers generally are allowed the greatest freedom of contract with shippers and passengers.

Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422, 26 N. E. 626.

only case, however, in which such a distinction is clearly suggested seems to be *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808.

The court, in that case, while intimating that it may be competent for a railroad company to exonerate itself in advance from statutory liability for the negligence of co-servants if it has exercised proper care in the selection of competent servants, held that a stipulation undertaking to exonerate a railroad company in advance from liability for breach of duty to furnish a servant a safe track, safe cars, machinery, etc., is void as against public policy. The distinction suggested is that the negligence of a fellow servant is not in fact and in morals the negligence of the master, even though by virtue of a statute it may be imputed to him.

The phraseology in the opinion in *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149, suggests

Public policy requires and encourages the making of contracts by competent parties, upon all valid and lawful considerations.

Stephens v. Southern P. Co. 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 17, 41 Pac. 783; *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201.

Authority for sustaining contracts like this is not wanting.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; *Bates v. Old Colony R. Co.* 147 Mass. 255, 17 N. E. 633; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind.

196, 40 L.R.A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Western & A. R. Co. v. Bishop*, supra; *Western & A. R. Co. v. Strong*, 52 Ga. 461; *Hendricks v. Western & A. R. Co.* 52 Ga. 467; *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322; *Alexander v. Toronto & N. R. Co.* 33 U. C. Q. B. 474, 35 U. C. Q. B. 453; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*

that possibly that court may have had the same distinction in mind. The court, in holding that a servant does not impliedly assume the risk from unknown perils due to the master's neglect in respect to machinery, said *arguendo*, that "an express contract in most solemn form by an employee exempting his master from liability for negligence in the performance of his *personal duties* toward the former has been often declared in American courts illegal, its subject-matter being considered as contrary to a sound public policy." (Italics ours.)

While, as already said, the other cases on the subject do not recognize the distinction, for the purpose of enabling the reader to examine the cases in the light of the possible distinction, the annotator has indicated the character of the negligence charged against the master as a defense to which the contract purporting to relieve the master from liability was relied upon.

In *Hissong v. Richmond & D. R. Co.* 91 Ala. 514, 8 So. 776, it was held that a stipulation in a contract of employment for service on a railroad that the regular compensation shall cover all risks, and that, if the employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized, is opposed to public policy, and does not avail to secure nonliability for an injury caused to an employee by defendant's own negligence or the misconduct of coemployees in the cases specified in the statute rendering the employer liable for the negligence of the coemployees. In this case the complaint charged that the injury was due to defects in the defendant's track and coupling appliances, and also to the negligence of coemployees; and the case therefore seems, impliedly at least, to repudiate the distinction suggested in the Arkansas case.

In *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276, also, the doctrine that a stipulation by an employer to exonerate himself from liability for injury to the servant on account of negligence is void as contrary to public policy was applied by sustaining a demurrer to a plea setting up 7 L.R.A. (N.S.)

a rule of the company to the effect that, if an employee is disabled by accident or any other cause, the right to claim compensation will not be recognized, against a complaint which alleges defects in the condition of the ways, works, machinery, or plant of the defendant, and also negligence on the part of the employees who had charge and control of the train by which the plaintiff was injured.

In *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360, where a brakeman was killed in consequence of an improper appliance on a car, the court held that it was not improper to exclude a rule of the railroad company warning employees to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required. The court said that a rule which imposes upon an employee the duty to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroads for negligence causing injury or death to their employees. If this case stood alone, it is apparent that the decision might be reconciled with the distinction suggested in the Arkansas case. That is also true of *Roesner v. Hermann*, 16 Biss. 486, 8 Fed. 782, where a servant was injured by defective and unsafe machinery, a stipulation in the contract of employment exonerating the master from liability by reason of his own negligence or that of his employees was held to be void as against public policy; and of *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114, holding that a stipulation exonerating the master from liability for nonperformance of the duty enjoined upon him by statute with reference to furnishing materials to support the roof of a mine is contrary to public policy and void. In *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105, which seems to have been an action against a railroad company to recover for the death of an employee in consequence of the negligence of other employees in charge of a locomotive in failing to give the signals required by statute when approaching a street crossing, the court

supra; *Griswold v. Illinois* C. R. Co. 90 Iowa, 265, 24 L.R.A. 647, 57 N. W. 843; *Stephens v. Southern P. Co.* *supra*.

It has been held, furthermore, where employers' liability acts have been passed, that provisions of the acts can be waived, and employers relieved from liability for negligence.

Griffiths v. Dudley, L. R. 9 Q. B. Div. 357; *Quinn v. New York, N. H. & H. R. Co.* 175 Mass. 150, 55 N. E. 891; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126.

Mr. Frederick A. Kuntzsch, with Messrs. *Kuntzsch & Miller*, for respondent:

The agreement is void as against public policy.

Purdy v. Rome, W. & O. R. Co. 126 N. Y.

209, 21 Am. St. Rep. 736, 26 N. E. 255; *Runt v. Herring*, 2 Misc. 105, 21 N. Y. Supp. 244; *Simpson v. New York Rubber Co.* 80 Hun, 415, 30 N. Y. Supp. 339; *Pratt v. Lake Shore & M. S. R. Co.* 63 Hun, 616, 18 N. Y. Supp. 682, Affirmed in 136 N. Y. 654, 32 N. E. 1016; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281; *Smith v. New York C. R. Co.* 24 N. Y. 222; *Bossout v. Rome, W. & O. R. Co.* 32 N. Y. S. R. 884, 10 N. Y. Supp. 602; *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Will v. Postal Telegr. Cable Co.* 3 App. Div. 22, 37 N. Y. Supp. 933; 20 Am. & Eng. Enc. Law, 2d ed. p. 154; *Alger & S. Employers' Liability Act*, § 5, p. 14; 1 *Shearm. & Redf. Neg.* 5th ed. ¶ 241d; 2 *Thomas, Neg.* 2d ed. pp. 1771-1773; 4 *Thomp. Neg.* 3d

stated the general principle that exemption cannot be secured by contract against liability for the consequence of gross negligence or a wilful act.

It will be observed that the court, in *Kansas P. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, in holding that a railroad company cannot contract in advance for the release of a statutory liability for injury to a servant from the negligence of a coemployee, applies the doctrine that such contracts are void as against public policy to the very case which the Arkansas court suggested might be an exception to the rule. Indeed, the Kansas court based its decision largely upon the legislative declaration of public policy by the passage of the statute modifying the common-law rule.

The doctrine of the last case was applied in *Atchison, T. & S. F. R. Co. v. Fronk* (Kan.) 87 Pac. 698, where a student brakeman was killed by the negligence of coemployees, by holding that a contract by the deceased, exempting the company from all liability for damages which he might sustain in consequence of the negligence of the company, its agents, servants, or employees, was against public policy and void. It was also held in that case that a student brakeman, who, in consideration of being permitted to ride on a railroad company's train to observe and learn the duties of a freight brakeman, agreed to perform services on its engines, trains, and cars while learning such duties, was an employee of the company for the purposes of the doctrine under discussion.

An agreement by the father of a minor child employed by a railroad company never to trouble the company if the son should be injured cannot be given the effect of exempting the company from the consequence of the negligence of an engineer operating an engine who was not a fellow servant of the son. *Texas & P. R. Co. v. Putman* (Tex. Civ. App.) 63 S. W. 910. The court said that the parent might consent or agree to the assumption of the ordinary risks and dangers of the minor's employment, but 7 L.R.A. (N.S.)

that to give effect to any act, course of conduct, or agreement on the part of the parent exempting the company from the consequence of negligence alleged and proved in the case at bar would be contrary to public policy.

In *St. Louis Southwestern R. Co. v. Arnold*, 32 Tex. Civ. App. 272, 74 S. W. 819, where a section hand was injured in consequence of the joint negligence of other employees of the railroad company and of a contractor in throwing or permitting timbers to be thrown from a moving train, the court said that a railway company cannot, by contract or otherwise, relieve itself of the duty it owes to the public and its employees to exercise ordinary care to operate its trains safely.

In *Tarbell v. Rutland R. Co.* 73 Vt. 347, 56 L.R.A. 656, 87 Am. St. Rep. 734, 51 Atl. 6, it was held that a contract by which the next of kin of one about to be employed by a railroad company released and discharged the company from all damages that might accrue to the next of kin by reason of the company's negligence was void as contrary to public policy, where the employee was killed by coming in contact with cars standing upon a side track while descending a ladder which, in violation of a statute, was placed on the side of the car. Defendant contended that, though such a contract between itself and the injured employee might not be upheld, yet the contract being with the next of kin did not contravene public policy. The court, however, said that, as the purpose of the contract was to exempt the defendant from the statutory liability for its negligence, and thus to defeat the statute, it was an immaterial fact that one of the contracting parties was the next of kin, and not the employee.

In *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467, a stipulation exonerating a railroad company from liability for injury to a brakeman from the neglect of any other employees of the company, including those superior to him in authority, as conductor or

5313, 5316; *Reno, Employers' Liability Act*, § 9, p. 18; *Pingrey, Extr. Industrial & Interstate Contr.* § 299, p. 326; *Greenhood, Pub. Pol. rule* 450, p. 528; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Kansas P. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514, 8 So. 776; *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. 782; *Mason v. Richmond & D. R. Co.* 111 N. C. 482, 18 L. R. A. 845, 32 Am. St. Rep. 814, 16 S. E. 698; *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 11 S. E. 829; *Bonner v. Bean*, 80 Tex.

152, 15 S. W. 798; *Memphis & C. R. Co. v. Jones*, 2 Head, 517; *Cook v. Western & A. R. Co.* 72 Ga. 48; *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335.

Gray, J., delivered the opinion of the court:

The plaintiff, while in the employment of the American Express Company, the defendant, sustained personal injuries, for which he has recovered this judgment in the municipal court of the city of Syracuse, which has been affirmed by the county court of Onondaga county and by the appellate division of the supreme court in the fourth de-

foreman, was held void as contrary to public policy. The injury in this case was caused by the negligence of a conductor.

In *Newport News & M. Valley Co. v. Eifert*, 15 Ky. L. Rep. 575, where the court declared that a contract whereby a railroad employee assumes all risk from accident from any cause while in the defendant's service is void as against public policy, the character of the negligence charged against the defendant does not appear.

In *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 11 S. E. 829, a stipulation exempting a railroad company in advance from liability for injuries to a member of a firm of contractors for the removal of a granite bluff on the right of way, or their employees, from the negligence of the railroad company, was held void as contrary to public policy.

The case of *International & G. N. R. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681, did not pass upon the validity in general of contracts to relieve the master from liability for future negligent injuries, but merely held that a contract by stepparents purporting to release the master from any liability for any injury the employee might sustain, and for the value of his services during the term of his minority, even if such stepparents were considered to have the rights and duties of natural parents, could operate to waive only what they were entitled to,—that is, the value of the labor and services of the minor until his majority; and did not exempt the company from responsibility to the minor for a permanent injury.

The doctrine of the foregoing cases which condemns a contract to relieve the master from liability for negligence as contrary to public policy has been applied in a number of cases in which a railroad company has sought to divest itself of a duty resting upon it by procuring a contract from the employee to assume that duty himself, or to assume the risk incident to its nonperformance. Thus, in *Bonner v. Bean*, 80 Tex. 152, 15 S. W. 798, it was held that the failure of a switchman to use a coupling knife

as he had stipulated to do would not protect the company from liability for injuries due to dangerous deadwoods if its use would not have removed the danger. The court said: "The defendants could not shield themselves directly nor indirectly from the consequences of their negligence by any form of contract."

It is not permissible for a railroad company to bind a brakeman by contract not to attempt to couple or uncouple a car, unless he knows the coupling is in a proper condition. *Missouri, K. & T. R. Co. v. Wood* (Tex. Civ. App.) 35 S. W. 879.

But a stipulation by a brakeman waiving all liability of the company for injuries resulting from disobedience of a rule requiring the use of a coupling stick is not void as contrary to public policy. *Russell v. Richmond & D. R. Co.* 47 Fed. 204. The court said that it was unnecessary to decide whether a railroad company can, in advance, contract with its employee for exemption from the consequences of its own negligence, since the stipulation in question was not of that nature.

Rules promulgated by a mining company are void as against public policy so far as they attempt to throw upon the employee the duty of ascertaining whether or not the places in which he is required to work are safe before entering them, and to relieve the master from the duty resting upon him to guard against danger from loose coal or bad roofs. *Consolidated Coal Co. v. Lundak*, 196 Ill. 594, 63 N. E. 1079; *Himrod Coal Co. v. Clark*, 197 Ill. 514, 64 N. E. 282.

So, a stipulation by a railroad employee to inform himself of obstructions near the track and use due care to avoid injury thereby is an attempt by the railroad company to divest itself of its duty to exercise care in providing a reasonably safe track, and to warn the plaintiff of the proximity of structures which it had negligently placed so near the track as to be dangerous, and as such is contrary to public policy. *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446. The assumption in the last case, that the defendant was negligent

partment. The latter court was divided in opinion, and has permitted the defendant to further appeal to this court, upon the ground that there was a question of law in the case which ought to be reviewed by us. The injuries were occasioned by the plaintiff's falling with an elevator, or lift, in the barn of the express company, while it was being used for carrying down some vehicles, and the complaint charges that it was in a defective condition and that the occurrence was due to the fault or negligence of the defendant. The evidence upon the trial was such as to raise questions of fact as to the negligence of the defendant and as to the contributory negligence of the plaintiff, and those questions were properly submitted by the trial court for the determination of the

jury. They demand no further consideration by us. The one question for discussion upon this appeal is the sufficiency of the defense made by the company upon an agreement which the plaintiff, upon entering the defendant's employment, executed and delivered to it. It was in these words: "I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employees, or otherwise, and that, in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release,

in permitting the structure so near the track, possibly distinguishes that case from *Quinn v. New York, N. H. & H. R. Co.* 175 Mass. 150, 55 N. E. 891, holding that an agreement, in a written application to a railroad corporation for employment, to make, as soon as possible, a careful examination of all things near the track so that dangers attending them may be understood, is not contrary to a statute forbidding an employer to contract with an employee for an exemption from liability for injuries, since in the latter case the defendant does not seem to have been chargeable with negligence in permitting the structure in question near the track, but merely in failing properly to warn the plaintiff of the danger.

In *Sedgwick v. Illinois C. R. Co.* 73 Iowa, 158, 34 N. W. 790, it was held that an objection to the admission in evidence of a stipulation by which a brakeman assumed all the risks incident to the disobedience of a rule forbidding any attempt to uncouple moving cars, upon the ground that it was in conflict with Iowa Code, § 1307, and in contravention of public policy, was not well taken. The decision, however, was upon the ground that, if the injury was sustained in consequence of the violation of the rule, unless there existed some necessity which imposed upon the injured employee a higher duty than that created by the rule there could be no recovery; that the fact that the injured employee contracted to hold the defendant harmless was quite immaterial; but that the defendant had the right to introduce the stipulation in evidence because it showed not only the existence of the rule and that it constituted one of the conditions of the employment, but also that its existence was known to the injured employee.

There is some express authority in favor of the validity of contracts exonerating the master in advance from liability even for injuries negligently inflicted.

Thus, in *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, it was held to be competent for a workman to contract with his employer not to claim compensation for personal injuries under the employer's liability act of 7 L.R.A. (N.S.)

1880. The purpose of this act, as stated in the opinion, was to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. This injury in this case was caused by the negligence of an inspector of machinery in the defendant's employment. The decision is put upon the broad ground that the public policy evidenced by the act does not involve a restriction of the freedom of contracting.

In *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L.R.A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464, the court states as a general rule that a contract by which an employee assumes all liability for injuries by reason of the employer's negligence or otherwise is not against public policy. The case is cited here for the sake of such statement. The ultimate question decided in the case as to the validity of stipulations the purpose of which is to exonerate a railroad company in advance from liability for injuries to an express messenger employed by the express company involves considerations foreign to the purposes of this note, and is therefore not treated herein.

In the original opinion in *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L. R. A. 586, 63 Pac. 539, it was held, in effect, that a contract made as an incident to the principal contract of employment, whereby a section hand agreed to exonerate a railroad company from responsibility for loss or injury received while riding to and from work on a free pass, was not void as against public policy. This was upon the assumption that the plaintiff was not in the employ of the company during transportation to and from work. Upon a rehearing (23 Wash. 643, 53 L.R.A. 596, 65 Pac. 543), the court modified its former opinion on this point, saying that the question whether the plaintiff and defendant could so contract was not involved; and that the point might still be considered open and undecided, for the reason that, under the pleadings, the plain-

under my hand and seal, of all claims, demands, and causes of action arising out of such injury, or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith." In submitting the case to the jury, the trial judge charged as follows with respect to this defense: "There is a clause in the contract which provides that the plaintiff shall release the defendant from any injuries which he might suffer by reason of the negligence of the defendant. I shall hold, as matter of law, that that clause in that contract is void as being without consideration and as against public policy." At the appellate division the judgment was upheld on this point upon the ground that the agreement was contrary to public policy, and therefore invalid, and Mr. Justice Hiscock, who delivered the opinion of the court, has presented the reasoning in support of that view very fully and ably.

tiff was being carried gratuitously without any consideration, and not in pursuance of any contract express or implied.

The validity of such contracts is upheld in Georgia, with the exception that they cannot operate to exonerate the master from liability for injuries due to criminal negligence. As subsequently shown, this exception is of especial importance as applied to actions against railroad companies for injuries to employees. The doctrine, with the exception thereto, was first declared in *Western & A. R. Co. v. Bishop*, 50 Ga. 465, and was applied in that case by upholding the validity of a contract stipulation by which an employee of a railroad company agreed to assume all risks connected with or incident to his position on the road, and agreed that in no case should the company be liable for any damages he might sustain by accidents or collisions on the road, or which might result from the negligence of himself or any other employee. The injury in this case resulted from defective appliances used in coupling cars. The court, in support of its decision, said: "He [the plaintiff] deliberately and for a consideration undertook what he knew to be a dangerous service, and contracted that he would not hold the company liable for the negligence of its servants, or even for the negligence of the company itself." The doctrine of this case was applied, and a contract exonerating the employer upheld, in *Western & A. R. Co. v. Strong*, 52 Ga. 461, where a railroad employee was injured in consequence of a defective appliance furnished by the company. 7 L.R.A. (N.S.)

The question is one upon which this court has not pronounced itself, and it is of considerable importance, touching, as it does, the principle of freedom of contract. In the case of *Purdy v. Rome, W. & O. R. Co.* 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255, such a contract to release the employer from liability for injury through negligence was involved; but it was held to have been void for being without the support of any consideration. It was said that no intimation was intended that it would have been valid if there had been a consideration for it, and that "it might even then be urged that public policy forbids the exaction of such a contract from its employees by railroad and other corporations; and upon that question we desire to express no opinion at the present time." In *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626, the contract for exemption from liability was between the defendant and the plaintiff's employer, an express company, under which the former sought to defeat the plaintiff's action. This question was not passed upon; nor was it in the case of *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 459,

In *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322, the doctrine of the *Bishop Case* was expressly reaffirmed, and was applied by upholding a stipulation whereby the employee agreed to relieve the employer, not a railroad company, from liability for any injury or damage he might sustain while thus employed "whether it arises from explosion, or the machinery, or accident, or the negligence or misconduct of himself or any other person employed by the company, or from any other cause." The injury in this case was sustained in consequence of the defendant's negligence in putting the plaintiff at work at defective machinery. In the official headnote to the case the court states that the acquiescence of the legislature in the principle established in the *Bishop Case* for so long a time was strong, if not decisive, evidence of the public policy of the state touching the question,—especially as legislative attention must have been called to the subject when the act of 1876 was passed, which deals with criminal negligence of railroad employees, but forbears to interfere with the prior law as to other employees, or as to employers generally. Under these circumstances, the court declined to overrule its previous decisions, but, on the contrary, affirmed the same in so far as they were unmodified by the statute referred to touching railroad employees.

In 1876, and after the decision in the *Bishop Case*, the legislature passed an act declaring that any person employed in any capacity by a railroad company, who shall be guilty of negligence in relation to the matter about which he is employed, by

63 N. E. 541, which involved the proposition of the implied assumption by the employee of the risks incident to the employment. The question of the validity of such a contract between the employer and a person in his employment, as affected by reasons of public policy, it must be conceded, is a debatable one. In support of the right to make the agreement we have respectable authority in decisions of the courts of England and of the state of Georgia. *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357; *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Western & A. R. Co. v. Strong*, 52 Ga. 461. The great weight of authority in decisions of the courts of the various states, however, sustains the view that such an agreement is contrary to public policy. *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Kansas P. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Memphis & C. R. Co. v. Jones*, 2 Head, 517; *Willis v. Grand Trunk R. Co.* 62 Me. 488; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 466, 3 Am. St. Rep. 245, 3 S. W. 808; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Maney v. Chicago, B. & Q.*

R. Co. 49 Ill. App. 105; *Newport News & M. Valley Co. v. Eifert*, 15 Ky. L. Rep. 575; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 11 S. E. 829. In the supreme court of this state we find, in addition to what has been held below in this case, a similar view taken by the general term of the second department in *Simpson v. New York Rubber Co.* 80 Hun, 415, 30 N. Y. Supp. 339. The preponderance of authority adverse to the validity of such contracts is such as greatly and properly influences our view of the question. In *Griffiths v. Dudley*, *supra*, where such an agreement was held to be quite consistent with public policy, the view of the English court, as expressed by Justice Field, was that "the interest of the employed only would be affected," and not that of "all society," and "that workmen, as a rule, were perfectly competent to make reasonable bargains for themselves." It is to be observed, however, with respect to the situation in England, that subsequently, in 1897, an act of Parliament was passed, entitled the "workingmen's compensation act" which in effect declares

which any person is injured, shall be guilty of the offense of criminal negligence, and subject to punishment. In the case of *Cook v. Western & A. R. Co.* 72 Ga. 48, which arose after the passage of that statute, the court—in consequence, as subsequently shown, of a misapprehension as to the exact scope and effect of the statute—held that a stipulation identical with that in the *Bishop Case* was invalid and inoperative in an action to recover for the death of a railroad employee caused by the negligence of a coemployee.

In *New v. Southern R. Co.* 116 Ga. 147, 59 L.R.A. 115, 42 S. E. 391, the court, following the doctrine laid down in the *Bishop Case*, upheld the validity of a contract by which a father agreed to exonerate a railroad company from any liability to him for damages or injuries that might be sustained by his minor son while in the employment of the company, and held that it prevented the father from recovering for loss of services of the son, who was killed while in the company's employ. The case was taken out of the exception to the doctrine which obtains in case of injuries due to "criminal negligence" upon the ground that the act of 1876, which declares that the negligence of railroad employees shall be criminal, expressly exempts cases in which death ensues, and applies only to cases of serious bodily injury not followed by death. The court said that a grave error was committed in making *Cook v. Western & A. R. Co.* *supra*, which was an action by a widow for the homicide of her husband, turn upon the act of 1876; and that decision was overruled. The court said that in an action like 7 L.R.A. (N.S.)

the case at bar against a railroad company for homicide, in which a contract exonerating the company from liability is set up, its efficacy should be made to depend upon whether or not the act causing the death was criminal without regard to the statute referred to.

Some of the statutes defining the master's duty and liability toward employees include an express prohibition against contracts exonerating the master from liability in the event contemplated by the statute. The constitutionality, construction, and effect of such provisions are beyond the scope of this note.

Assuming, as some of the cases above cited do, that a contract exonerating the master in advance from liability for negligent injury to the servant may be valid, the question may arise, as it did in *Griffiths v. Dudley*, *supra*, whether such a stipulation by the employee will prevent an action for his death, under Lord Campbell's act or other statutes giving a cause of action for death. That question, however, is not within the scope of this note.

Cases involving the validity of the release of an employer from liability for an injury already sustained are, of course not in point here; and the numerous class of cases involving the validity and operation of agreements by railroad employees to the effect that acceptance of benefits from a relief department, to the support of which the company contributes, shall operate to release the company from liability, are also excluded, as they present a distinct question which will be treated as the occasion arises.

the public policy of the state. By that act, in reality, though not in form, the right of the workman to contract away his right to recover compensation from his employer is nullified, inasmuch as such a contract is only valid when, as between employer and employed, there exists a general scheme for compensation which secures to the workman benefits as great as those he would derive from a proceeding under the compensation acts.

The attitude of this court, with respect to the freedom to contract for immunity from the consequences of negligence has been from an early day very firm where the contracts of common carriers are concerned, as may be seen by reference to *Kenney v. New York C. & H. R. R. Co.* supra, where the cases establishing the rule were reviewed; but to extend the application of the doctrine in such cases to the relations of the employer and the employed involves considerations so closely touching the general welfare of the community that the state must be necessarily deeply concerned. This court has not been in agreement with the Supreme Court of the United States upon the right of common carriers to contract against their negligence; but recently, in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, the doctrine of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, seems to have been somewhat departed from. As that decision touches in a degree upon the question we are considering, I shall briefly refer to it. In that case Voigt was an express messenger, and was injured as a consequence of a collision upon the railroad. The company showed, in defense of a claim for compensation, a contract made between it and the express company, relating to the latter's business, which agreed to protect it from liability to messengers by reason of accidents occurring through negligence, and a further contract between Voigt and the express company, by which he assumed the risk of all accidents from negligence, sustained by him in the course of his employment, and agreed to hold his employer harmless from any claim for personal injuries. It was held that the contract did not contravene public policy. Though the distinction was made that Voigt was not a passenger, within the meaning of the *Lockwood Case*, supra, and that his contract exonerated the railroad company from liability to him, it might, perhaps, be said that the decision affords some support, in doctrine, to the appellant's argument.

Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect or subvert the
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public interests. 1 Story, Eq. Jur. § 260n; *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 156. If it were true that the interest of the employed only would be affected by such contracts as the present one, as it was held by the English court in *Griffiths v. Dudley*, supra, it would be difficult to defend, upon sound reasoning, the denial of the right to enter into them; but that is not quite true. The theory of their invalidity is in the importance to the state that there shall be no relaxation of the rule of law which imposes the duty of care on the part of the employer towards the employed. The state is interested in the conservation of the lives and of the healthy vigor of its citizens, and, if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb. The rule of responsibility at common law is as just as it is strict, and the interest of the state in its maintenance must be assumed; for its policy has, in recent years, been evidenced in the progressive enactment of many laws which regulate the employment of children and the hours of work, and impose strict conditions with reference to the safety and healthfulness of the surroundings of the employed in the factory and in the shop. The employer and the employed, in theory, deal upon equal terms; but practically that is not always the case. The artisan or workman may be driven by need, or he may be ignorant, or of improvident character. It is therefore for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employees. That freedom of contract may be said to be affected by the denial of the right to make such agreements is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one who directly is interested in the making of such a contract, indirectly the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts.

To a certain extent, the internal activities of organized society are subject to the restraining action of the state. This is evidenced by the many laws upon the statute books, in recent years, which have been passed for the purpose of prohibiting, restricting, or regulating the conduct of a private business, either because regarded as hurtful to the health or welfare of the

community, or because deemed from its nature or magnitude affected with a public interest. It has been observed that it is still the business of the state, in modern times, to defend individuals against one another, and, though the proposition is a broad one, when considered with reference to penal legislation, and all legislation intended for the promotion of the health, welfare, and safety of the community, it is not without truth. It is evident, from the course of legislation framed for the purpose of affording greater protection to the class of the employed, that the people of this state have compelled the employer to do many things which at common law he was not under obligation to do. Such legislation may be regarded as supplementing the common-law rule of the employer's responsibility, and is illustrative of the policy of the state. Therefore it is, when an agreement is sought to be enforced which suspends the operation of the common-law rule of liability and defeats the spirit of existing laws of the state, because tending to destroy the motive of the employer to be vigilant in the performance of his duty towards his employees, that it is the duty of the court to declare it to be invalid and to refuse its enforcement.

I think that the judgment below was correct, and should be affirmed, with costs.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Vann, Willard Bartlett, and Chase, JJ., concur.

NORTH CAROLINA SUPREME COURT.

T. M. KIMBERLY et al.

v.

R. S. HOWLAND, Appt.

(Two cases.)

(— N. C. —, 55 S. E. 778.)

Blasting—evidence.

1. Evidence that one attempted to use dynamite in blasting, though inexperienced, without smothering the blasts, in consequence of which a rock was cast upon a neighboring house, is sufficient to carry to the jury the question of his negligence.

Same—proximate cause.

2. That one attempting to use dynamite in blasting without smothering the blasts cannot foresee the exact consequences of his act does not absolve him from liability for

an injury to an occupant of neighboring property, where the neighborhood is populous, and he ought, in the exercise of ordinary care, to know that he is subjecting the occupants of the dwellings in the vicinity to danger.

Negligence—fright—right of action.

3. Impairment of health, or loss of bodily power, through fright which is the natural and direct result of the negligent act of another, is sufficient to sustain an action against the wrongdoer.

Damages—injury to wife—recovery by husband.

4. A man may recover compensation from one causing negligent injuries to his wife, for the loss of society, service, aid, and comfort resulting therefrom, including, if the injury is permanent, compensation for diminished capacity to labor in the future.

(December 18, 1906.)

A PPEAL by defendant from judgments of the Superior Court for Buncombe County in plaintiffs' favor in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Brown, J.:

The plaintiffs brought two distinct actions for an injury to the *feme* plaintiff by reason of the negligence of the defendant in conducting certain blasting operations. The husband sued for the loss of his wife's services.

The two actions were consolidated and tried together upon the following issues:

(1) Was the defendant negligent as alleged?

A. Yes.

(2) If so, was the plaintiff Janie Kimberly injured thereby?

A. Yes.

(3) What damage, if any, is plaintiff Janie Kimberly entitled to recover?

A. \$3,500.

(4) What damage, if any, is plaintiff T. M. Kimberly entitled to recover?

A. \$700.

From the judgment rendered, defendant appealed.

Messrs. Merrimon & Merrimon, for appellant:

In order to warrant a recovery, the phys-

Note.—The right to recover for physical injuries resulting from fright caused by negligence is a much-discussed question, on which the decisions are in considerable conflict. Reason and justice, as well as the analogies of the law, seem to sustain the right to recover in 7 L.R.A. (N.S.)

such a case, however, where the negligence and the resulting injury are clearly proved, and nothing (other than the fright) intervenes to break the chain of causation. A full review of all the cases which have considered the question will be found in a subject note in 3 L.R.A. (N.S.) 49.

ical injury must be contemporaneous with the occasioned fright, or the fright and mental anguish occasioning the injury must have been inflicted in a spirit of wanton disregard or negligence.

13 Cyc. Law & Proc. pp. 41-43; 8 Am. & Eng. Enc. Law, 2d ed. pp. 665, 667; Nellis, Street Surface Railroads, 34; 6 Current Law, 631; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 252, 26 L. ed. 1071; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; St. Louis, I. M. & S. R. Co. v. Bragg, 60 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657; Chicago v. McLean, 133 Ill. 148, 8 L.R.A. 765, 24 N. E. 527; Lee v. Burlington, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; Cleveland, C. C. & St. L. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; Lehman v. Brooklyn City R. Co. 47 Hun, 355; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747; Smith v. Postal Teleg. Cable Co. 175 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98; Sanderson v. Northern P. R. Co. 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; Fox v. Borkey, 126 Pa. 164, 17 Atl. 604; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Linn v. Duquesne, 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; Gulf, C. & S. F. R. Co. v. Trott, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003.

Mr. Thomas A. Jones, for appellees:

One who, in blasting upon the premises, casts rock or other *débris* upon the land of another, is liable for such invasion, regardless of the degree of care or skill used in doing the work.

19 Cyc. Law & Proc. p. 7; Watson, Damages for Personal Injuries, § 4; Blackwell v. Lynchburg & D. R. Co. 111 N. C. 151, 17 L.R.A. 729, 32 Am. St. Rep. 786, 16 S. E. 12; 7 L.R.A. (N.S.)

Gates v. Latta, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173; Thomp. Neg. §§ 764, 765, 767-770.

An action for damages will lie for physical injury or disease resulting from fright or nervous shock caused by negligent acts.

Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983; Bell v. Great Northern R. Co. Ir. L. R. 26 C. L. 428; Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; 13 Case & Comment, 31.

It is not necessary that there should be contemporaneous physical injuries.

Watson, Damages for Personal Injuries, § 405; Canning v. Williamstown, 1 Cush. 451; Warren v. Boston & M. R. Co. 163 Mass. 484, 40 N. E. 895; Hatchell v. Kimbrough, 49 N. C. (4 Jones, L.) 164; 26 Am. & Eng. Enc. Law, p. 615; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88.

The wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him.

13 Cyc. Law & Proc. p. 28.

Brown, J., delivered the opinion of the court:

The defendant excepted to the issues submitted by the court, and tendered the following: (1) Were the injuries alleged in the complaint the immediate, natural, and necessary consequences of the alleged blasting? (2) Were the alleged injuries to the plaintiff such as might naturally and probably occur from the alleged negligence, and were they such as should have been in contemplation of the defendant with reasonable certainty? (3) Was the alleged physical injury the natural and proximate result of the alleged fright? The issues submitted by the court presented every phase of the case, and are such as arise upon the pleadings, and are approved by precedent as appropriate in such cases. The defendant was given the opportunity to present every defense he had and every proposition of law and fact embraced in the issues tendered by him. Not only was he given a fair opportunity to present his view of the law and facts, but the record shows that he did so present them. The issues submitted are also a sufficient basis for the judgment rendered. Wright v. Cotton, 140 N. C. 1, 52 S. E. 141; Wilson v. Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250.

The chief contention made by the learned counsel for the defendant in his argument is that in no view of the evidence can either plaintiff recover, and therefore the motion to

nonsuit should have been sustained. As the right to recover anything on the part of the husband is dependent upon the liability of the defendant to the wife, we will consider her case first.

It is contended: (1) That the evidence discloses no negligent act. (2) That the defendant's agents could not reasonably have foreseen the consequences of their acts. (3) That the injury complained of by the wife was the result of fright only, for which no recovery can be had. The plaintiff offered evidence tending to prove that defendant was blasting rock with dynamite on the outskirts of the city of Asheville about 100 yards from Charlotte street and 175 yards from plaintiffs' residence, and in close proximity to other houses. A rock from one of the blasts, weighing about 20 pounds, crashed through a portion of plaintiffs' residence. It was further in evidence that defendant's foreman was not an expert blaster and that a part of the time when the blasting was going on he was absent, and that his assistants had but little experience. It was in evidence that the blasts were fired off without being properly "smothered," and that "smothering" is a safe method usually employed in such operations, and that, had it been properly done on this occasion, the injury to plaintiffs' residence could not well have resulted. We think the evidence of negligence amply sufficient to have been submitted to the jury. *Blackwell v. Lynchburg & D. R. Co.* 111 N. C. 151, 17 L.R.A. 729, 32 Am. St. Rep. 786, 16 S. E. 12. We think, furthermore, that a man of ordinary prudence should have foreseen the probable consequences of blasting with dynamite in such a neighborhood without properly smothering the blast. Persons using such an inflammable and powerful instrumentality as dynamite are charged with knowledge of its probable consequences which they could by reasonable diligence have acquired. The defendant knew he was blasting in a populous neighborhood, and that plaintiffs' dwelling was near by. If the evidence offered by plaintiffs is to be believed, the workmen were unskilful and the blasts deficiently smothered so as to fail to properly confine their effect. It is true defendant did not know, at the time he fired the blast, that the *feme* plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwelling house and that in well-regulated families such conditions occasionally exist. While the defendant could not foresee the exact consequences of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to dan-

ger and to have taken proper precautions to guard against it. *Gates v. Latta*, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173; *Watson, Damages for Personal Injuries*, § 4; 19 Cyc. Law & Proc. p. 7, and cases cited; *Blackwell v. Lynchburg & D. R. Co.* supra. The authorities seem to agree that, if the tort is wilful, and not merely negligent, the wrongdoer is liable for such physical injuries as may proximately result whether he could have foreseen them or not. We do not base our decision upon any evidence of a wilful wrong, for there is none. The defendant was engaged in a lawful act, and, if prosecuted with due care, he would not be liable, and due care means, in a case of this sort, a high degree of care. We bear in mind the distinction between wilful wrongdoing and those consequences flowing from simple negligence, so clearly stated by Mr. Justice Walker in *Drum v. Miller*, 135 N. C. 208, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 424: "In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man, in the exercise of proper care, can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen." We therefore conclude that, while there is no evidence of a wilful wrong, the defendant should have reasonably foreseen the result of his negligence. No human being could foresee the exact form of the injury inflicted, but ordinary prudence could foresee that there was danger to the plaintiffs and their household unless the blast was securely confined.

It has been argued in this case by defendant's counsel with much earnestness and ability, backed by most respectable authority, that the *feme* plaintiff's injuries, if she sustained any, were the result of fright without any contemporaneous physical injury, and that she cannot recover for them. This brings us to the consideration of a question concerning which there is much conflict among the authorities. We will not undertake to either reconcile or review them. All the courts agree that mere fright, unaccompanied or followed by physical injury, cannot be considered as an element of damage. In a very exhaustive note by Judge Freeman to *Gulf, C. & S. F. R. Co. v. Hayter*, 77 Am. St. Rep. 860, all the authorities are collected. But, where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided. The testimony offered on behalf of the plaintiffs tends to prove that the wife was lying on her bed

heavy with child at the moment the rock crashed through the roof; that, although it did not strike her, it greatly shocked her nervous system and nearly caused a miscarriage, and that she has never recovered from the effects of it. If this testimony is believed, the injury to the wife was a physical injury resulting from shock and fright and directly traceable to it. There is much conflict of evidence, but plaintiffs' testimony tends to prove that, had not the rock crashed through the roof, she would not have endured the nervous physical pain and suffering which has followed. The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and, when "out of tune," cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter. A recent writer on the subject trenchantly says: "To deny recovery against one whose wilful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent indeed if it shall be entitled to respect." *Case & Comment*, August, 1906. A text writer of repute says: "The preferable rule on this subject is, in our opinion, that, if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries result directly from the mental disturbance, there should be a recovery for the anguish of mind and its consequent physical ills, irrespective of contemporaneous bodily hurt." *Watson, Damages for Personal Injuries*, § 405. We think the able judge who tried this case in the court below clearly stated the law, as we administer it, when he said: "While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this issue. There must be an injury, as explained to you, and this injury must have been the natural and direct result of the negligent act of the defendant and one which should have been foreseen by the defendant by the 7 L.R.A.(N.S.)

exercise of ordinary care." *Watkins v. Kaolin Mfg. Co.* 131 N. C. 537, 60 L.R.A. 617, 42 S. E. 983, and cases cited; *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034.

It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that, where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name. 15 Am. & Eng. Enc. Law, 2d ed. p. 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the court so charged the jury, and directed them to allow nothing on that account. His Honor also correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife and that the injury inflicted was of such a character as to deprive the husband of her society, services, aid, and comfort. The court further charged that, if the injuries are permanent, the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction we think is correct and supported by authority. 6 *Thomp. Neg.* §§ 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor under all the circumstances of the case.

We have carefully examined all the exceptions in the record, although we comment only on such as we think proper. The case appears to us to have been well and fairly tried, and we find no reversible error in any of the rulings or instructions of the court.

No error.

OKLAHOMA SUPREME COURT.

J. A. WILLOUGHBY, Receiver of Capitol National Bank, Plff. in Err.,
v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

(16 Okla. 546, 85 Pac. 713.)

Fidelity bond—representations—authority.
In an action upon contract, the party

seeking to recover cannot claim the benefits thereunder, and at the same time repudiate the burden. So, in an action against a surety company to recover on the bond of a defaulting bank president, the bond must be construed as a whole, and the plaintiff's right to recover must depend upon such a construction; and, where such bond is issued by the surety company and accepted by the bank, upon the faith of certain statements and representations in writing, made by the assistant cashier of the bank, relative to the conduct, duties, employment, and accounts of the defaulting bank president, and such statements so made by the said assistant cashier are, by the terms of said bond, made a part of the bond itself, the bond and statements together form the contract, and they must be construed together, and upon their joint construction, or upon

their construction as a whole, must depend the rights and liabilities of the parties thereto; and where the bond is issued by the surety company and accepted by the bank upon the faith of the statements and representations so made by the assistant cashier, the receiver of the bank, later appointed, in an action on the bond, cannot be heard to repudiate or question the authority of the assistant cashier to bind the bank by his statements and representations concerning the conduct, duties, employment, and accounts of the defaulting bank president, and at the same time be allowed to recover on the bond procured on the strength of the statements and representations so made by the said assistant cashier.

(February 15, 1906.)

Headnote by GILLETTE, J.

ERROR to the District Court for Logan County to review a judgment in defend-

Case Note.—Right of beneficiary in bond insuring fidelity of officer or employee to repudiate authority of person who made the representations in reliance upon which the bond was issued:—It would seem to be a well-established rule of law that the beneficiary of a bond guaranteeing the fidelity of an employee will be bound by any statement which induced the issuing of the bond, even if made by a third person who had no authority to make such statement for the beneficiary, if the statement induced the issuing of the bond, and is by the terms thereof made the basis of that instrument. Upon this proposition, the few authorities that can be found are in accord with *WILLOUGHBY v. FIDELITY & D. Co.*: and in the learned and well-reasoned opinion in that case nearly all of them are fully set forth. In addition to the cases there found, the two following add further support to its position.

In *Issaquah Coal Co. v. United States Fidelity & G. Co.* 61 C. C. A. 145, 126 Fed. 80, the plaintiff was held to be bound by a certificate of its auditor that the accounts of its assistant treasurer had been examined and found correct, and all moneys handled by him accounted for, which statement was made for the purpose of renewing a bond insuring the fidelity of the assistant treasurer. It appeared that the plaintiff's board of directors had, by resolution, instructed the general manager and the assistant treasurer, who with the auditor had their place of business in a different state from that in which the board met, to procure surety bonds at the expense of the company, and that they were so procured, that of the assistant treasurer being issued on a statement in the name of the company by the general manager as such. It further appeared that it was to obtain a subsequent renewal of the assistant treasurer's bond that the statement in question was made by the auditor. The court said that, while there was no evidence that the board select-

ed the surety of the assistant treasurer, or that the auditor acted in the matter with their actual knowledge or approval, or that they ever knew before the commencement of the action that the renewals had been made upon certificates signed by the auditor, yet "they must have known from the terms of the original bond that it was issued in reliance upon a statement made on behalf of their corporation to the surety company, and that, in the ordinary course, renewals must also be based upon further similar statements." The court was also of the opinion that the board, by directing the general manager and the assistant treasurer to procure bonds at the expense of the company, thereby committed to those officers the matter of the procurement of the bonds, and that the plaintiff, upon receiving the policy in question, "had notice, from the terms thereof, that in its corporate capacity it had delivered to the insurer a statement in writing relative to the duties, responsibilities, and check to be used upon its employee in said position and other matters. It thereby became chargeable with notice of everything that the statement contained. Among the other matters set forth therein, was the representation that the accounts of the secretary and assistant treasurer had . . . been audited and found correct, and that . . . he was not in default. It must have known that, in the ordinary course of business, the renewals must necessarily have been based upon similar statements made in their behalf relative to the duties, responsibilities, and check to be used upon . . . [the assistant treasurer], and the condition of his accounts. It is true that the first statement was signed by the general manager, whereas the subsequent statements were signed by the auditor. But in each instance they were signed in the name and on behalf of the corporation. Having notice that the bond was issued in the first instance upon a statement made in its behalf, it became the duty of

ant's favor in an action brought to recover the amount alleged to be due on a fidelity insurance contract. Affirmed.

The facts are stated in the opinion.

Messrs. Flynn & Ames for plaintiff in error.

Messrs. Lawrence & Huston and Dale & Bierer, for defendant in error:

Where the assured, in a policy of life insurance, warrants the truth of the answers made by him to questions in his application, compliance with such warranty is a condition of the validity of the contract of insurance.

Dwight v. Germania L. Ins. Co. 103 N. Y.

the corporation thereafter to inquire of and to know upon what statements the renewals were made."

And in Warren Deposit Bank v. Fidelity & D. Co. 116 Ky. 38, 74 S. W. 1111, the plaintiff bank was held to have assented to those conditions of the bond guaranteeing the fidelity of its cashier, which provided that the representations made by the president relative to the duties and accounts of the cashier should constitute part of the contract. In this case the statement was made on a printed form sent to the bank by the surety company and purported to be signed by the bank by its president. The court said: "While it may be true that, as a matter of law, answering questions such as those propounded to the president in this case, and making the representations therein contained, were not within either the actual or the apparent scope of the duties of that office, and that the president was not authorized expressly, either by the charter or by anything appearing upon the minutes of the proceedings of the board of directors, to make such representations on behalf of the bank, yet it does not follow from these premises that the president did not act in the bank's behalf in making them. There is no principle of the law of agency truer or more familiar than that, although an agent may act in fact without authority, express or implied, from his principal, his act may become binding upon the latter by its ratification. . . . It is not claimed, nor is it attempted to be shown, that the board of directors acted at all in that matter, so far as any proceeding by their body is concerned. The action of . . . [the president], then, was that which represented the bank in that transaction. If the bank would avail itself of the benefit of his actions, it must take them subject to his representations and statements that induced the execution of the contract by the surety. . . . If the board examined the bond at all, they are bound to have taken notice of these statements, which is enough to have reasonably put them upon inquiry as to the character of the statements therein referred to. But, whether they actually examined the bond or not, they must in all fairness and reason be held to have assented

341, 57 Am. Rep. 729, 8 N. E. 654; Kansas Mut. L. Ins. Co. v. Pinson, 94 Tex. 553, 63 S. W. 531; Price v. Phoenix Mut. L. Ins. Co. 17 Minn. 497, 10 Am. Rep. 166, Gil. 473; Hubbard v. Mutual Reserve Fund Life Assn. 40 C. C. A. 665, 100 Fed. 719; McClain v. Provident Sav. & Life Assur. Soc. 105 Fed. 834; Jeffries v. Economical L. Ins. Co. 22 Wall. 47, 22 L. ed. 833.

This rule of the law is applicable not only to life insurance, but as well to guaranty insurance.

People ex rel. Stevens v. Fidelity & C. Co. 153 Ill. 32, 26 L.R.A. 295, 38 N. E. 752; American Credit Indemnity Co. v. Carrollton

to its statements, when appellant elects to claim a recovery upon it. It manifestly would not do to impose upon one party to a contract an obligation in favor of another, which was made to depend upon a condition stated in the contract, and yet relieve the latter from the condition because he had not noticed it. Having accepted the result of its president's action in procuring the bond for it, and being required to take notice of all material statements and conditions contained in the bond, appellant is as much bound by these statements and the concurrent representations made by its president and referred to in the bond as if his action and statements had been expressly authorized by the most solemn and specific entry of record upon the minutes of the board of directors' book of proceedings."

Of course, if two or more officers or employees of the beneficiary of a fidelity bond conspire together to defraud such beneficiary, and one of them, upon a statement by the other, by which the issuing of such bond is induced, procures the bond as a means to that end, and there is no reference in the bond itself that it is based upon such statement, by which the beneficiary, upon accepting the bond, would be put upon inquiry, the rule would not be applicable. All these circumstances were presented in American Surety Co. v. Pauly, 170 U. S. 133, 40 L. ed. 977, 18 Sup. Ct. Rep. 552, upon which the plaintiff in the WILLOUGHBY CASE relied, also quite fully set forth in the opinion in that case; and it is to be noted that the bond was not obtained by the bank, but by the cashier, who paid the premium therefor, and who also, in order to obtain the bond, procured and proffered to the surety company the statement of the bank's president. Nor did the policy, by its terms, make any reference to the statement of the president. It was further shown that the board of directors of the bank had no knowledge of the issuing of the certificate by the president, and that they did not authorize the same. It also appeared that the president of the bank was in collusion with the cashier to loot the bank, and that the statements made by the former on behalf of the latter were but a step towards consummating that end. It was held that the issuance

Furniture Mfg. Co. 36 C. C. A. 671, 95 Fed. 111; Hunt v. Fidelity & C. Co. 39 C. C. A. 496, 99 Fed. 242; Rice v. Fidelity & D. Co. 43 C. C. A. 270, 103 Fed. 427; Carstairs v. American Bonding & T. Co. 54 C. C. A. 85, 116 Fed. 449.

Gillette, J., delivered the opinion of the court:

In this case, the plaintiff, J. A. Willoughby, as receiver of the Capitol National Bank of Guthrie, sues the Fidelity & Deposit Company of Maryland upon the bond of the defendant company guaranteeing the faithful discharge of the duties of Charles E. Bil-

lingsley, as president of the Capitol National Bank. A copy of the bond with all its indorsements is attached to and made a part of the plaintiff's petition. The bond provides, among other things: "Amount, \$10,000.00. Annual premium, \$40.00. Baltimore, Md. Whereas Chas. E. Billingsley, Guthrie, Ok., hereafter called the 'employee' has been appointed to the position of president, in the service of the Capitol National Bank, Guthrie, Oklahoma, hereafter called the 'employer,' and whereas, the employer has delivered to the Fidelity Deposit Company of Md., a corporation of the state of Maryland, hereafter called the 'company,' certain

of such statements, not being within the scope and the ordinary duties of the president of a bank, was but the gratuitous commendation of one individual by another, and the bank was not bound thereby. This decision, of course, proceeds upon the self-evident proposition that, where an agent steps aside from the duty enjoined upon him to commit a fraud upon his principal, his representations and acts in that affair cannot be imputed to his principal.

Very similar to the Pauly Case in the facts presented is *Sherman v. Harbin*, 125 Iowa, 174, 100 N. W. 629, where it was held that an employer was not bound by a certificate furnished by its secretary to the surety on its president's bond that the books and accounts of the president had been audited and found correct. Here the bond did not purport to be based on this statement, nor was the statement made a part of the bond. It also appeared that it was no part of the secretary's duty to make such statement, that he in fact made it without the authority of the board of directors or its executive committee, and that he acted in this matter merely for the accommodation of the president, with whom he had joined in the improper use of the company's funds. The court reasoned that, "as what he did was not within the scope of his agency, the association was not chargeable with notice thereof, or bound thereby."

The same conclusion has been reached in a few cases, even in the absence of any fraudulent conspiracy against the beneficiary, where the statement relied upon by the surety as a defense was made without the authority and knowledge of the beneficiary, and no reference thereto is contained in the bond itself. Thus, in *United States Fidelity & G. Co. v. Muir*, 53 C. C. A. 56, 115 Fed. 264 (certiorari denied in 187 U. S. 648, 47 L. ed. 348, 23 Sup. Ct. Rep. 847), what the court considered the fundamental principle in the Pauly Case was held to be controlling, and the bank not bound by the statement by its president accompanying an application to a surety company by its cashier for an indemnity bond running to the bank, where it appeared that the statement was signed by the president en-

tirely on his own motion, at the request of the cashier, and without any authority from the board of directors of the bank, who never heard of it until made a defense in the case; and such statement was not referred to in the bond nor made a part thereof.

And in *Independent School District Hubbard*, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241, the school district was held not to be bound by a statement of the president of its board of directors, made in reply to an inquiry of the surety upon the bond of the treasurer of the school district, that that officer had settled some months before the issuing of the bond, and that at that time the funds were counted and found correct. The court deemed that this representation was no part of the duty of the president, and therefore must be regarded as his individual act and not binding on the school district. The opinion fails to show whether there was any reference in the bond to the president's statement, but it is fair to presume that there was not.

And in *Perpetual Bldg. & L. Asso. v. United States Fidelity & G. Co.* 118 Iowa, 729, 92 N. W. 686, it was held that the plaintiff was not bound by a statement made by its president to the surety upon its secretary's bond that the accounts of the secretary were correct in every respect, where it purported to be simply his statement to the best of his knowledge and belief. In this case it was urged that the plaintiff, in ratifying an unauthorized contract by its president, could not insist upon the contract and repudiate that unauthorized representation of its agent which to some extent constituted an inducement to the defendant. The court said: "The ready answer is that the certificate does not purport to be a statement of other than the president, and then only to the best of his knowledge and belief. He pretended to speak for no one but himself. Making the certificate was not within his duties as president, and the association is bound only in so far as the contract is based upon his individual assertions. As these were referred to in the bond it was doubtless accepted subject to them."

statements in writing relative to the employee, his conduct, duties, employment, and accounts, the manner of conducting the business of the employer, and other things connected with the issuance of this bond, which, together with any other statements in writing, hereafter made by the employer to the company relating to any such matters, do and shall constitute the basis and form part of this contract, or any continuation thereof; and shall be warranted; and it is hereby agreed, that any such statement, made in writing by the president, cashier, or any officer or director of the employer, shall be considered the statements of the employer within the meaning hereof. Now, therefore, in consideration of the sum of \$40.00 paid as premium for the period from January 1, 1904, to January 1, 1905, at 12 o'clock noon, and upon the faith of said warranties of said employer as aforesaid, it is hereby agreed that, subject to the obligations imposed by this bond, on the employer, the performance of which shall be condition precedent to the right on the part of the employer to recover under this bond, the company shall, at the expiration of three months next after proof of a pecuniary loss as hereinafter mentioned has been given to the company, reimburse the employer to the extent of the sum of \$10,000.00, and no further, for such pecuniary loss of money, securities, or other personal property, as the employer shall have sustained by any dishonest act or acts committed by the employee in the performance of the duties of the office or position in the service of the employer hereinbefore referred to, or of such other office or position as employee may be subsequently appointed to or called upon to fill by the employer, as such duties have been or may hereafter be stated in writing by the employer to the company, and occurring during the continuance of this bond, and discovered at any time within six months after the expiration or cancelation of this bond, or in case of the death, resignation, or removal of the employee prior to the expiration or cancelation of the bond, within six months after such death, resignation, or removal."

Then follow conditions of the bond that are not material in the consideration of this case. The defendant surety company answered admitting the giving of the bond, but denying liability, because, as it claimed, the bond was procured by false and fraudulent representations made by the Capitol National Bank to the defendant surety company, concerning the said Charles E. Billingsley, his conduct, duties, employment, and accounts. A copy of the letter of the defendant surety company to the Capitol National Bank, asking for information, to-

gether with such of the questions, answers, and statements made by R. S. Briggs, the assistant cashier, as are necessary for the consideration of this case are as follows:

Baltimore, December 5th, 1903.

To the Capitol National Bank,

Guthrie, O. T.:

An application has been made to this company to issue to you a Fidelity Bond for Mr. C. E. Billingsley, as president in your service at Guthrie, O. T., to the amount of \$——. Before passing on the said application the company must have answers to the following questions:

Very respectfully yours,
Edwin Warfield,
President.

5. (a) Is he now (C. E. Billingsley) or has been from any cause indebted to the bank or its officers?

A. No.

(b) If so, give particulars, stating amount, how incurred, and how payment is secured.

Not answered.

It is agreed that the above answers shall be warranties, and shall constitute the basis and form part of the bond, or any continuation or continuations of the same, that may be issued by the Fidelity & Deposit-Company of Maryland to the undersigned upon the person above named; and it is agreed that the duties, powers, and remunerations of the employee and obligations of the employer as stated in the above warranty shall remain unchanged during the currency of this bond, or any continuation or continuations thereof.

Dated at Guthrie this 22d day of December, 1903. Capitol National Bank, by R. S. Briggs, Ass't Cashier, Official Capacity.

This must be returned to the home office, Baltimore, Md., before bond will be issued.

The reply is an unverified general denial, and a special denial of the authority of R. S. Briggs, the assistant cashier, to bind the bank by his answers to said questions, and by the agreement he undertook to make on behalf of the bank. Upon the trial of the cause it was shown by the plaintiff, and by the proper cross-examination of plaintiff's witnesses, that, notwithstanding the statements of the said R. S. Briggs, the assistant cashier, in answer to question 5a, that Mr. Billingsley was not indebted to the bank, he was at the time the statement was made indebted to the bank on his own note of \$5,150, and his own overdraft of \$35,693.24. The bond given by the defendant

surety company and accepted by the bank expressly provided that the statements in writing relative to C. E. Billingsley, his conduct, duties, employment, and account, and other things connected with the issuance of the bond, should constitute the basis, and form a part of the contract, and should be warranted; and that any statements made in writing by any officer of the bank should be considered the statements of the bank; and in consideration of the sum of \$40, and upon the faith of such warranties of the said bank, the \$10,000 bond sued on herein was given by the surety company, and accepted by the bank. When the plaintiff rested, the defendant surety company demurred to the evidence upon the ground that the plaintiff had failed to prove facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The demurrer to the evidence was sustained, and the case dismissed at the cost of the plaintiff, and he brings it to this court claiming that the trial court erred in sustaining the demurrer.

In this court the plaintiff contends that whatever his rights might have proved to be upon a full and final hearing, the demurrer to the evidence was not well taken, and should not have been sustained, based as it was on the pleadings and plaintiff's evidence alone. Let us examine for a moment the issues and status of the case when plaintiff rested, and the demurrer was interposed by the defendant, and sustained by the court. A copy of the bond sued on was attached to and made a part of the plaintiff's petition, and was admitted by the defendant in its answer, so it was fully before the court. The questions and answers thereto, as made by the cashier, and the statements attached to them, were attached to and made a part of the defendant's answer, and, not being denied under oath under § 3986 of our statutes of 1893, were taken as true, and therefore were fully before the court. By the terms of the bond itself these questions and answers, and the statement attached thereto were made a part of the bond, and constituted the basis of the contract, and were stipulated to be warranties; and upon the faith of such warranties the bond was issued by the surety company, and accepted by the bank. The pleadings and evidence also disclosed that in December, 1903, application was made to the defendant surety company for this bond for C. E. Billingsley, as president of the Capitol National Bank; that the surety company, by its letter of December 5th, submitted certain questions to the bank to be answered by it; that on December 22, 1903, the questions were answered by R. S. Briggs, the assistant cashier

of the bank, and he answered them falsely, knowing at the time that the answers were false; that on December 30, 1903, the defendant surety company issued its bond, and the bank accepted it, upon the express written condition contained in the body of the bond itself, that the statements, answers, and representations so made should constitute the basis, and form a part of the contract; and that the bond was issued by the surety company and accepted by the bank upon the faith of the said warranty and representations; that during the years covered by the life of the bond the doors of the bank were closed, and it was placed in the hands of a receiver, and later the receiver brought this action to recover from the surety company on the bond in question, claiming that the said C. E. Billingsley, the bonded president, had defaulted in a sum far in excess of the amount of the bond. In this condition of the case, we think the question was fairly presented upon the demurrer to the evidence as to whether or not a cause of action had been proved in favor of the plaintiff and against the defendant. A careful examination of the record has convinced us that the plaintiff did not make out his case, and that the demurrer to the evidence was well taken and properly sustained. We shall base our conclusion upon but one of the grounds urged in the court below.

Fidelity and guaranty insurance is of comparatively modern origin, and has not had the consideration in the books that has been bestowed upon fire and life insurance. But while it is of but comparatively modern origin, it is nevertheless already a thoroughly established and legitimate line of insurance that has come to stay, and indeed is filling a most important part in the modern business world. From reason and analogy, however, it is plain that many of the principles underlying and governing fire and life insurance must apply to fidelity and guaranty insurance. It has long been the settled law in fire and life insurance that where statements and representations have been made by the insured as the basis for the insurance, and by the terms of the policy, issued and accepted, said statements are made a part of the policy itself, any material, false, and fraudulent statement made by the insured will avoid the policy. The reason for this rule is sound. A person unsound in body and mind, who falsely and knowingly represents himself to be sound physically in order to secure life insurance, and stipulates that his false representations shall be treated as warranties, and as part of the policy itself, should not be allowed to recover. The man seeking fire insurance, who falsely and knowingly represents his

property to be free from encumbrance when it is encumbered for more than its value, and such false representations are made a part of the policy of insurance, should not be allowed to recover for a loss by fire, for reasons too apparent to admit of consideration here. In the case of *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654, the court says: Where the assured, in a policy of life insurance, warrants the truth of the answers made by him to questions in his application, compliance with such warranty is a condition of the validity of the contract of insurance; and it must be assumed that any substantial deviation from truth in such answers is material to the risk and renders the policy void. Also, see the following cases, and cases cited therein: *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 497, 10 Am. Rep. 166, Gil. 473; *Jeffries v. Economical L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833.

We are not entirely without precedent in fidelity guaranty insurance cases. In the case of *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 36 C. C. A. 671, 95 Fed. 111, this language is used: "When there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true, or the policy will not take effect." See also *Hunt v. Fidelity & C. Co.* 39 C. C. A. 496, 99 Fed. 242, and authorities there cited. In the *Hunt* case the court says: "The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declaration, was, in effect, a warranty, which the assured was bound to fulfil in substance and according to its meaning. *Jeffries v. Economical L. Ins. Co.* 22 Wall. 53, 22 L. ed. 835; *Ætna L. Ins. Co. v. France*, 91 U. S. 513, 22 L. ed. 402; *Brady v. United Life Ins. Asso.* 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 23 C. C. A. 65, 40 U. S. App. 710, 77 Fed. 117. It is quite immaterial that the statement is not called a warranty. It is a stipulation embodied in the contract by the words of the policy for the performance of future acts, and, as such, is an express warranty." We are aware that many cases may be found in the books where doubts arise as to whether the warranties made by the assured were untrue as made, or were made in good faith, and doubts yet remain of their untruth. In such cases a disputed question of fact arises for the jury to determine. A few courts have gone so far as to hold that 7 L.R.A. (N.S.)

the fact that the warranties when made were false is not enough, but that it must be further shown that they were also known to be false by the assured; but the great weight of authority holds that proof of the material falsity of the warranties defeats the right of recovery.

In the case at bar, however, we are not called on to make any fine distinction. The representations of the assistant cashier, which were contracted to be warranties, were that C. E. Billingsley, the defaulting president, was not indebted to the bank in any sum. These warranties were outrageously untrue, and were known to be untrue by the assistant cashier when he made them, as shown by his evidence. At the time he represented that said Billingsley did not owe the bank, he, Billingsley, was indebted to the bank on his own note of \$5,151, and interest, and on his own overdraft in the sum of \$35,693.34. Slight or immaterial errors may be conceded not to avoid the liability of the surety company, but, with such glaring misrepresentations as the above, the court need only to look to the face of the transaction to detect its bad faith, when in connection with the testimony of the assistant cashier that he knew of the above indebtedness of C. E. Billingsley, when he represented to the surety company that said Billingsley was not indebted to the bank at all. But we are not confined, in the case at bar, to the authorities of life and fire insurance alone, as many cases have arisen and have been passed on, not only by the state courts, but by the Supreme Court of the United States, two of which will later be considered in the discussion of the second question presented in this case. *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833.

This leads us to the second point necessary to our consideration. It is claimed by the plaintiff in error that, even though it be true that wilful, false statements made by one seeking fidelity insurance, which are made the basis of and form part of the bond itself, may defeat the plaintiff's rights to recover, yet such a proposition can have no application to the case at bar, and cannot affect the rights of the plaintiff in this action, for the reason that the said Briggs, the assistant cashier, had no authority to make said statements, or to bind the bank in any way; and that, as he was only the assistant cashier, no presumption arises that he acted with authority, and his authority to act was not shown in the trial of the case. This bond was issued by the defendant surety company, and accepted by the bank upon the

faith of the correctness of the statements, and said statements were made warranties and became a part of the bond itself, and so became and were a part of the contract sued on by the plaintiff. It is the well-settled law that a party seeking to recover upon a contract cannot claim the benefits arising therefrom, and at the same time repudiate its burdens. To allow the receiver of the bank, while suing on the contract, to question the authority of the assistant cashier to make the statements and misrepresentations which are a part of the contract sued on, would be to allow him to accept its benefits and reject its burdens. To secure the bond on which its receiver sues, the bank, by its assistant cashier, made the representations which form a part of the bond itself, and it does not lie in the mouth of the receiver, while suing on the bond, to repudiate the statements and warranties made by the assistant cashier upon which the bond was secured. The Supreme Court of the United States has said: "The information solicited was such as was proper to be asked of and communicated by the bank; and, as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulation agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment." *Fidelity & D. Co. v. Courtney*, supra; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770.

The plaintiff in error lays great stress upon the case of *American Surety Co. v. Pauly*, 170 U. S. 134, 42 L. ed. 977, 18 Sup. Ct. Rep. 552. That was a case wherein George N. O'Brien, as cashier of the California National Bank, sought and secured an indemnity bond from the surety company in the sum of \$15,000. In his negotiations for this bond he transmitted to the surety company a strong letter of recommendation from one J. W. Collins, the president of said bank. Collins also secured from said surety company a \$25,000 bond for himself. During the life of these bonds O'Brien and Collins, acting together, wrecked the bank, and its doors were closed. The surety company refused payment, and suit was brought against it. It was contended that the president of the bank had made false representations concerning O'Brien, his conduct, his character, accounts, and integrity, in order to enable O'Brien to secure the bond, and that the receiver of the bank

should not be allowed to recover on the bond secured by the fraud of the president; but the court held the surety company liable, and, upon the authority in that case, the plaintiff in error maintains that the surety company in this case should also be held liable. In that case the court said: "None of the cases cited embrace the present one. In the first place the procuring of a bond for O'Brien in order that he might become qualified to act as cashier was no part of the business of the bank, nor within the scope of any duty imposed upon Collins as president of the bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity, or integrity of O'Brien. No relations existed between the bank and the surety company until O'Brien presented to the former the bond in suit. What, therefore, Collins assumed in his capacity as president to certify as to O'Brien's fidelity and integrity was not in the course of the business of the bank, nor within any authority he possessed. He could not create such authority by simply assuming to have it."

It will be noted that the court here decides that the recommendation of the president of the bank was not authorized by the bank itself, and that, being outside of the scope of the duties and authority of the president, the recommendation is held not to be that of the bank, and hence not binding upon the bank. But it will also be noted that the court says that no relationship existed between the bank and the surety company until O'Brien presented to the bank the bond in suit. Under such circumstances we think the conclusion of the court entirely in accord with the great weight of authorities; and, were the facts in the case at bar in accord with those in the *Pauly* Case, we would regard it as a case in point and controlling. But in the case now under consideration it is not true that no relations existed between the bank and the surety company until C. E. Billingsley presented his bond to the bank. On the other hand, application having been made to the surety company for a bond, the surety company, on December 5, 1903, wrote to the bank the letter of inquiry which we have hereinbefore set forth. The letter of inquiry, it will be noted, was addressed to the bank, and not to R. S. Briggs, the assistant cashier. The assistant cashier, on December 22, 1903, answered the questions and falsely stated that

C. E. Billingsley was not indebted to the bank in any sum. He also signed the agreement following the questions, and a part of the same document, agreeing that the answers to the questions should be warranties and constitute the basis and form a part of the bond to be issued by the surety company. All this occurred prior to the issuance of the bond, while in the Pauly Case no letter of inquiry was addressed to the bank, and it was not agreed that the statements of the president upon which the bond was obtained should constitute warranties and be the basis for the bond. In short, no relations existed between the bank and the surety company until O'Brien presented his bond to the bank. When the bond of C. E. Billingsley, in the case at bar, was later issued on the 30th day of December, 1903, it expressly provided that, in consideration of the sum of \$40. and upon the faith of the warranties of the said bank (referring to the warranty signed by R. S. Briggs, cashier), the bond was issued. Not only, then, was the bond issued on the faith of the correctness of the answers and statements of the assistant cashier, but it was also accepted by the bank upon the faith of the correctness of said statements. We think that these facts take this case entirely outside of the rule laid down in the Pauly Case.

Nor are we alone in this conclusion, for the question has been twice before the Supreme Court of the United States in more recent cases than the Pauly Case, and in these subsequent cases that case has been distinguished to such an extent that it cannot, as we have heretofore said, fairly be regarded as a case applying here. In the case of *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124, Chief Justice Fuller uses this language: "It also results that there can be no recovery at all on the cashier's bond. If the bank had observed the stipulation in the teller's bond, to which we have referred, it is obvious that there would have been no cashier's bond, and the question would not have arisen. But this it did not do, and the bond was given. The bond provided that the company covenanted with the bank, in reliance on the statement and declaration of the president on behalf of the bank, and on the bank's strict observance of the contract, that any misstatement of a material fact in the declaration should invalidate the bond; . . . that any written answers or statements made by or on behalf of said employer in regard to, or in connection with, the conduct, duties, accounts, or methods of supervision of the said employee, delivered to the company either prior to the issue of this bond or to

any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guaranty or of its continuance. . . . The statements were required to be, and were, made on behalf of the bank, and the president acted for the bank in so doing; and the bonds were procured by the bank, and the bank paid the premiums. There can be no doubt that the bank was responsible for the representations of its cashier in the one instance, and its president in the other, in procuring these contracts of indemnity. The representations made in the declaration on which the cashier's bond was issued were clearly misrepresentations. . . . In Pauly's Case, the president and the cashier were confederates in the dishonesty of the cashier for the purpose of defrauding the bank; and also it was held no part of the duties of the president, under the circumstances there disclosed, to certify to the integrity of the cashier, as he did."

In the still later case of *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833, Justice White says: "In *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* supra, this court recognize as binding upon the bank a certificate given by one of its officers, embodying replies to questions asked by the guaranty company respecting one of the employees of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in *American Surety Co. v. Pauly*, 170 U. S. 156, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the Pauly Case it was not agreed that the statement of the president, upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendations by one individual of another individual, at a time when, as said by the court, 'no relations existed between the bank and the surety company.' Again, in the Pauly Case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter whose contents in the Pauly Case was claimed to be binding on the bank was written by one who was not charged with the duty of conducting the correspondence of the bank." Entertaining the views that we do, we think that the plaintiff clearly failed to establish facts sufficient to entitle him to recover, and that the demurrer to the evidence was well taken and properly sustained. The conclusions here reached

make it unnecessary to pass upon other questions presented in briefs of counsel.

The judgment of the court below will be affirmed.

All the Justices concur, except **Pancoast, J.**, who sat in the trial of cause in the court below, and **Burford, Ch. J.**, who declined to take any part in said cause for the reason that he is a creditor of said insolvent bank.

UTAH SUPREME COURT.

STATE OF UTAH, Resp't.,

v.

ALBERT McBRIDE, Appt.

(30 Utah, 422, 85 Pac. 440.)

Handwriting—testimony by recipient of letter.

One who claims to have received letters from another, but who has never seen him write and is not an expert in handwriting, is not competent to testify that they were written by him, although she claims that he acknowledged that he wrote two of them, where that fact is disputed, so that there is no undisputed writing in evidence to form the basis of comparison.

(Straup, J., dissents.)

(May 12, 1906.)

Case Note.—Competency of nonexpert to testify as to authorship of writings when he bases his opinion upon letters purporting to come from the person whose handwriting is in question: —The original, and at first the only recognized, method of proving handwriting, was by the testimony of a witness who had seen the person write. But this rule was later broadened so as to permit other methods of proof, one of the most common of which is by means of witnesses who have carried on correspondence with the person whose writing is in dispute.

Proof of this kind was apparently allowed as early as 1722 in *Layer's Case*, 16 How. St. Tr. 93, and in 1761 in the case of *Gould v. Jones*, 1 W. Bl. 384, Bull. N. P. 236; and Lord Raymond, in deciding a similar point in *Ferrers v. Shirley* (1730) Fitzg. 195, said: "It is not necessary in all cases that the witness have seen the person write to whose hand he swears; for where there has been a fixed correspondence by letters, . . . that will entitle a witness to swear to that person's hand, though he never saw him write."

And it is now well established that where the parties have carried on a fixed business correspondence, the amount and length of which allow no question of the good faith and identity of the person with whom the

A PPEAL by defendant from a judgment of the District Court for Sevier County convicting him of rape. Reversed.

The facts are stated in the opinions.

Messrs. S. R. Thurman and A. J. Weber, for appellant:

The evidence as to the handwriting was inadmissible.

Wharton, Crim. Ev. § 552; Rogers, Expert Testimony, § 142; Martin v. Maguire, 7 Gray, 177; 15 Am. & Eng. Enc. Law, pp. 15, 257; Tucker v. Kellogg, 8 Utah, 14, 28 Pac. 870.

Mr. M. A. Breeden, Attorney General, and Joseph H. Erickson, for respondent:

Anyone who is familiar with the handwriting of a person, although he never saw him write, if he has seen writing acknowledged or admitted to be genuine, is a competent witness.

Bruce v. Crews, 39 Ga. 544, 99 Am. Dec. 467; Pope v. Askew, 23 N. C. (1 Ired. L.) 16, 35 Am. Dec. 729; People v. Spooner, 1 Denio, 343, 43 Am. Dec. 672; United States v. Simpson, 3 Penn. & W. 437, 24 Am. Dec. 331; Johnson v. Davenport, 19 Johns. 134, 10 Am. Dec. 198; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Hammond v. Varian, 54 N. Y. 398; Cabarga v. Seeger, 17 Pa. 514; Hanley v. Gandy, 28 Tex. 213, 91 Am. Dec. 315.

Handwriting may be proved by persons who have had access to or possession of the writing of the person whose handwriting is in question.

witness has corresponded, this is sufficient to qualify the witness to express an opinion as to the genuineness of a writing attributed to the other party. 2 Phillips, Ev. 5th Am. ed. p. 503; 2 Starkie, Ev. 7th Am. ed. p. 512; 1 Wigmore, Ev. § 702, p. 800; 1 Greenl. Ev. 14th ed. § 577; Wade v. Broughton, 3 Ves. & B. 172; Harding v. Jones, 1 Tyrw. & G. 135; United States v. Simpson, 3 Penn. & W. 437, 24 Am. Dec. 331; Pearson v. McDaniel, 62 Ga. 100; Russell v. Coffin, 8 Pick. 143; Com. v. Smith, 6 Serg. & R. 568; Parker v. Amazon Ins. Co. 34 Wis. 363.

There are also numerous *dicta* to this effect.

And a witness who testifies that he has had business correspondence with an individual, having written letters to him and received letters in reply, and in this way has acquired knowledge of his signature, although not of his general writing, is a competent witness on the question of the genuineness of a signature purporting to be that of such person. McKonkey v. Gaylord, 46 N. C. (1 Jones, L.) 94.

But where the correspondence has not been of such length or character as to establish beyond doubt its genuineness, and the writing of individual letters from which a witness seeks to make out a knowledge of the hand of the supposed author has not

Hanley v. Gandy, *supra*; State v. Ryno, 68 Kan. 348, 64 L.R.A. 303, 74 Pac. 1114.

Handwriting may be proved by a party having seen letters, bills, or other documents purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them.

1 Greenl. Ev. 14th ed. § 577; 2 Jones, Ev. §§ 559, 560.

Knowledge of handwriting may be gained by correspondence.

2 Jones, Ev. §§ 559, 560; State v. Ryno, *supra*.

Bartch, Ch. J., delivered the opinion of the court:

The defendant was prosecuted for and convicted of the offense of carnally knowing a

female over the age of thirteen and under the age of eighteen years, and was sentenced to imprisonment in the penitentiary. He thereupon appealed to this court. At the trial the prosecuting witness, so far as material here, testified, in substance, that she first met the defendant in March, 1904; that at that time she had a conversation with him, went buggy riding with him, and that when they returned he walked home with her; that she saw him again two days later. She says she saw him next at the postoffice April 1st; met him at the Johnston hotel, and saw him again at the same hotel on April 29th, between 8 and 9 o'clock in the evening; and that she walked with him to the depot, then back to the hotel and up to his room; that he told her his

been expressly acknowledged by the correspondent, some act on his part from which an acknowledgment may be inferred is generally held necessary to stamp the transaction with sufficient certainty and render the witness competent. The courts have differed somewhat as to the degree of proof necessary to establish the genuineness of the letters in such case. And a greater degree of proof is required, apparently, in the case of letters not pertaining to business.

A letter purporting to come from one, and signed in his name, will not furnish a sufficient basis of knowledge to permit the one who received such letter to give an opinion respecting the genuineness of the signature of the putative writer to another instrument, unless the one whose name was signed to the letter in some manner subsequently acknowledged the signature to be his. A course of correspondence may amount to such acknowledgment, but a single letter or message will not, in the absence of further communication of some character. Talbott v. Hedge, 5 Ind. App. 555, 32 N. E. 788.

The mere receipt of letters purporting to be from a person never seen, with whom no subsequent relations existed which were based upon them as genuine, is held not sufficient to make the recipient competent to testify thereto. Pinkham v. Cockell, 77 Mich. 265, 43 N. W. 921.

And a witness who has received letters signed in the name of a person whose signature is disputed, and has answered one of them, but has received no reply to the answer, has been held not to have sufficient knowledge of the other's handwriting to be competent to prove his signature. Webb v. Mauro, Morris (Iowa) 329.

So, a witness who had never seen the person whose signature is in question write, but stated that he had once received a letter purporting to be written by him, and, in consequence of its abusive character, he paid much attention to the handwriting, was held incompetent, although a third person swore that the defendant had told him that he had written the letter addressed to

the witness. Pope v. Askew, 23 N. C. (1 Ired. L.) 16, 35 Am. Dec. 729.

Where, in case of a dispute as to the indorsements on certain bills of exchange, a witness swore that he had written letters to the indorsers in relation to the bills, at the request of a third person, in the latter's name, and that later such third person showed him what he said were answers to those letters, the witness was held not to be sufficiently acquainted with the handwriting of the indorsers to swear to their signatures. Desbrow v. Farrow, 3 Rich. L. 382. The court said that, if the witness had stated that he knew the signatures of the letters to be genuine, by having afterwards conversed with the signers about the letters, then his evidence would have been sufficient; but that he knew nothing of the handwriting of the parties in question, except that the third person had shown him letters purporting to have been written by them, and that he had no knowledge that they had written the letters, except the word of such third person and the intrinsic evidence the letters themselves bore, with the postmark, the time of mailing them, and the contents.

And, while a person who has had business correspondence with another, acted upon by both parties, is competent to testify as to the handwriting of his correspondent, although he may never have seen him write, where the letters have no relation to business transactions, but are letters of mere friendly or polite intercourse, some acknowledgment of the handwriting in some way other than the letters themselves on the part of the supposed writer must be shown. Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 870. In this case the testimony of a witness that he had known the person in question for fourteen years, corresponded with her about fourteen years before, and received about a dozen letters in answer to his own, with her name signed to them, was held not to make a sufficient foundation for the admission of his opinion.

But knowledge of handwriting acquired through correspondence carried on between

name was Jack McAuliffe; that on both occasions, April 1st and 29th, they had sexual intercourse; and that he accomplished his designs through force and persuasion. She identified four letters, exhibits C, D, E, and F, signed "Jack McAuliffe," as letters she had received, and claimed he had talked to her about two of them, but she never saw him write. The defendant, testifying in his own behalf, denied the truth of all the material statements of the prosecuting witness. He testified that he never knew her until he saw her in the court room, after this prosecution had been instituted; that he never had any association with her, and never wrote to her either over his own signature or that of Jack McAuliffe; that he did not write the letters which were in-

troduced in evidence, and never admitted to the prosecuting witness that he had written them; and that he "never had anything to do with her, or say to her, in any relation whatever." In his testimony he also gave an account of his whereabouts during the evening of April 29th, the time when, it was charged, he committed the offense, and in this he is corroborated by several witnesses. As to the commission of the act, on either occasion, the statements of the prosecuting witness are not corroborated by any other direct evidence.

The principal question presented on this appeal has arisen out of the introduction in evidence of the letters referred to above. Counsel for the prosecution, upon offering in evidence those letters, interrogated the

both persons in relation to the business of the company in which both were engaged is held sufficient to bring the case within the rule that, if a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be permitted to speak of that person's handwriting. *Southern Exp. Co. v. Thornton*, 41 Miss. 216.

So, where a witness testifying to the handwriting of an indorser on a note, in an action by the indorsee against the maker, had written letters to the indorser and received replies on which both parties had acted, this rendered him competent to testify as a witness concerning the indorser's handwriting. *Chaffee v. Taylor*, 3 Allen, 598.

And the opinion of a witness who had mailed one or more letters to the person whose signature was in question, directed to his name and place of residence, and received replies purporting to come from that place, and to be signed by him, was held *prima facie*, and, in the absence of any denial of the authenticity of the letter in question, sufficient to establish the genuineness of the signature. *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369.

The manager of a messenger company was held competent to testify in regard to the authenticity of disputed signatures, where he said that he knew the signatures of the parties by means of correspondence, and having seen their signatures upon telegrams and upon the tickets of the company, returned to the office by messenger boys, but admitted that he had never seen either of the parties write. *Tyler v. Mutual Dist. Messenger Co.* 17 App. D. C. 92.

So, where witnesses testified that they had corresponded with the persons purporting to have written a disputed letter, and had put money into their hands, and had drawn the money from them; and that the letter they produced was, they believed, in the same handwriting,—the letter was held 7 L.R.A. (N.S.)

sufficiently proved. *Reid v. Hodgson*, 1 Cranch, C. C. 491, Fed. Cas. No. 11,667.

And knowledge of the handwriting of a person whose signature is disputed, derived from the fact that the witness has addressed a personal letter and received an answer to it, though not from the postoffice to which the first letter was sent, when followed by other correspondence and acted upon by that person, is held sufficient proof to support that person's testimony. *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216.

A witness who had never seen the defendant, but had corresponded with a Samuel Fry, of Plymouth Dock, and had so addressed his letters, and had received answers from him, was held competent to prove his handwriting upon another witness swearing that the defendant, Samuel Fry, lived at Plymouth Dock, and that there was no other person of that name living at Plymouth Dock within his knowledge; this being held at least evidence for the jury to consider whether the letters alluded to by the witness were not written by the defendant. *Harrington v. Fry, Ryan & M.* 90, 9 J. B. Moore, 344, 2 Bing. 179, 1 Car. & P. 289, 3 L. J. C. P. 244.

And when a witness called to prove handwriting has declared as the ground of her belief and the cause of her knowledge the receipt of certain letters, proof as to the genuineness of those letters by the opinion of another witness is not objectionable upon the ground of raising a collateral issue, the proof being competent in corroboration of the first witness. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

Williams, J., in *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 727, in discussing the rule that letters "must be acted upon" in order to form the basis of an opinion as to the handwriting of the author, says that if, by this expression, it be meant to imply that any business must be transacted, or in any sense of the word an act done, the observation is without foundation, for nothing of the sort is necessary; that anything from which the identity of the writer is established may suffice. And *Patteson, J.*, in

prosecuting witness as follows: "Referring again to this letter marked state's exhibit C, I will ask you as to whose handwriting this is." To this the defense objected upon the ground that no foundation had been laid, it not having been shown that the witness was competent; that it had not been shown that she knew the defendant's handwriting; nor that she was an expert; nor that she had ever seen him write. The objection was overruled, and the witness answered that it was his handwriting. Practically the same proceedings were had respecting each of the other letters. It is contended, in behalf of the appellant, that the court erred in permitting the witness to thus testify,

and we are of the opinion that this contention is well founded. Her own evidence showed her incompetency to testify on the subject of his handwriting, for she admitted that she never saw him write, and that she was not an expert on handwriting. It is true that, as to two of the letters, she claimed he acknowledged to her that he wrote them or sent them, but this he positively denied, and there was nothing to corroborate her statement. To identify the several letters as those of the accused, the prosecution called the witness Brewerton, who claimed to know the defendant's handwriting, but the witness said: "I couldn't say positively that McBride wrote either

the same case, says that the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence, or acquiescence by the party on some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which in the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were the handwriting of the party.

And in *Starkie on Evidence*, 7th Am. ed. p. 514, footnote m, reference is made to the case of *Doe v. Wallinger*, cor. Holroyd, J., *Dorchester Spring Assizes* (1819), which is said to have held that handwriting is well proved by a witness who has received letters from the party in answer to letters written to him by the witness, although the latter has never done any act in consequence of the receipt of such letters.

It has also been held that the act following the receipt of letters from the person in question, from which their genuineness is to be assumed, may be the act of the witness, if such that its result is an implied acquiescence by the writer. Thus, in *Tharpee v. Gisburne*, 2 Car. & P. 21, the defendant's attorney, called to prove a signature to a paper, said that he had never seen the defendant write, but that he believed the instrument to be in his handwriting from having received letters from him upon which he, the witness, had acted; and it was held that this was quite sufficient for a witness to ground a belief upon, which was all that was required.

And in *Rex v. Slaney*, 5 Car. & P. 213, this case was followed on identical facts.

The decision in *Tharpee v. Gisburne*, however, is criticized in *Cunningham v. Hudson River Bank*, 21 Wend. 557, where the court says that the fact that the specimens of writing upon which the witness founds his

opinion are genuine must be proved; that it is not enough that they purport to come from the person whose handwriting is in question, and that, although when letters are directed to a particular person on business, and answers are received in due course, a fair inference arises that the answers were written by the person from whom they purport to come, yet in some way the fact that the specimens are genuine must be satisfactorily proved; that the fact that the recipient of the letters had acted upon them, standing alone, was of no importance, although it might be of value in a chain of circumstantial evidence; that it had no tendency to prove the letters genuine, but only proved, and that merely by inference, that the witness believed them authentic. The court, however, added that the acts done in pursuance of the letters might be followed by such acts of approval or acknowledgment on the part of the supposed author as could only be accounted for on the supposition that he was in truth the writer of the letters, and that there could be no doubt that in this way, as well as by direct admission, the fact of authenticity might be satisfactorily established.

Letters forming one side of a correspondence may enable others than the parties to whom they are written to express an opinion as to the handwriting of the persons writing them.

Thus, the opinion of a clerk of persons who had had long correspondence with one whose writing was in question, upon which correspondence both parties had acted, was held competent evidence. *Reid v. Hodgson*, 1 Cranch, C. C. 491, Fed. Cas. No. 11,667; *Titford v. Knott*, 2 Johns. Cas. 211; *Reyburn v. Belotti*, 10 Mo. 597; *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 740, *dictum*.

But a witness who had merely read certain letters which came to a business house at which he was clerk, purporting to have been written by the person whose signature was in question, and not being in reply to any letters which the witness had written or seen written, although his employers recognized them as genuine, and who does not

one of those letters, because I don't know. Didn't see him write them, and don't know that he wrote them. My knowledge of his handwriting is so vague that the slightest little circumstance that I think he might not have been there would have a tendency to raise a serious doubt about whether he wrote a certain letter that is exhibited to me." In the opinions of other witnesses, familiar with the accused's handwriting, none of the letters were written by him.

To say the least, in view of such evidence, the authenticity of even the two letters above referred to, and which she claimed he acknowledged he had written, was in serious doubt, and hence could not become the

basis of comparison which was her only means of determining the genuineness of the other two; for there was no other paper in evidence, nor did the witness, so far as appears, even have in her possession any instrument of any kind from the accused, the genuineness of which was not in dispute. The law is well settled that for the admission of such evidence it is essential that the authenticity of the paper, which becomes the standard of comparison, be established by positive proof, and not left in uncertainty and doubt. Therefore, "before a witness will be permitted to testify as to a person's handwriting from knowledge derived from seeing papers purporting to have been writ-

state that he knows the hand, but says that from having read the letters he thinks the signature genuine, is held not to have such knowledge as complied with Ga. Code, § 3786, providing that one who testifies that he knows the hand in question is competent. *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467. The court said that clearly, in order to be able to know handwriting, so as to be able to testify on the subject, the witness must have seen the party write, or have read papers expressly or by implication acknowledged by the party to be genuine.

For a full review of all the cases on the general question of competency of witnesses to handwriting, see note in 63 L.R.A. 963.

Since the competency of the witness in this class of cases depends upon the authenticity of the letters upon which he bases his opinion, decisions as to the sufficiency of letters received through the mails and purporting to come from a particular person as standards of comparison for use by experts in testifying to such person's handwriting are relevant to the subject of this note. The following cases are of that nature:

In order to establish a letter as a standard for comparison with a disputed signature, proof by a witness that he had received it through the mail, and that, as a result of receiving it, he presumed he had a conversation with the person purporting to have written it, about having written it, was held insufficient. *Wilson v. Irish*, 62 Iowa, 260, 17 N. W. 511.

So, evidence that a letter came through the mail, purporting to be from the person whose signature was in dispute, and believed to be such, was held not sufficient to establish it as a standard. *Phillips v. State*, 6 Tex. App. 364.

And, on an issue as to the genuineness of a will, letters purporting to be signed by the testator and addressed to a witness, which he testified that he received through the mail, and believed to have been written by him, some of which, specifying them, he testified that he received in answer to letters which he had written to the testator, and that they contained answers to inquiries in his letters, were held not established 7 L.R.A. (N.S.)

by such clear and undoubted proof as to be admissible as standards of the handwriting of the testator for comparison with the will. *McKeone v. Barnes*, 108 Mass. 344.

Again, proof, by a witness who had no knowledge of the handwriting of the person whose handwriting was in question, that he had forwarded to that person, unsigned, a paper which was offered as a standard at the trial and purported to be signed by that person, and that it was returned to the witness signed, in a letter from a third person, was held insufficient to warrant its admission as a test paper. *Brant v. Dennison*, 1 Sadler (Pa.) 62, 5 Atl. 869.

And proof that a letter offered as a standard had been received by mail in reply to a letter sent by mail to the address of the person whose signature was disputed, and that it was signed in the name of such person, was held not such proof as to justify its use as a standard. *State v. Horn*, 43 Vt. 20.

But proof that a letter was received through the mail by a witness from the person whose handwriting is in question, and that the witness afterwards saw that person and talked to her about having written a letter to him, was held to establish it as a standard for comparison with the disputed writing. *Manning v. State*, 37 Tex. Crim. Rep. 180, 39 S. W. 118.

So proof that a letter, offered as a standard of comparison and signed in the name of the person whose writing was in dispute, was the only letter received by the witness from such person, and that it was received in reply to a postal card written by the witness to a third person; together with proof by a second witness that the person purporting to have written it stated to him that he wrote a letter to the person who received it at the place where it was received,—was held to establish it as a basis for comparison. *Walker v. State*, 14 Tex. App. 609.

For a further discussion as to competency of handwritings as standards for comparison, see note in 63 L.R.A. 427.

As to comparison of handwriting generally, see note in 62 L.R.A. 817.

ten by him, it must be clearly shown that such papers were in his handwriting." 15 Am. & Eng. Enc. Law, 2d ed. p. 257. "It is a prerequisite," says Mr. Wharton, "to the admission of such proof that the writings from which the witness has drawn his knowledge should be genuine. It will not be enough that the witness obtains his knowledge from letters whose genuineness is in dispute." Wharton, Crim. Ev. § 552. Mr. Rogers, in his work on Expert Testimony (§ 138), says: "The general rule, moreover, is that the proof of the genuineness of the instrument thus offered must be positive. It should be proved either by the admission of the party when the standard is not offered by himself, or else by the testimony of persons who testify directly and positively to having seen the party write the paper." In *Martin v. Maguire*, 7 Gray, 177, it was said: "The mode of proving the genuineness of the paper in controversy, by comparison merely with other documents, has often been questioned elsewhere, though with us it is always allowed. But the paper with which the comparison is to be made must be unquestionably a genuine paper, and that must be shown beyond a doubt." This court, in *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870, said: "The common law excludes a comparison of handwriting as proof of signature. But to the general rule there is this exception: That, if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the case, the signature or paper in question may be compared by the jury, with or without the aid of experts. The principal reasons given for the exclusion of evidence by comparison of handwriting are (1) the danger of fraud in the selection of specimens for comparison and (2) if admitted, their genuineness may be contested, and collateral issues introduced into the trial. These reasons do not apply against the introduction of writings conceded by the parties to be genuine as specimens, because, if either party entertains a suspicion that the writing offered is spurious, he will not concede it to be genuine; and if all the parties concede the specimen to be genuine, no collateral issue can arise upon it. Therefore, we think there should also be an exception to the general rule excluding evidence by comparison, admitting writings as specimens for comparison conceded by the parties to be genuine." *McKeone v. Barnes*, 108 Mass. 344; *Cochran v. Butterfield*, 18 N. H. 115, 45 Am. Dec. 363; *Pavey v. Pavey*, 30 Ohio St. 600; *National Union Bank v. Marsh*, 46 Vt. 443; *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357, 11 So. 365; *Cohen v. Teller*, 7 L.R.A. (N.S.)

93 Pa. 123; *Hyde v. Woolfolk*, 1 Iowa, 159; *Cunningham v. Hudson River Bank*, 21 Wend. 557; *Calkins v. State*, 14 Ohio St. 222; *Sartor v. Bolinger*, 59 Tex. 411; *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573.

In the case at bar, as we have seen, the genuineness of all the letters was in dispute; and, therefore, while it may be conceded that, in view of the testimony of the prosecuting witness, that they had been received by her, and that two of them had been the subject of conversation between her and the accused, the prosecution had a right to have the letters themselves, or at least the two which had formed such subject, admitted in evidence and read to the jury, it was not entitled to the admission of the testimony in question. Under the conflicting evidence it was the province of the jury to consider the letters in determining the question of the defendant's guilt or innocence, and to give them such weight, in connection with all the other evidence, as the jury, in its judgment, deemed them entitled to receive; but the testimony in question ought to have been excluded. Considering all the evidence, and the circumstances disclosed, with the fact that there was no direct testimony as to the commission of the act alleged as constituting the offense charged, except that of the prosecuting witness, we are unable to say that the admission of the testimony in question was not prejudicial to the rights of the accused. Having reached such conclusion, it is not deemed important to discuss any other question presented. The judgment must be reversed, and the cause remanded, with directions to the court below to grant a new trial.

It is so ordered.

McCarty, J., concurs.

Straup, J., dissenting:

I dissent. The prosecutrix testified that the defendant told her his name was Jack McAuliffe, and that she became acquainted with and knew him by that name; that he wrote and sent to her some seven different letters under such name. They were posted, and received by her in the regular course of mail. It was shown that the defendant was at the various places where, and at the times when, the letters bore their postmarks. Four of these letters, "C, D, E, and F," she produced at the trial. The first letter referred to a ring sent to her under a separate cover. After receiving the letter and the ring, she met the defendant, and he asked her if she had received the letter signed by the name of Jack McAuliffe, and the ring therein referred to. Upon her re-

plying that she had, he told her that he wrote the letter, and sent the ring. Another letter referred to some handkerchiefs. After receiving that letter she had a conversation with him about it and the handkerchiefs, in which he told her that he wrote the letter, and gave the handkerchiefs, therein referred to, to her. The four letters were all identified by the witness as having been received by her from the defendant in the course of mail.

She then was asked by the state:

Q. Do you know his handwriting?

A. Yes, sir.

Q. Referring again to this letter marked "C," I will ask you whose handwriting this is.

Here counsel for the defendant made the statement that the prosecution was qualifying the witness as an expert, and he desired to examine her on the *voir dire*.

He then asked her:

Q. You have studied handwriting a great deal?

A. I have studied it enough so I can tell his handwriting in that letter there.

Q. You have seen him write, have you?

A. No, sir.

Q. Do you pretend to be an expert on handwriting? You never saw him write?

A. He acknowledged to me that he wrote those letters.

Q. You say it is his handwriting; you pretend to be an expert on handwriting, do you?

A. No, sir.

Defendant's counsel: I object to her saying whose handwriting this is. She has not qualified as an expert. She hasn't seen him write, either.

The State: Did he acknowledge to you having written this letter?

A. Yes, sir.

Q. Did you have any conversation with him about other letters that he had written to you?

A. Yes, sir. He asked me if I had received his letters during that time, and signed Jack McAuliffe, and I told him I had.

Q. Do you know the defendant's handwriting?

A. That is his handwriting. [Referring to exhibit C.] The signature is his handwriting.

Q. I call your attention to exhibit D, and ask you if you know the handwriting, the signature, and also the address?

A. Yes. It is McBride, the defendant's.

In like manner she testified concerning exhibits E and F, of course, all over the defendant's objection as heretofore set forth. 7 L.R.A. (N.S.)

She also testified that she had a conversation with the defendant about exhibit D, wherein she asked him why the letter was not stamped at American Fork, and he told her because it was mailed on the train.

The witness Brewerton testified that he had been acquainted with the defendant for more than a year, during which time he and the defendant both worked for the same wholesale house at Salt Lake City; that the defendant was a traveling salesman for the house; that the witness checked the defendant's orders, which were two or three a week and sometimes more; and that he also helped to fill some of them; and that at several times when the defendant was making out his expense account, the witness saw him write.

Then, on the part of the state, he was further interrogated:

Q. Now, I will ask you, Do you know the handwriting of McBride?

A. Yes, sir; I think I can recognize it all right.

Here defendant's counsel interrogated the witness on the *voir dire*:

Q. You say you know the handwriting of Mr. McBride?

A. Yes.

Q. Now do you know it from having frequently seen him write, or from claiming to be an expert on handwriting?

A. I know it more so by the orders that have come in.

Q. What do you have to do with his orders that come in; what is your business in relation to them?

A. I have filled some of them, but my real business with them was to check off the orders.

Q. In doing that, did you pay particular attention to the handwriting for any reason, or just take a casual glance at it?

A. Well, just by the way, I say, I don't know that I studied it, just by seeing them come in.

Q. You know his signature, do you?

A. Yes, sir.

Q. You can't be mistaken as to that?

A. I don't think I can. No sir.

Q. Your familiarity goes to that extent that you think you know his handwriting and you know his signature?

A. Yes, sir.

Q. You don't claim to be an expert?

A. No, sir.

The witness was then again interrogated by the state, and was shown the letters in question, and was asked if he knew whose handwriting they were, and he said that he did; and stated positively that they were in the handwriting of the defendant, except

exhibit F, of which the witness said: "I am not sure but that it looked like the defendant's handwriting, and I should say that it was his handwriting." On cross-examination he said that he had no doubt about the letter being in the handwriting of the defendant, unless two persons could write so much alike.

Q. If one were trying to imitate, they might write a great deal alike, mightn't they?

A. Yes, sir.

Q. You won't say, will you, without some kind of qualification, that McBride wrote either one of those letters?

Here considerable discussion followed between counsel, in which counsel for the defendant insisted that the most that could be claimed for the testimony of the witness was that it is his opinion merely that the writing is the defendant's.

The witness was then asked by the defendant's counsel:

Q. You wouldn't say, would you, positively, that McBride wrote either one of those letters?

A. Well, I couldn't say positively because I don't know.

Q. Well, that's what I am asking, and now you have answered.

A. As near as I know.

Q. Well, as near as you know. You didn't see him write them?

A. No, sir.

Q. You don't know that he wrote them, do you?

A. No, sir.

The witness was then asked why he hesitated about exhibit F, dated July 1st. He answered that the last day of July (he probably meant June) was pay day, and that one or two days after pay day he and the defendant took dinner together at Salt Lake City, and for that reason there might be a question as to whether the defendant was at the place where the letter purports to have been written, on July 1st.

Then follows the question, the substance of which is stated in the opinion by the majority court:

Q. Your knowledge of his handwriting is so vague that the slightest little circumstance that you think he might not have been there would have a tendency to raise a serious doubt about whether he wrote a certain letter that is exhibited to you?

A. Yes, sir.

It is apparent, of course, that these matters, on cross-examination, go merely to the weight of the testimony, and not to the competency of the witness. It is conceded 7 L.R.A.(N.S.)

by the appellant that the witness Brewerton sufficiently qualified to express a belief or opinion as to the defendant's handwriting, because of the testimony of the witness that at different times he saw the defendant write. The appellant concedes, also, that all of the letters in question were sufficiently proved by the state to be the defendant's handwriting so as to entitle their admission in evidence. The particular complaint made in this regard is that the prosecutrix should not have been permitted to express an opinion or belief that the letters were the defendant's handwriting, because she at no time had seen him write, and because she was not an expert on handwriting. From the objections made in the court below by counsel for the defendant, and from their brief on appeal, they seem to entertain the view that there are but two ways by which a witness may qualify so as to express an opinion as to the handwriting of another. One is by having seen the person write. The other is by comparison. The majority court seem to entertain the same view; for they say: "Her own evidence shows her incompetency to testify on the subject of his handwriting, for she admitted that she never saw him write, and that she was not an expert on handwriting." It being conceded that the prosecutrix had not at any time seen the defendant write, her testimony in the prevailing opinion is considered from the standpoint of identifying handwriting by comparison, the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person. Of course, when that kind of testimony is sought, it is essential that the writing or standard, with which the disputed writing is compared, be proved or admitted to be genuine, and that the witness making the comparison must be shown to have special skill and experience in making it, before he is entitled to express an opinion. It is to that kind of evidence that the authorities cited and quoted by the majority court refer. But the prosecutrix was not called to give, nor did she give, that kind of testimony. The statement made by defendant's counsel that the state was qualifying her as an expert is erroneous. The state was not attempting to so qualify her, nor did she in the least qualify as such, and from that alone it is sufficient to say that she was not entitled to testify as an expert. But this witness, like the witness Brewerton, did not testify as to defendant's handwriting by comparing a disputed writing with another writing, and by expressing a belief that the writings were written by the same person, or that if the defendant wrote one he also wrote the other. They

testified as to his handwriting from their knowledge of and familiarity with his handwriting. It may be said, in a very general sense, that all evidence of handwriting, except where the witness saw the disputed document written, is, in its nature, comparison. That is, it is the belief or opinion which the witness entertains upon comparing the writing in question was an exemplar in his mind derived from some previous knowledge. But that is not what is meant in law by proof of handwriting by comparison. *Berg v. Peterson*, 49 Minn. 420, 52 N. W. 37; *Burdick v. Hunt*, 43 Ind. 381; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540; 6 Enc. Ev. p. 386; 15 Am. & Eng. Enc. Law, p. 263. I think we can well eliminate the question of expert testimony as to handwriting, for it is not involved in the case. The question here is, Was sufficient knowledge of or familiarity with the defendant's handwriting shown on the part of the prosecutrix to make her competent to express an opinion or belief as to whether the letters were in his handwriting? This leads to the inquiry, from what source or sources, other than seeing a person write, may a witness derive knowledge of, or familiarity with, the handwriting of such person so that the witness may be qualified to speak, from his knowledge and familiarity, as to such person's handwriting? In speaking of the qualifications and sources of knowledge of such a witness, in vol. 6, p. 370, Enc. Ev., it is said: "Any person who has seen the purported author write, and has thus acquired a standard in his own mind of the general character of his handwriting, is competent to testify as to the genuineness of the signature in question. In showing familiarity with handwriting the witness is not restricted to the single means of having seen the person write. It is sufficient that the witness may have acquired knowledge of the handwriting by having seen writings admitted by the purported author to be his, or with his knowledge acted upon as his, or so adopted in the ordinary business of life as to create a reasonable presumption of genuineness."

Mr. Jones, on the Law of Evidence (vol. 2, § 559), says: "It has also been held that a witness is competent to testify as to the handwriting of another, although he has not actually seen him write, if the witness has seen writing which such person has acknowledged or admitted to be his. Such acknowledgment may not only be in express terms, as where a person has formally acknowledged his signature or other writing to have been executed by him, but may be inferred as will be seen from other facts and circumstances or from the course of

business. But when a witness has testified that he has neither seen a person write, nor any writing which he knew to be the writing of the person, his opinion as to the genuineness of such writing is not admissible." In the case of *Flowers v. Fletcher*, 40 W. Va. 107, 20 S. E. 871, it is said: "The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine." Illustrations are also given by the court in *Redding v. Redding*, 69 Vt. 502, 38 Atl. 231: "One is deemed to be acquainted with the handwriting of another person when he has seen him write, though but once, and then only his name; or when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting, and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or when, in the ordinary course of business, documents purporting to be written or signed by that person have been habitually submitted to the witness." To the same effect, also, are the following: 1 Greenl. Ev. § 577; 1 Wigmore, Ev. §§ 700, 701; *Berg v. Peterson*, supra; *Hammond v. Varian*, 54 N. Y. 398; *Kinney v. Flynn*, 2 R. I. 319; *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Gordon v. Price*, 32 N. C. (10 Ired. L.) 385.

The prosecutrix having testified that she saw, and had in her possession, writings, admitted to her by the defendant to have been written by him, and to be genuine; that she and the defendant conversed about matters and things therein referred to, the subject-matter of which the defendant, in effect, acknowledged; and that, from having seen such writings, she was able to and could identify the defendant's writing, thereby made herself competent, in my opinion, to speak upon the subject. Such sources gave her a means of knowledge, and afforded an opportunity of becoming acquainted with the defendant's handwriting, equally as well

as if, at some time, she had seen him once write his name. When it is said that a person who has seen another write may testify to that other's handwriting, that is but an illustration of identifying handwriting from knowledge. The witness in such case is qualified to speak, not merely because he saw such other write, but because he knows his handwriting from having seen him write. When a witness shows personal knowledge, not from having seen another write, but from having seen writings admitted by him to be his, or with his knowledge acted upon as his, that is but another way of also identifying handwriting from knowledge. But it is claimed that the testimony of the prosecutrix shows that the defendant only admitted or acknowledged to her that letters "C" and "D" were written by him; and that inasmuch as he, in his testimony, denied making such admissions or of writing any of the letters, "C" and "D" could not become the basis of comparison, which was her only means of determining the genuineness of the other two—"E" and "F"—because of the essential that the standard of comparison must be established by proof of genuineness. But the prosecutrix did not testify by comparison, but from knowledge. Whatever may be the rule and the reasons therefor, in that regard, when evidence is sought by comparison, they do not apply when the witness speaks from personal knowledge of the handwriting. When a witness testifies that at some previous time he saw the defendant write, if only his name, and for that reason he knows his handwriting, that qualifies the witness to speak as to the defendant's handwriting of a document or signature exhibited to the witness. Because the defendant denies the fact that such witness ever saw him write, it does not render the testimony of the witness incompetent, nor is it essential before the witness is permitted to speak upon the subject that the admission of the defendant of such fact be first had. All that is necessary is that the fact of the witness having seen him write be proved, which generally is done by the witness himself. Now, when a witness qualifies himself by showing knowledge of the defendant's handwriting from having seen letters or writings acknowledged or admitted by him to the witness as his handwriting, the fact that the defendant may or does deny that he made such acknowledgment or admission, or that he wrote the writing with respect to which the admission is claimed, does not render the witness incompetent, in such instance, any more than in the other. All that is essential is that proof be made of such an admission or acknowledgment, which, of course, may be done by

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the witness. The competency of the witness is a matter for the court upon the showing made at the time when the witness is asked to express his belief. If sufficient knowledge on the part of the witness as to the handwriting of the purported author is shown, his testimony on the subject may be received. Whether the statements of the witness in regard to his knowledge are thereafter controverted by the defendant or by other testimony, goes merely to the weight of the testimony and to the credibility of the witness, and not to his competency in the first instance. It certainly was proper to have the prosecutrix state that the defendant admitted to her that he wrote exhibits C and D. That alone was sufficient proof that he wrote them. It also was proper for her to state that the defendant corresponded with her, and that she received letters purporting to come from him in the regular course of mail, and that after they were received by her, she and the defendant conversed about their contents; the subject-matter of which the defendant acknowledged and in which he acquiesced. From such sources sufficient knowledge on her part may be obtained to enable her to speak as to the defendant's handwriting, not only as to exhibits C and D, but also to E and F as well, or as to any other writing purporting to have been written by him. And the fact that the defendant thereafter, in his testimony, denied that he made any such admissions, or that he wrote the letters, or that he ever saw the witness until in the court room, or that because he was corroborated as to his alibi, or because the prosecutrix was not corroborated by any "direct evidence" as to the acts of sexual intercourse, did not, in my judgment, destroy her competency.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON

v.

EDWARD PARSONS et al., Appts.

(— Wash. —, 87 Pac. 349.)

Robbery—pretended arrest—force.

1. The elements of force and putting in fear, within the statutory definition of robbery, are present where accused approached

Note.—The authorities upon the question as to the assumption or pretense of authority as a police officer, as supplying the elements, fear and force, essential to constitute robbery, are discussed in notes in 57 L.R.A. 441, and 1 L.R.A.(N.S.) 1024. And see, also, the cases cited in the opinion in the reported case.

an intoxicated person and pretended to arrest him, and, after compelling him to go a ways with them, searched and took from him his valuables, he making no resistance because he believed his assailants to be officers, and that they would "lick him" if he resisted.

Trial—neglect to instruct—error.

2. The court's neglect to instruct the jury of its own motion upon the lesser degrees of the crime for which accused is on trial is not error, in the absence of any exception or request for more specific instructions.

(November 9, 1906.)

A PPEAL by defendants from a judgment of the Superior Court for Chehalis County convicting them of robbery. Affirmed.

The facts are stated in the opinion.

Messrs. W. H. Abel and E. A. Philbrick, for appellants:

There must be in robbery either actual violence inflicted on the person robbed, or such demonstrations or threats, and under such circumstances, as to create in him reasonable apprehension of bodily injury.

2 Bishop, Crim. Law, 7th ed. 1166.

There was not such exercise of force or violence as would warrant the submission to the jury of the question whether appellants had committed robbery by force and violence.

Hall v. People, 171 Ill. 540, 49 N. E. 495; Territory v. McKern, 3 Idaho, 15, 26 Pac. 123; Routt v. State, 61 Ark. 594, 34 S. W. 262; State v. Miller, 83 Iowa, 291, 49 N. W. 90; Williams v. Com. 20 Ky. L. Rep. 1850, 50 S. W. 240; Long v. State, 12 Ga. 293.

The evidence as to fear is meager, indefinite, and unsatisfactory. There must be such circumstances of terror, such threatening by word or gesture, as by common experience is likely to cause an apprehension of danger, and cause a man to part with his property for the safety of his person.

Long v. State, *supra*; 2 Blashfield, Instructions to Juries, § 2557; State v. Howerton, 59 Mo. 91; Simmons v. State (Fla.) 25 So. 881; Williams v. State, 12 Tex. App. 240; Jackson v. State, 118 Ga. 125, 44 S. E. 833; Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; Davis v. Com. 21 Ky. L. Rep. 1295, 54 S. W. 959; State v. Donohue (N. J. L.) 59 Atl. 12.

Mr. E. E. Boner for the State.

Fullerton, J., delivered the opinion of the court:

The appellants were convicted on an information charging them with robbery, and appeal from the judgment and sentence pro-
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nounced upon them. The acts constituting the offense charged took place at Hoquiam on the morning of February 14, 1906, between the hours of 12 and 2 o'clock. The evidence on the part of the state tended to show that the prosecuting witness some time between those hours entered a restaurant at that place and ordered a meal. He had been drinking the night before, and had not as yet fully recovered from its effects. While his meal was being prepared he leaned over the counter at which he was sitting and went to sleep. When the meal was ready he was awakened by the waiter, when he began eating, but seemingly did not become fully awake, and gradually dozed off to sleep again. The appellants came into the room in the meantime, ordered a meal, and, while eating it, jested with the waiter and restaurant cook over the prosecuting witness's condition. After they had finished one of them turned to the cook to settle for their meal, when the other took the witness by the shoulder and aroused him, telling him that he must pay for his meal and get out of doors, as that was not a lodging house. The witness then paid for his meal, when the appellant, still holding him by the shoulder, led him out of the door of the restaurant, and there told him that he and his companion were policemen, and were going to take him to jail for being drunk. The other appellant, who had remained talking with the cook until this time, then joined them, and the two took the witness down an alleyway into a saloon, where they told him to sit down. No one was in the saloon at the time except the bartender. After seating the witness in a chair, the appellants approached the bartender and held with him a whispered conversation, whereupon he took some keys from a hook, and went out into a room a short distance away. While the bartender was out of sight, the appellants again took hold of the witness, raised him up, and told him he must now go to jail, and that it was necessary to search him before going. They thereupon went through his pockets taking from him such money as he had, some \$28, and then led him back through the alleyway to the main street, where they let him go, telling him to go to a certain saloon, and not let himself be seen on the street until morning. The witness went to his boarding house where he announced that he had been robbed by the night policemen of the town. His complaint caused an inquiry to be made which resulted in the arrest of the appellants within a few hours afterwards. The witness testified that he made no resistance or outcry for the reason that he believed the appellants to be policemen, and would "lick him" if he resisted or made an outcry; that they told him,

while searching him, that he must keep still. The prosecuting witness was a Finlander by birth, who had been in the United States less than four years, and spoke the English language brokenly.

The statute (Ballinger's Anno. Codes & Statutes, Supp. § 7103) defines robbery to be the forcible and felonious taking from the person of another, or from his immediate presence, any article of value by violence or putting in fear; and it is contended by the appellants that the evidence here fails to show such use of force and violence, or such putting in fear, in taking the property, as is necessary to constitute robbery under the statute. The courts generally hold that it is not robbery to merely snatch from the hand or person of another, or to surreptitiously take from another's pocket, money or some other thing of value, as such taking lacks the element of force, or putting in fear, one or the other of which being essential to constitute the crime of burglary. It is also generally held that where the property is obtained by some artifice or trick intended to, and which does, allay resistance and not arouse fear, such as inducing one to part voluntarily with his money or property under the belief that the taker has a lawful right to it, does not constitute robbery. But, on the other hand, it is generally held whenever the element of force or putting in fear enters into the taking, and is the cause that induces the owner of the property to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstances the taking may be accompanied. It is enough that the force or the putting in fear employed is sufficient to overcome resistance on the part of the person from whom the property is taken, and is the moving cause inducing him to part unwillingly with his property.

It seems to us that there was in the case before us both the element of force and putting in fear. There was a forcible seizure of the prosecuting witness, his forcible taking to a place where he had no desire to go, a command to keep silent, and a forcible taking against his will of his money from his person. True, these acts were accompanied by the false representations to the effect that the appellants were officers of the law having authority to compel him to accompany them, and to take from him his property; but these representations did not induce the prosecuting witness to part with his money. They were still compelled to take it from him. Nor was the mere false impersonation sufficient to enable them to thus obtain the property of the prosecuting witness. They were compelled to exercise

their assumed authority by such threats of violence as to put him in fear. It may be that a man of more intelligence and resolution than the witness exhibited would have seen through the very flimsy pretext the appellants were making, and would have successfully resisted such an attempt as was here successful. But this is beside the question. The law must protect the weak and irresolute as well as those of stronger wills, and it is enough that the person assaulted was intimidated and yielded up his property because of the force used and threatened, be the same ever so slight.

The courts usually hold it robbery to obtain the property of another by means of the ruse used by the appellants in this instance. In *McCormick v. State*, 26 Tex. App. 678, 9 S. W. 277, the proof showed that the defendant met the prosecutor at night, and summoned him to throw up his hands, stating at the same time that he was an officer of the law, and would arrest the prosecutor for being drunk and noisy. On the prosecutor's yielding to him, he took from him a roll of bills. This was held to constitute robbery. In *Williams v. State*, 51 Neb. 711, 71 N. W. 729, defendants three in number conspired to unlawfully extort money from the prosecuting witness, pursuant to which one of them, falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of the prosecutor's collar. The prosecutor thereupon handed him \$20, because, as he testified, he was so scared he did not know what he was doing. This money was immediately handed by the person receiving it to his associates. It was held that all three of the persons were guilty of robbery by putting in fear. In *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, the facts were that the defendant, who pretended to be marshal of the town, having on star designating the office, seized the prosecutor, to whom another was showing a trick at cards, and upon the exclamation of that other, "There's the marshal!" pushed him against the wall and threatened to put him in jail unless he paid money. The prosecutor, to keep from going to jail, and because he "did not want to be bothered," paid him \$8. This was held robbery. See also *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Thompson v. State*, 61 Neb. 210, 87 Am. St. Rep. 453, 85 N. W. 62; *Seymour v. State*, 15 Ind. 288.

The appellant has cited cases which maintain that it is not robbery to obtain the property of another by artifice or trick, or by falsely impersonating a police officer, where no element of force or putting in fear

enters into the taking; and it may be that one or two of the cases so cited cannot be distinguished in their facts from the facts of the cases above cited or the facts in the case at bar. But we think the better rule is with the cases we have cited. There was no error in the charge of the court to the effect that the degree of force used was immaterial as long as it was sufficient to compel the prosecuting witness to part with his property; nor was it error for the court to refuse to give as part of his charge the requested instructions submitted by the appellants. These, in so far as they were proper, were substantially included in the charge given.

Finally, it is urged that the court erred in failing to charge the jury on its own motion as to the lesser offenses included in the offense charged in the information. It is conceded that no request was made to the court to give such an instruction as part of his charge, and that no exception was taken because such an instruction was not made a part of the charge. There are well-considered cases which sustain the appellants' contention, but we think the weight of authority is the other way. See 11 Enc. Pl. & Pr. p. 217; 12 Cyc. Law & Proc. pp. 639, 640. Mr. Thompson states the rule in the following language: "It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that mere nondirection, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate supplementary instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they

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ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits." § 2341; Thompson on Trials.

The judgment is affirmed.

Mount, Ch. J., and Rudkin, Hadley, Dunbar, Root, and Crow, JJ., concur.

IOWA SUPREME COURT.

M. A. TROTTER, Appt.,
v.

GRAND LODGE OF IOWA LEGION OF
HONOR.

(— Iowa, —, 109 N. W. 1099.)

Benefit society—local secretary—agent.

1. The secretary of a local branch of a fraternal society, charged with the duty of collecting the assessments on benefit certificates issued by the grand lodge, is the agent of such lodge with respect to the business of such collections.

Same—waiver of rule.

2. Where the secretary of the local lodge of a mutual benefit society is frequently away from home on the last day prescribed for payment of assessments on certificates, and for a long time has been in the habit of accepting payments any time prior to the date of transmitting the assessments to the supreme body, a rule of the order that failure to pay assessments on or before the last specified day shall of its own force suspend the certificate will be regarded as waived.

Same—applicability of waiver.

3. The principle of waiver and estoppel applies in case of fraternal or lodge insurance.

(December 14, 1906.)

A PPEAL by plaintiff from a judgment of the District Court for Page County in defendant's favor in an action brought to enforce payment of the amount alleged to be due on a mutual benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. W. P. Ferguson and Earl R. Ferguson, for appellant:

If the promisor is prevented from performing his contract, or any part of it, by

Note.—The authority of a subordinate lodge, or of its officers, to waive forfeiture for nonpayment of assessments, is treated in *Royal Highlanders v. Scovill*, 4 L.R.A. (N.S.) 421, and note thereto.

the default or refusal of the promisee, performance is to that extent excused.

Hammon, Contr. § 459; Murphy v. Independent Order, S. & D. of I. of A. 77 Miss. 830, 50 L.R.A. 111, 27 So. 624; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Jones v. Walker, 13 B. Mon. 163, 56 Am. Dec. 557; Davis v. Crookston Waterworks, Power, & Light Co. 57 Minn. 402, 47 Am. St. Rep. 622, 59 N. W. 482; Cape Fear & D. River Nav. Co. v. Wilcox, 52 N. C. (7 Jones, L.) 481, 78 Am. Dec. 280.

One party cannot predicate a forfeiture upon an omission by the other party, which his own conduct has helped to bring about.

Guetzkow v. Michigan Mut. L. Ins. Co. 105 Wis. 448, 81 N. W. 652; Grand Lodge A. O. U. W. v. Scott, 3 Neb. (Unof.) 851, 97 N. W. 637; Continental Ins. Co. v. Miller, 4 Ind. App. 553, 30 N. E. 718; Vance, Ins. pp. 218, 219; 2 Joyce, Ins. No. 1351, § 1168; Blackerby v. Continental Ins. Co. 83 Ky. 574; Fidelity Mut. Life Asso. v. Troy, 20 Ohio C. C. 644.

The financial secretary of the subordinate lodge is the agent of the grand lodge for the collection of assessments.

Murphy v. Independent Order, S. & D. of I. of A. supra.

The course of dealing constituted a waiver of a strict compliance.

Mayer v. Mutual L. Ins. Co. 38 Iowa, 304, 18 Am. Rep. 34; De Frece v. National L. Ins. Co. 46 N. Y. S. R. 479, 19 N. Y. Supp. 8; Arnott v. Prudential Ins. Co. 44 N. Y. S. R. 480, 17 N. Y. Supp. 710; Home Protection v. Avery, 85 Ala. 348, 7 Am. St. Rep. 54, 5 So. 143; Sues v. Imperial L. Ins. Co. 86 Mo. App. 10; Reisz v. Supreme Council, A. L. of H. 103 Wis. 427, 79 N. W. 432; Bannister v. Patty, 35 Wis. 215; Alexander v. Continental Ins. Co. 67 Wis. 422, 58 Am. Rep. 869, 30 N. W. 727; Stylow v. Wisconsin Odd Fellows' Mut. L. Ins. Co. 69 Wis. 228, 2 Am. St. Rep. 738, 34 N. W. 151; Whiting v. Mississippi Valley Mfrs.' Mut. Ins. Co. 76 Wis. 592, 45 N. W. 672; True v. Bankers' Life Asso. 78 Wis. 287, 47 N. W. 520; Jackson v. Northwestern Mut. Relief Asso. 78 Wis. 463, 47 N. W. 733; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327; Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 449, 38 L. ed. 496, 500, 12 Sup. Ct. Rep. 671; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; Beatty v. Mutual Reserve Fund Life Asso. 21 C. C. A. 227, 44 U. S. App. 527, 75 Fed. 65; Mueller v. Grand Grove, U. A. O. D. 69 Minn. 236, 72 N. W. 48; Thropp v. Field, 26 N. J. Eq. 82; Dilleber v. Knickerbocker L. Ins. Co. 76 N. Y. 576; 2 Bacon, Ben. Soc. ¶ 433; 2 Beach, Ins. ¶ 769; 2 Joyce, Ins. ¶¶ 1356, 1361.

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Messrs. W. B. Ingersoll and Parslow & Peters for appellee.

Weaver, J., delivered the opinion of the court:

The facts in the case are substantially without dispute. The defendant is a fraternal life association, doing business in this state, and, upon certain specified conditions and considerations, insures the life of each of its members in a sum not exceeding \$2,000, payable upon his decease to a designated beneficiary. The membership of the association is organized into local societies, or lodges, under the general headship or government of a grand lodge, having jurisdiction of the order within the state. The fund from which benefit certificates are paid is accumulated by assessments made by the grand lodge not oftener than one each month. The by-laws of the association provide that notice of each assessment shall be sent out to the membership on the 1st of the month for which it is called, and that any member failing to pay the same on or before the 28th day of each month shall be held to be delinquent. Each local lodge has an officer known as the "financial secretary," whose duty it is to collect the assessments. The laws of the association are not fully disclosed in the record, but we draw the inference from what is shown that, in the regular order of business, it is made the duty of the financial secretary, on the 28th day of each month, to pay over the assessments collected by him to the local treasurer, who transmits the same to the proper officer of the grand lodge. It is also provided that any member of a lodge "in arrears in the payment of assessments or dues on the 28th day of the month upon which the same has been called shall, from that date, stand suspended from all rights and benefits under his or her certificate of membership; and it shall be the duty of the financial secretary to mark such members suspended upon his or her book from that date, without action of the lodge; and such member so in arrears shall remain suspended until he or she shall lawfully be reinstated." It is further provided that any member who has become thus delinquent may renew his certificate at any time within three months thereafter upon payment of all arrears and furnishing a proper certificate of health, if such certificate be required of him. After a suspension of three months, the delinquent desiring reinstatement is required to submit to a new medical examination. Another section provides that any member in arrears for the period of six months shall stand suspended from all benefits and privileges

in the society, and that his or her certificate shall be reported to the grand secretary as annulled; and the member shall not be again admitted, "except as provided in this article." Immediately following this provision it is enacted that "any member suspended by reason of nonpayment of dues or arrearages or beneficiary assessments, applying to be reinstated, shall pay the amount he or she was in arrears at the date of the suspension, and all other arrearages, and, in addition thereto, a sum not less than \$5." By still another section, it is provided that any member "neglecting to pay and in arrears to the lodge to the amount of three months' dues or more . . . shall stand suspended from all benefits and privileges until the payment of all arrearages up to the time of reinstatement," in accordance with the rules. Upon admission to the lodge, each member is required to pay one advance assessment. It is made the duty of the financial secretary to keep a correct account between the lodge and its members, receive all moneys for the lodge, pay the same over to the local treasurer, taking vouchers therefor, and report the same to the recording secretary. He is also required to notify all members in arrears to the amount of three months' dues, and notify the local president of the fact. By § 5, art. 9, of the laws of the association, it is made the duty of the financial secretary, on the 28th day of the month, to "mark and report to the recording secretary the names of the members who are in arrears on such assessments; and the recording secretary shall place the same on the records of the lodge, and mark such certificates suspended on the certificate register book, affixing the date thereto. The financial secretary shall, upon receipt of any arrearages from the assessments, pay the same into the treasury (said amount from arrearages to be forwarded to the grand secretary upon the first order thereafter), and notify the recording secretary of the same; and the recording secretary shall so place it on the records of the lodge, and mark the certificate so paid 'renewed' on the certificate register book, affixing the date thereto."

The foregoing requirements of the association are all which the record before us contains, bearing upon the questions raised by the appeal. It appears that a local lodge of the association was organized at Shenandoah, in Page county, Iowa, on October 27, 1880, and the deceased, George E. Trotter, became a charter member. For some time prior to the death of said Trotter, this lodge had been reduced to six members, four of whom, it is alleged, had re-

moved from said town, leaving but two to transact the business of the lodge. Of these two the deceased acted as president of the lodge, and W. P. Ferguson as its financial secretary. There was, and for some years had been, no recording secretary or treasurer or other officer of such lodge, except the president and financial secretary above named. In this situation, it had been the custom, if not the duty, of the financial secretary to collect the assessments as they were made from time to time upon the membership of the lodge, and remit them direct to the grand secretary. This remittance was required to be made not later than the 15th of the month following the maturity of an assessment. Mr. Ferguson, the financial secretary of the lodge for a period of ten years prior to death of Trotter, is a practising lawyer, and frequently away from home on the 28th of the month, and very frequently the assessments upon the deceased and other members were not paid until after the date, when, according to the letter of the by-laws, they were in arrears. But in all cases they were paid in time to be forwarded to the grand lodge within the time allowed for such remittance. The fact that these payments were frequently made after the 28th of the month was shown upon the books kept by the financial secretary. In no instance of such delinquency was the member treated as suspended, or as having forfeited his rights in the association, and no mark or entry of any suspension on account of such delinquency, or of restoration or reinstatement to membership, was ever entered upon any of the books or records of the lodge.

The deceased was in the mercantile business in Shenandoah, and it was the habit of the financial secretary to call at his store on or about the time he wished to make remittance to the grand secretary and receive payment of the assessment from the deceased, or from his partner or clerk. All assessments upon the deceased prior to June, 1904, were paid and remitted. On the morning of June 27, 1904, Mr. Ferguson left Shenandoah and went to St. Louis, Missouri, where he remained until July 5, 1904. During his absence there was no one left in charge of his business who was authorized to receive or receipt for the assessments due from the lodge members. On the morning of July 6, 1904, Trotter, who had been in good health up to that time, died without having paid the assessment which became due on June 28th. On the following day the plaintiff, or the partner of the deceased, paid the amount of the June assessment to the financial secretary, who included the same in his report and re-

mittance to the grand secretary. Formal proofs of the death of Trotter were furnished the grand lodge on July 13, 1904, but were not approved because the financial secretary had failed to sign and swear to a so-called "supplementary affidavit," which had been called for, stating in effect that the June assessment had been paid on or prior to June 28, 1904. The grand secretary again called for said affidavit from the financial secretary, who declined to make it, and, on October 8, 1904, the amount of the assessment, which had been remitted on July 7, 1904, as aforesaid, was returned by the grand lodge to the financial secretary, who tendered its return to plaintiff, but the same was refused.

1. As we understand the record, and the arguments presented, it is the theory of the appellee, and was the theory on which the trial court proceeded, that, upon the failure of the deceased to pay the June assessment on the 28th day of that month, he was by the automatic operation of the laws of the association at once suspended from membership therein, and his certificate became forfeited; and that this result is in no manner avoided by any practice, custom, or habit, which may have prevailed between him and the local lodge or its officers, as to the time when or the manner in which the assessments had been collected during the previous history of the lodge. We are not prepared to go to that length. What was the legal relation in which the financial secretary stood to the parties? Upon the answer to this inquiry depend very largely the force and effect of the conceded facts in the case. If he was simply the agent of the member paying the assessments, then, of course, the dealings between him and his principal could have no effect to avoid a forfeiture of the member's certificate for a neglect to observe the conditions on which it was issued; but, if he was the agent of the grand lodge, his habitual practice as to the time and manner of collecting the assessments may operate as a waiver or estoppel to prevent insistence upon such a forfeiture after a loss has occurred. It must be borne in mind that, no matter how stringent the condition upon which the continued validity of the contract of insurance is made to depend, the company or association is under no obligation to enforce it. If, then, such company or association itself, or by its agent (and it can act only by agents), adopts a method of business by which premiums or assessment are habitually collected and received for a period of several days after they become delinquent according to the strict letter of the contract, and no forfeiture or suspension is declared thereon, but such members are recognized as be-

ing at all times in good standing; and by this course of business members have reason fairly to conclude that the insurer does not insist upon literal compliance with the terms of the contract in this respect,—then it will not be heard to deny the good standing of a member who has depended upon the custom observed by the agent, and has paid, or offered to pay, his assessments in accordance therewith. *Cline v. Sovereign Camp*, W. of W. 111 Mo. App. 601, 86 S. W. 501, and cases there cited; *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 304, 18 Am. Rep. 34; *Loughridge v. Iowa Life & Endowment Asso.* 84 Iowa, 146, 50 N. W. 568; *Reisz v. Supreme Council*, A. L. of H. 103 Wis. 429, 79 N. W. 430; *Sweetser v. Odd Fellows' Mut. Aid Asso.* 117 Ind. 97, 19 N. E. 722; *Grand Lodge A. O. U. W. v. Lachmann*, 199 Ill. 140, 64 N. E. 1022; *Modern Woodmen v. Tevis*, 49 C. C. A. 250, 111 Fed. 113; *Supreme Lodge K. of P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; *Gunther v. New Orleans Cotton Exch. Mut. Aid Asso.* 40 La. Ann. 776, 2 L.R.A. 118, 8 Am. St. Rep. 554, 5 So. 65; *Georgia Masonic Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247, 35 Am. Rep. 122; *Appleton v. Phenix Mut. L. Ins. Co.* 59 N. H. 541, 47 Am. Rep. 220; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Home Protection v. Avery*, 85 Ala. 348, 7 Am. St. Rep. 54, 5 So. 143; *Equitable Acci. Ins. Co. v. Van Etten*, 40 Ill. App. 232; *Mueller v. Grand Grove*, U. A. O. D. 69 Minn. 236, 72 N. W. 48; *DeFreece v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556; *Spoeri v. Massachusetts Mut. L. Ins. Co.* 39 Fed. 752; *James v. Mutual Reserve Fund Life Asso.* 148 Mo. 1, 49 S. W. 978; *Richwine v. LaCrosse Mut. Aid Asso.* 76 Minn. 417, 97 N. W. 504; *Supreme Council C. K. v. Winters*, 108 Ky. 141, 55 S. W. 908; *National Mut. Ben. Asso. v. Jones*, 84 Ky. 110; *Tripp v. Vermont L. Ins. Co.* 55 Vt. 100; *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 80 N. W. 6; *United States Indemnity Soc. v. Griggs*, 118 Ill. App. 577; *Foresters of America v. Hollis*, 70 Kan. 71, 78 Pac. 160; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Supreme Court of H. v. Sullivan*, 26 Ind. App. 60, 59 N. E. 37; *Fraternal Aid Asso. v. Powers*, 67 Kan. 420, 73 Pac. 65.

There is no magic in the mere name of a thing; and, if an act done or performed by one person or party for or in behalf of another is in its essential nature one of agency, then the former is the agent of the latter. This principle has been often enforced as between the insurer and insured, and the person appointed or designated to receive payment of premiums and assess-

ments, held to be the agent of the insurer, even where, by the terms of the contract, it is provided that he shall be regarded as the agent of the insured. *Ancient Order of P. v. Drake*, 66 Kan. 538, 72 Pac. 239; *Supreme Lodge K. of P. v. Withers*, supra; *Supreme Lodge, K. of H. v. Davis*, 26 Colo. 252, 58 Pac. 595; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557, 18 Pac. 291; 3 Cooley, *Briefs on Insurance*, p. 2373.

As is well said by Mr. Justice Brown in the *Withers* Case, supra: "The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent and to deny his agency is a mere juggling with words. Defendant cannot play fast and loose with its own subordinates." The question involved in that case, as in this, turned largely upon the proposition whether the local secretary, in collecting assessments made by the grand lodge upon members of local lodges, was acting as the agent of the latter. This question the court answered in the affirmative, in a very vigorous opinion, which cites many of the cases, and takes note of the tendency of the courts, generally, to discountenance forfeitures of insurance on merely technical grounds, and to hold such forfeiture waived where the insurer, or its agent, by a course of business or conduct, has given the insured reasonable ground to believe that strict observance of the time and manner of paying recurring instalments, as required by the letter of the contract, will not be insisted upon. The authorities are substantially unanimous that in schemes of co-operative life insurance in which the authority to issue benefit certificates, prescribe terms of membership, and levy assessments is vested in a grand or supreme lodge, or council, or other central governing body, which central body exercises jurisdiction over local lodges or societies through which the membership is recruited, and by the officers of which assessments are collected and remitted, the local organization and its officers to whom the duty of making such collections is committed are to be considered the agents of the governing body. *Bragaw v. Supreme Lodge K. & L. of H.* 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905; *Fraternal Aid Asso. v. Powers*, supra; *Whiteside v. Supreme Conclave I. O. of H.* 82 Fed. 275; *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369; *Bacon*, *Ben. Soc.* 3d ed. § 148; *Brown v. Supreme Court*, I. O. of E. 176 N. Y. 132, 68 N. E. 145.

That this agency is subject to the operation of the ordinary rules applicable to 7 L.R.A.(N.S.)

agencies of the same general character in the business of ordinary life insurance is also well settled. *Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; *McCorkle v. Texas Benev. Asso.* 71 Tex. 152, 8 S. W. 516. As to the effect of the act of the collection agent in extending the time of payment of assessments and premiums, especially where such indulgence is so frequent or so often repeated that the member may reasonably rely thereon, there are numerous decisions, and, with very few exceptions, they sustain the contention of the appellant. Without any attempt at an exhaustive citation, we may note the following:

An officer of a subordinate lodge, charged with the duty of collecting and forwarding assessments, is an agent of the supreme lodge. *Supreme lodge, K. of H. v. Davis*, supra.

In *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 80 N. W. 6, the deceased and other members had frequently failed to pay their assessments promptly on the prescribed day, and on some occasions the payments were not made until they were several weeks past due. An assessment which became due July 18th was not paid, and a member so in default died August 11th. In an action upon his certificate, plaintiff asked the court to instruct the jury that, if payment of assessments had been frequently allowed to be made after due, and the officers of the local lodge had, by their course in conducting business, caused the deceased to believe that strict performance on his part would not be exacted, then a forfeiture could not be insisted upon because of the nonpayment of the last assessment, and plaintiff would be entitled to recover. This request was refused, and the jury was instructed according to the contention of the appellee herein, that failure to pay on or before the day fixed by the contract operated to work the suspension of the deceased without any declaration or affirmative action to that effect on part of the lodge, and that deceased was bound to know the laws and rules of the society, and must be held to have understood that his failure to pay served to relieve the society from all obligation upon his certificate. On appeal it was held that the charge given was erroneous, and that the jury should have been instructed as requested by the plaintiff. This doctrine was approved and applied in *Johanson v. Grand Lodge A. O. U. W.* (Utah) 86 Pac. 494. It was also approved by this court, in *Loughridge v. Iowa Life & Endowment Asso.* 84 Iowa, 141, 50 N. W. 568. We there say: "Nor can it be doubted that a general practice and course of business which would lead the

plaintiff to rely upon the acceptance of payment for assessments after failure to pay in the time prescribed by the policy will operate as a waiver of the forfeiture. Insurance companies cannot lead customers to rely upon their usages, course of business, and the declarations of their officers which disarm vigilance, overcome watchfulness, and remove stimulus to promptness in payments provided by their policies, and then rigidly enforce the conditions of payment." See also *Walsh v. Aetna L. Ins. Co.* 30 Iowa, 133, 6 Am. Rep. 664.

In the case of *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 304, 18 Am. Rep. 34, we held that an agent's custom of sending out written notices, or reminders, to policy holders, calling attention to the date when their premiums would be due, operated as a waiver of the right to forfeit a policy, where the notice was omitted, and the insured thereby led to omit prompt payment. In the same case we approved an instruction to the jury to the effect that, if the agent had been in the habit of receiving payment of premiums after they were due; or if the agent had informed the insured that he would call at the latter's place of business and collect the premium and had in fact pursued that practice in the past,—these circumstances "would excuse the deceased from going to the agent's office and paying such premium the day it was due." In upholding this instruction, the opinion says: "The vast increase in the business of insurance, and the many interests which it involves, have demonstrated that many of the decisions heretofore made respecting it are unwise, and have created a necessity for innovation. Every law should be reasonable, and it is reasonable only when it is adapted to human conduct. . . . Now, it must strike every reasonable mind that a majority of ordinarily prudent persons, who had been customarily notified of the time when premiums upon their policies became due, and who had received no notice of an intention to abandon the customary course, would, in a particular case, expect and await a like notice. And, if such is the reasonable and natural result of the previous dealings of the company, it must govern its future conduct, so as to accord with the reasonable expectation thus created." See also *Warnebold v. Grand Lodge, A. O. U. W.* 83 Iowa, 26, 2d par., 48 N. W. 1069.

In the recent case of *Alexander v. Grand Lodge A. O. U. W.* 119 Iowa, 519, 93 N. W. 508, we again had occasion to consider the effect of the act of the financier of a local lodge upon the governing body of the association. There the policy or certificate had been issued under circumstances which made it subject to be avoided for fraud on the part 7 L.R.A.(N.S.)

of the insured. Thereafter, with knowledge of the fraud, the financier of the local lodge advised the beneficiary to continue paying the assessments and keep the certificate alive, and this was done. This we held to operate as a waiver of the defense, saying: "One asserting the right to pay under a valid certificate, and allowed to do so by the officer having authority to determine whether or not such payments should be received, is certainly justified in relying on the statements of such officer; and the association is estopped from insisting, by way of defense, on any fact which would have been a proper ground for refusing, when the dues are offered, to recognize the certificate as valid; provided, such fact is known to the association through such officer, or there is such notice of the fact as to charge the association or its officer with knowledge thereof."

Under circumstances very similar to those in the case at bar, and upon a contract practically identical with the one here sued upon, the Wisconsin court was held that, where the local officer collecting assessments has been in the habit of receiving them after they were due, thereby leading the insured to believe that no forfeiture would be claimed if payments were made within a few days after maturity, the right to insist upon such forfeiture is waived; and where, under such circumstances, a member failing to pay an assessment due July 1st, died on July 10th, and on the same day a member of his family paid such assessment (a return of which was promptly tendered), there was no forfeiture, and a recovery upon the certificate was upheld. *Reisz v. Supreme Council, A. L. of H.* 103 Wis. 427, 79 N. W. 430. The same rule is applied in *Mueller v. Grand Lodge, A. O. U. D.* 69 Minn. 236, 72 N. W. 48.

In Illinois, it has been repeatedly held that in organizations of this class the local lodge and its officers are agents of the grand lodge, and the latter is bound by notice to, or knowledge of, the latter. *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 918; *High Court I. O. of F. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Grand Lodge A. O. U. W. v. Lachmann*, 199 Ill. 140, 64 N. E. 1022; *Germania L. Ins. Co. v. Koehler*, 168 Ill. 293, 61 Am. St. Rep. 108, 48 N. E. 297. Likewise in Indiana. *Supreme Tent, K. of M. v. Volkert*, 25 Ind. App. 627, 57 N. E. 203; *Supreme Tent, B. H. v. Hall*, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780; *Sweetser v. Odd Fellows' Mut. Aid Asso.* 117 Ind. 97, 19 N. E. 722. And in Michigan. *Wagner v. Supreme Lodge K. & L. of H.* 128 Mich. 667, 87 N. W. 903. See also *Sty-low v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 69 Wis. 224, 2 Am. St. Rep. 738, 34 N.

W. 151; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Knights of Pythias v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333; *Supreme Lodge K. of P. v. Kalinski*, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047.

Under this rule thus well established, and the undisputed facts in the case, we are clearly of the opinion that the association should not be permitted to insist upon a forfeiture of the contract. It is a universally recognized doctrine that forfeitures are not favored in law, and that the courts will be vigilant and quick to discover, and give effect to, any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance of the insured, or upon which an estoppel against such defense may be founded. *Appleton v. Phenix Mut. L. Ins. Co.* 59 N. H. 541, 47 Am. Rep. 220. Counsel seem to argue that, while waiver or estoppel may exist in a matter of ordinary insurance, a rule less favorable to the insured obtains in fraternal or lodge insurance. An occasional case may be found in which this doctrine seems to find support. *Supreme Lodge, K. of H. v. Oeters*, 95 Va. 610, 29 S. E. 322; *Busby v. North America L. Ins. Co.* 40 Md. 572, 17 Am. Rep. 634. But, as we have seen, it is contrary to the general trend and the great weight of the authorities, as, we think, it is also opposed to the principles of common right and justice. In addition to cases cited, see *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Girard L. Ins. Co. v. Mutual L. Ins. Co.* 86 Pa. 236; *Baxter v. Massasoit Ins. Co.* 13 Allen, 323. Indeed, if there is to be any difference in the degree of strictness with which the insured shall be held to pay premiums, and assessments promptly on time, it would be in favor of members of fraternal and co-operative associations like the appellee. *Murphy v. Independent Order, S. & D. of I. of A.* 77 Miss. 830, 50 L.R.A. 111, 27 So. 624; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154.

These societies are, as a rule, organized in an informal way. Their constitutions, rules, and by-laws, as is well illustrated in those on the record before us, are often crude, obscure, and confused, if not contradictory in their terms. The officers and members of each local lodge are neighbors, acquaintances, and personal friends, ordinarily without experience in the insurance business, and rarely, if ever, insisting upon strict technical compliance with all the written regulations by which they are supposed to be guided. The officer collecting the assessments generally knows the financial standing of the members on his list, and

their desire with reference to a continuance in such membership; and, as he is generally given a period of grace in which to make remittance to the grand lodge (in this case at least two weeks), he very naturally continues to receive payments until such remittance is made, even though they be past due according to the letter of the rules. Indeed, it may often occur, as it sometimes did in this case, that delinquency and suspension of a member are prevented by the act of the collector in advancing the amount due, and thereafter being reimbursed by such member. It is incredible that such lenient tendencies and practices should not be well understood by the grand lodge. Indeed, the very fact that liberal time is given to the collector to make his remittance is strongly suggestive of the conclusion that an opportunity is thus afforded for the very purpose of enabling him to round up the delinquents and prevent wholesale suspensions from membership. If the doctrine contended for by the appellee is to be upheld, then the deceased, who had been recognized as a member of the association in good standing for nearly twenty-five years, and had from time to time paid the assessments made upon him in the belief that he held a valid and enforceable certificate, had, as a matter of law, been under the cloud of suspension for years without suspecting it, and his certificate was all the time of no more value than a piece of blank paper; for it is shown that during all this time he frequently did not pay until called upon after payment was due. To so hold is to set a trap for the feet of the unwary member; it is to receive his money without furnishing him any consideration therefor, and to enable the insurer to escape liability on its contract for no better reason than that it has itself misled the insured to his injury by its own course of business. It is not too much to say that technical defenses to actions upon insurance policies are not regarded with favor by the courts (*Supreme Lodge, K. of P. v. Withers*, supra), and that the professedly benevolent and charitable character of the so-called fraternal insurance societies is not regarded as exempting them from the application of this rule. Speaking of a claim for such exceptional consideration, the supreme court of Nebraska has well said: "This consideration would appeal to us with greater force, if these principles of mutuality and benevolence more frequently survived the holders of certificates, and were uniformly regarded by the associations as being applicable to and as including the persons named as beneficiaries. A charitable organization which collects its funds with avidity, but is astute in finding excuses

for not bestowing them upon the designated objects of its bounty, is not entitled to any exclusive or special consideration at the hands of the court." *Modern Woodman v. Colman*, supra.

2. The conclusions arrived at in the preceding paragraph being decisive of the appeal, we shall not attempt any extended discussion of other issues presented. With reference, however, to the claim of waiver because of the absence from home of the financial secretary at the time when the assessment became delinquent, according to the rules of the association, we will say there is a good authority for the proposition that under such circumstances the member is entitled to a reasonable time after the return of such officer or agent, in which to make the payment. See *Cotton States L. Ins. Co. v. Lester*, and note thereto in 36 Am. Rep. 122 (62 Ga. 247). Also *Sovereign Camp, W. of W. v. Hicks* (Tex. Civ. App.) 84 S. W. 425. On the general subject of waiver, we may also note that, according to our decisions, the question whether waiver will be found in any particular case depends not upon the intention of the party against whom it is asserted, but on the effect which his conduct or course of business has had upon the other party. *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 264, 33 N. W. 663; *Bailey v. Mutual Ben. Asso.* 71 Iowa, 689, 27 N. W. 770; *Moore v. Order of Railway Conductors*, 90 Iowa, 727, 57 N. W. 623. And this rule has been held applicable even where the insurer acts under a mistake. See *Bailey Case*, supra. It is to be noted, also, that this is a case in which an advance assessment is exacted of a member prior to his initiation, and we must presume that the deceased complied with the condition imposed upon his admission to membership. No claim is made that deceased failed to pay any of the subsequent assessments, except the one made for June, 1904. Since this litigation was begun, we have decided that, until the advance payment thus exacted has been duly applied upon some assessment, the member cannot be held to be in arrears (*Rambousek v. Supreme Council, M. T. [Iowa]* 106 N. W. 947; *Sleight v. Supreme Council, M. T. [Iowa]* 107 N. W. 183; *Arrison v. Supreme Council, M. T.* 129 Iowa, 303, 105 N. W. 580; *Hetzel v. Knights & Ladies, G. P.* 129 Iowa, 655, 106 N. W. 157), and, under the rule of these cases, there would seem to be no ground for holding the deceased to have been suspended or subject to suspension at the date of his death. A partial defense was pleaded by the appellee, to the effect that, by an amendment to the laws of the association, a lien had been imposed upon the certificate, which would re-

duce the amount recoverable thereon to \$1,415.50. This issue does not appear to have been considered by the trial court, nor has it been argued by counsel, and we do not attempt to pass upon it.

For the reasons stated, the judgment of the District Court is reversed, and cause remanded for further proceedings in harmony with this opinion.

NORTH CAROLINA SUPREME COURT.

S. C. MARTIN

v.

CALVIN HOUCK et al., Appts.

(141 N. C. 317, 54 S. E. 291.)

Police—power.

1. A police officer has only such powers as are given him by statute, since such officer was not known to the common law.

Same—jurisdiction.

2. A police officer cannot, as such, justify an arrest without warrant out of the limits of the town for which he was appointed.

Same—persons assisting.

3. Persons assisting a police officer in making an arrest without a warrant out of his jurisdiction cannot justify under his authority, since he has none.

Arrest—without warrant—felony.

4. A private citizen cannot justify an arrest without warrant for the alleged commission of a felony, unless it appears that a felony was in fact committed.

Imprisonment—words.

5. Words are sufficient to constitute an imprisonment, if they impose a restraint upon a person, and he is actually restrained.

Same—declaration of arrest.

6. A formal declaration of arrest is not requisite to constitute an imprisonment, if

Case Note.—Words as effecting false imprisonment, where plaintiff did not accompany the person using them:—In ordinary practice, words are sufficient to constitute an imprisonment if they impose a restraint upon the plaintiff's liberty of action and movement, and he is accordingly restrained, for he is not obliged to incur the risk of personal violence and insult by resisting, until actual violence is used. *Pike v. Hanson*, 9 N. H. 491; *Limbeck v. Gerry*, 15 Misc. 663, 39 N. Y. Supp. 95; *Comer v. Knowles*, 17 Kan. 436; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005.

And, although the plaintiff did not accompany the one who used the words, yet, if they were sufficient to deprive him of liberty of movement, they have been held to constitute an imprisonment. Thus, in *Herring v. State*, 3 Tex. App. 108, the court held that a man who was called from his bed about 11 o'clock at night to come out and receive a message, and who, by a show

the person imprisoned understands that he is in the power of the one making the arrest, and submits in consequence thereof. Same—coercive restraint.

7. False imprisonment may be effected if one is ordered to do or not to do a certain thing, to move or not to move against his own free will, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield.

(May 8, 1906.)

APPEAL by defendants from a judgment of the Superior Court for Caldwell County in plaintiff's favor in an action brought to recover damages for false imprisonment. Affirmed.

Statement by Walker, J.:

The action was brought to recover damages for an unlawful arrest and false imprisonment. The defendant Calvin Houck was a policeman of Granite Falls, when he was informed that the plaintiff had stolen a pair of shoes from a store while it was on fire. He and his codefendants, J. O. Deal and George Lefevers, who acted as deputies, went to the plaintiff's house, which was 2 miles from the town, in the night and

after the plaintiff and his wife had retired, and arrested him, after searching the house at plaintiff's request, as the state's evidence tended to show. The plaintiff's wife was compelled to dress in the presence of these strangers. The plaintiff, when accused of stealing the shoes, denied his guilt, but voluntarily agreed to go with the defendants to town, and answer the charge. The defendants then told him that he need not go that night if he would come to town the next morning, which he promised to do. He went to Granite Falls the next morning, but no warrant was ever issued, and no accusation made against him for stealing the shoes. The defendants had no warrant for the plaintiff when they went to his home for the purpose of arresting him, nor does it appear that any formal charge was ever made against him, before or after the arrest. There was evidence on the part of defendants tending to show that, while they had entered his house that night, they had not arrested him. The defendants offered to prove that the plaintiff was seen with a pair of shoes two weeks after the night of the fire; and further, that the defendant Calvin Houck had been told by A. M. Martin of a report made to him (Martin) that the plaintiff had stolen shoes

of weapons, was detained at his gate about fifteen minutes, and was compelled to retract certain derogatory statements alleged to have been made by him, which he did because he was afraid to do otherwise, was deprived of his liberty against his will, within the meaning of a Texas statute defining false imprisonment as "a wilful detention of another against his consent, and when it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats, or by any other means which restrains the party so detained from removing from one place to another as he may see proper."

And in *Searls v. Viets*, 2 Thomp. & C. 224, the court held that a constructive arrest, on which a charge of false imprisonment could be based, was made by a constable who stopped the plaintiffs as they were driving past his house, and informed them that he had a warrant for their arrest for stealing pumpkins, but told them, when they were about to get off their wagon, that they could go home, put out their horses, take tea, and then come down. The plaintiffs then went home, and later engaged a lawyer, who went with them to the justice's office.

A similar decision was rendered in *Tracy v. Seamans*, 26 N. Y. Week. Dig. 117, 7 N. Y. S. R. 144, in which the defendant issued a warrant and handed it to a police officer, directing him to arrest the plaintiff; the officer found the plaintiff, and, after telling her that he had a warrant for her arrest,

asked her to walk over to the justice's office, which she did in company with her husband, after the officer had left her.

And in the case of *Pike v. Hanson*, supra, which is closely analogous to the preceding cases, it appeared that a tax collector, with power of arrest, told the plaintiff, upon her refusal to pay her taxes, that she was under arrest, and thereupon she paid them to him. The court said that it clearly appears that the plaintiff did not intend to pay her taxes, and that she did pay them under such a restraint as was sufficient to constitute an arrest and imprisonment. See also, on this subject, *Hebrew v. Pulis*, post, 580.

But bare words are insufficient to effect an imprisonment, if the party to whom they are spoken resists. *Searls v. Viets*, supra.

The following statements by an officer have been held not to constitute an arrest on which an action for false imprisonment could be based: Merely informing the plaintiff of his business without taking him into custody, where the latter understood that he was not deprived of freedom of action,—*Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899; and reading the summons in an action to the plaintiff, after informing him that he had an order of arrest for him, and telling him that he had better come along and fix the matter up, which he refused to do, but finally going away, leaving the bond with the plaintiff upon the latter's promise to call the next day and fix the matter up. *State ex rel. Lawrence v. Buxton*, 102 N. C. 129, 8 S. E. 774.

from the burning building. This testimony was excluded, and defendants excepted. The court instructed the jury upon the law as applicable to the different phases of the case, and to this part of the charge there was no exception. The defendants requested the court to instruct the jury as follows: "That in no view of the case could they return a verdict against the defendants Deal and Lefevers, they having been summoned by Houck, who was chief of police of the town of Granite Falls, to go with him in search for stolen goods, and that there was no testimony that either of the defendants Deal or Lefevers in any manner attempted to arrest the plaintiff, or in any manner restrained, or assisted to restrain, him of his liberty." The court refused to give this instruction, and the defendants (Deal and Lefevers) excepted. The court, in lieu of said instruction, charged the jury as follows: The arrest, if made at all, is admitted to have been made outside the town of Granite Falls; and, no authority being shown for a policeman of Granite Falls to arrest outside of the town limits by the evidence in this case, the defendants Deal and Lefevers were not required to obey Houck; and, if the plaintiff was actually arrested, and the defendants Deal and Lefevers were present and participated in it, they would be liable. Defendants excepted. The jury found, under issues properly submitted, that the defendants did unlawfully arrest the plaintiff, and assessed his damages at \$200. Judgment was entered upon the verdict, and the defendants appealed.

Mr. W. C. Newland for appellants.

Messrs. Lawrence Wakefield and E. B. Cline, for appellee:

Defendants had no right to arrest the plaintiff outside the corporate limits of Granite Falls without a warrant, unless they had reasonable ground to apprehend an escape for a crime.

Revisal of 1905, § 2939; State v. Sigman, 106 N. C. 728, 11 S. E. 520; State v. Campbell, 107 N. C. 948, 12 S. E. 441.

Walker, J., delivered the opinion of the court:

The court, in its charge, fully explained to the jury the law applicable to the power of an officer to arrest without a warrant, and also instructed them as to the powers of a town policeman. The only two exceptions made to the charge are really the same in substance, and are sufficiently presented in the exception noted. The statute provides as follows: "As a peace officer, the constable shall have within the town all the powers of a constable in the county; and, as a ministerial officer, he shall have

power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct." Revisal of 1905, § 2939. "Every person in whose presence a felony has been committed may arrest the person whom he knows, or has reasonable ground to believe, to be guilty of such offense; and it shall be the duty of every sheriff, coroner, constable, or officer of police, upon information, to assist in such arrest." § 3177. "Every sheriff, coroner, constable, officer of police, or other officer, intrusted with the care and preservation of the public peace, who shall know, or have reasonable ground to believe, that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest." § 3178. "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant, and thereon proceed to act as may be required by law." § 3182.

We see, therefore, that an officer may arrest for a felony without a warrant, if he knows, or has reasonable ground to believe, that a felony has been committed, and that a particular person is guilty, and he also believes that he will escape if not immediately apprehended; while an individual may arrest in such a case if the offense has been committed in his presence, and he knows or has reasonable ground to believe the suspected party to be guilty. A policeman, as a peace officer, is given within the town all the powers of a constable in the county, and as a ministerial officer he has the power to serve process directed to him by a court. In this case it appears that Houck had no warrant, so that he was not acting as a ministerial officer. What, then, are the powers of a constable in the county which he has under the statute as a peace officer? "In executing warrants . . . [a constable] is a ministerial officer. In the apprehension of those who violate the law, he is a conservator of the peace. By the original and inherent power he possesses, he may, for treason, felony, breach of the peace, and some misdemeanors less than a felony, committed in his view, apprehend the

supposed offenders, *virtute officii*, without any warrant." *State v. Freeman*, 86 N. C. 685. A police officer was not known to the common law, and therefore he can exercise only such powers as are given by the statute. His right to arrest when he has no warrant is confined necessarily by the statute to the limits of the town. *Ibid.*; *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. So that Houck cannot justify the arrest of the plaintiff as an officer, for he did not arrest in the town and had no warrant, and his codefendants consequently cannot justify under him. This will free the charge of the court of any error, unless the defendants can justify as individuals, upon the ground that they had good reason to suspect that the plaintiff had stolen the shoes.

Larceny is a felony. The statute provides that anyone may arrest a person who he knows, or has reasonable ground to believe, has committed a felony; but the offense must have been committed in his presence. The shoes are not alleged to have been stolen in the presence of the defendants. So that statute does not apply. We need not inquire whether the statute, in this respect, is exclusive of the common-law right of a person to arrest another who is suspected of having committed a felony; and that question is not therefore decided. It is sufficient to dispose of this case that we hold, as we do, that, if the common-law rule still exists, the defendants cannot justify under it, as the evidence is not legally sufficient for the purpose. At the common law, in every case of treason and felony, the supposed offender may be apprehended without warrant, if such a crime has been actually committed, and there is reasonable ground to suspect him to be guilty. In such a case the party making the arrest will not be liable to an action, though it should ultimately appear that he was mistaken and the person suspected was innocent. But, if no such crime was committed by anyone, an arrest without warrant by a private individual would be illegal. 1 *Chitty, Crim. Law*, 15; *Neal v. Joyner*, 89 N. C. 287; *State v. Campbell*, 107 N. C. 948, 12 S. E. 441. The foregoing doctrine was declared by Lord Tenterden in *Beckwith v. Philby*, 6 Barn. & C. 635, which seems to be a leading case upon the subject. In *Ashley's Case*, 12 Coke, 90, it was resolved that, "if felony be done, and one hath suspicion upon probable matter that another is guilty of it, . . . he may arrest the party so suspected, to the end that he may be brought to justice; but in this case three things are to be observed: (1) That a felony be done; (2) that he who doth arrest hath suspicion upon probable cause, which may be pleaded, and is traversable; 7 L.R.A.(N.S.)

(3) that he himself who hath the suspicion, arrest the party. He cannot command another to do it, for suspicion is a thing individual and personal, and cannot extend to another person than to him who hath it." The law on this subject is set forth with great clearness and fulness in *Voorhees on Arrest*, § 112. The principle is thus stated in *Holley v. Mix*, 3 Wend. 351, 20 Am. Dec. 702: "An arrest of a felon may be justified by any person without warrant, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested. If an innocent person is arrested upon suspicion by a private individual, such individual is excused, if a felony was in fact committed, and there was reasonable ground to suspect the person arrested; but, if no felony is committed by anyone, and a private individual arrest without warrant, such arrest is illegal." A police officer, however, having general authority to arrest, would be justified, without having a warrant, if he relied upon information from another on which he had reason to rely. *Brockway v. Crawford*, 48 N. C. (3 Jones, L.) 433, 67 Am. Dec. 250; *Kennedy v. State*, 107 Ind. 144, 57 Am. Rep. 99, 6 N. E. 305; *Brooks v. Com.* 61 Pa. 352, 100 Am. Dec. 645; *Wright v. Com.* 85 Ky. 123, 2 S. W. 904; *Long v. State*, 12 Ga. 293. There is no evidence in this case tending to show that a larceny had been committed, and none to show that the plaintiff had stolen the shoes. *State v. Rutherford*, 8 N. C. (1 Hawks) 457. What Masten told the defendant he had heard anybody else say is hardly sufficient proof of the fact that a larceny had been committed for submission to the jury. It is no legal proof at all, and the case was totally devoid of evidence that any such crime had been committed, even when we consider the evidence offered and excluded, that the plaintiff was wearing a pair of new shoes two weeks after the fire. It was not shown that any shoes had been taken, nor, if any had been taken, were those worn by the plaintiff identified as the stolen property, or a part of it; nor were any stolen goods found at his house. There was no serious attempt to establish the essential fact that a felony had been committed.

There was abundant evidence to show that the plaintiff had been unduly restrained of his liberty by Houck, and the other defendants who were present and participated. In ordinary practice, words are sufficient to constitute an imprisonment if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. This principle is reasonable in itself,

and is fully sustained by the authorities. Nor does there seem that there should be any very formal declaration of arrest. If the officer goes for the purpose of executing his warrant, and has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and the officer, in the execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body. It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield, the offense is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats. *Voorhees on Arrest*, §§ 274, 275, and 276. The evidence shows that the defendant Houck said to the plaintiff: "Consider yourself under arrest. You must go back to Granite Falls with us." Plaintiff asked for his warrant, when Houck replied: "That is all right about the warrant. You must go to Granite Falls with us." Plaintiff then said: "I will go with you." There was still other evidence showing that he submitted to the control they attempted to exercise over his person, and that he was made to act contrary to his own will. It is clear, we think, that there was no error in the charge with respect to the question whether or not there was an arrest. There was ample evidence, also, of the participation of the defendants Deal and Leffers. It would not serve any useful purpose to state the evidence in full.

We have not failed to observe that there is no evidence of any reasonable apprehension that the plaintiff might escape, or that he was attempting to escape. The fact is that he was at his home, apparently unconscious that he was being pursued, or that he was even suspected of having committed a crime. Nor have we overlooked the fact that the defendants never made any charge against the plaintiff before a magistrate on the next day after the arrest, and did not in any respect comply with the requirements of the statute. Their conduct was not only illegal, but extremely reprehensible, and 7 L.R.A. (N.S.)

they have, under the circumstances, been very lightly dealt with by the jury. The verdict is but a small recompense to the plaintiff for the grievous wrong inflicted upon him and his family. We can find no error in the rulings and charge of the court. No error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANNIE L. HEBREW, Plff. in Err.,
v.

PETER E. PULIS et al.

(— N. J. —, 64 Atl. 121.)

Imprisonment—what constitutes.

1. The essential thing to constitute an imprisonment is constraint of the person, which may be by threats as well as by actual force; and, if the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.

Same—submission—question for jury.

2. Where a plaintiff in an action for false imprisonment has submitted to the defendant, it is a question for the jury whether the submission was voluntary or brought about by fear that force would be used, unless it is clear that there was no reasonable apprehension of force.

Same—stripping prisoner.

3. An officer who has no warrant for arrest is not justified in compelling a person whom he may suspect of larceny to strip naked for the purpose of a search.

(June 18, 1906.)

ERROR to the Supreme Court to review a judgment in favor of defendants in an action brought to recover damages for false imprisonment. Reversed.

The facts are stated in the opinion.

Mr. Neilson Abeel, for plaintiff in error:

The evidence indisputably establishes a case of false imprisonment.

1 Hilliard, Torts, p. 197; *Ahern v. Collins*, 39 Mo. 145; 7 Am. & Eng. Enc. Law, p. 662; *Gold v. Bissell*, 1 Wend. 210, 19 Am. Dec. 480; 2 Addison, Torts, *Dudley & Baylies'* ed. p. 697; *Brushaber v. Stegemann*, 22 Mich. 268; *Hale*, Torts, p. 245; 3 *Starkie*, Ev. 1448; *Chinn v. Morris*, 2 Car. & P. 361; *Stevens v. O'Neill*, 51 App. Div. 364, 64

Headnotes by SWATZE, J.

Note.—The subject of imprisonment by means of words, where, as in the above case, the plaintiff did not accompany the person using them. is covered in a case note to *Martin v. Houck*, ante, 576.

N. Y. Supp. 663; Wood v. Lane, 6 Car. & P. 774; Cant v. Parsons, 6 Car. & P. 504; Sorenson v. Dundas, 50 Wis. 335, 7 N. W. 259; Peters v. Stanway, 6 Car. & P. 737; Fotherington v. Adams Exp. Co. 1 L.R.A. 474, 36 Fed. 252; Hawk v. Ridgway, 33 Ill. 475; Dunlevy v. Wolferman, 106 Mo. App. 46, 79 S. W. 1165; Marshall v. Cleaver, 4 Penn. (Del.) 450, 56 Atl. 380; 2 Addison, Torts, 719.

There was no justification on the part of the officer.

Spencer v. Anness, 32 N. J. L. 101.

Mr. Cornelius Doremus, for defendants in error:

There is no evidence in the record of a wrongful restraint of the plaintiff's liberty.

Greathouse v. Summerfield, 25 Ill. App. 296.

False imprisonment is an unlawful detention of the person.

12 Am. & Eng. Enc. Law, 2d ed. p. 721; Bigelow, Torts, 3d ed. chap. 6, p. 113; Cooley, Torts, 2d ed. chap. 6, pp. 195, 196; Pollock, Torts, p. 138.

In order to constitute an unlawful imprisonment, where no force or violence is actually employed, the submission must be to a reasonably apprehended force; the circumstance merely that one considers himself restrained in his person not being sufficient to constitute a false imprisonment, unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty.

12 Am. & Eng. Enc. Law, 2d ed. p. 734; Brushaber v. Stegemann, 22 Mich. 266; Miller v. Ashcraft, 98 Ky. 314, 32 S. W. 1085; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089.

Mere words will not amount to an arrest.

Genner v. Sparks, 6 Mod. 173, 1 Salk. 79; Russen v. Lucas, 1 Car. & P. 153; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Hershey v. O'Neill, 36 Fed. 168; Limbeck v. Gerry, 15 Misc. 663, 39 N. Y. Supp. 96; McClure v. State, 26 Tex. App. 102, 9 S. W. 353.

An arrest, made without warrant, by an officer of the law, is not a false imprisonment if the officer arresting has reasonable ground to believe that a felony has been committed, and that the person arrested is the guilty party.

12 Am. & Eng. Enc. Law, 2d ed. p. 740; 4 Bl. Com. p. 292; Reuck v. McGregor, 32 N. J. L. 70; Kirk v. Garrett, supra; Burns v. Erben, 40 N. Y. 463; Rohan v. Sawin, 5 Cush. 281.

Swayze, J., delivered the opinion of the court:

This is an action for false imprisonment. A nonsuit was ordered at the trial, for the 7 L.R.A. (N.S.)

reason that the restraint complained of was thought to be due to the voluntary act of the plaintiff. The facts as testified to by the plaintiff are as follows: She was a domestic servant in the employ of Helen Sands and Elizabeth Sands, two of the defendants. Helen had lost a diamond ring. Pulis, the other defendant, known to the plaintiff as a police officer, was called in. In the presence of the Misses Sands, he asked the plaintiff if she had the ring. She denied having it. After further talk, Pulis said: "I want you to go upstairs and strip yourself to your hide."

What further happened is thus told by the plaintiff:

I said: "Do you mean to say I have got the ring?" I said: "I don't know anything about that ring, and you have no right to say so." And when I said that he said: "Don't you tell me what you don't know. You do what I tell you." He said: "Don't you dare to dictate to me what I have no right to do." And he shook his finger in my face and he said: "We are going to search every piece of clothing you own." And I went out in the hall, and I said, "My key is downstairs, to the door," and I went down to get it, went down there and got the key, and went back, and then he said, "You go upstairs and strip yourself to the hide," and I went upstairs and sat in the rocking chair, and the three girls stood looking at me, and I was crying, and the detective pulled out everything and looked in the tips of the shoes and the heels, and shook out the stockings, and looked through the bureau drawers and turned everything over, and looked at the letters, and opened the pocketbook, and asked me where I got so much money, and he said, "I am going to find that ring," and then he says, "Now I want you to strip and undress to your hide," and when he said that, and I was crying still, I said, "Do you really mean that I have got to undress?" and he said, "Yes," and with that he stepped out of the room, and Miss Bessie and Ellie followed him. So then Miss Helen was there, and as I took off everything, I took the long skirt off, and let all my other clothes down, and she took up piece by piece and searched it.

Q. Who searched them?

A. Miss Helen.

Q. Where was Mr. Pulis all this time?

A. Standing outside the door.

Q. How do you know?

A. Because I could hear him. The door was open.

Q. Did you take your shoes and stockings off?

A. I did; and when she had searched everything, she said, "I have searched every-

thing, and I cannot find the ring on her," and the detective stepped inside the sill of the door, and he said, "Are you stripped right down to the hide," and I said, "Yes sir," and then he said, "All right," and then he said, "yes, you can get dressed now."

Q. How long did he stay there in the room after that?

A. He just stayed long enough to look at me, and then said I could dress.

The question presented to us is whether, upon this evidence, it appears so conclusively that the plaintiff's conduct was voluntary that a jury would not have been justified in finding that she was under constraint. Our view differs from that taken at the trial. The fact that Pulis was a police officer and known to the plaintiff to be such; that she was confronted, not only by him, but her employers; that she was suspected of larceny for which the officer might arrest her if he had reasonable ground to believe that the crime had been committed,—warranted her in believing that, if she failed to submit to Pulis's demand, she would be actually arrested. The emphatic language in which the officer commanded her to strip to the hide was calculated to terrorize a girl in her situation; and the very fact that the officer, wholly without right, asserted such authority and gave such a command justifies the inference that he and his employers and co-defendants intended to terrorize the plaintiff and to secure the effect of a search without legal process. If it was only intended to secure the consent of the plaintiff to a thorough search, the presence of the police officer was quite unnecessary. The appeal of the Misses Sands would have been as persuasive as the command of the officer, but for his seeming authority. We think the case at least presents a question for the jury, and that the reason given by the learned trial judge is not sufficient to justify his conclusion. We think, further, that the nonsuit cannot be sustained on any other ground. There is, indeed, no proof that the defendants laid hands on the plaintiff; but that is unnecessary. Whatever doubt may have been thrown upon this question by some of the earlier English cases is now removed by the later authorities. *Grainger v. Hill*, 4 Bing. N. C. 212; *Warner v. Riddiford*, 4 C. B. N. S. 180. The American cases are to the same effect. *Gold v. Bissell*, 1 Wend. 210, 19 Am. Dec. 480; *Pike v. Hanson*, 9 N. H. 491; *Brushaber v. Stegemann*, 22 Mich. 266; *Johnson v. Tompkins*, *Baldw.* 571, 601, 602, *Fed. Cas. No.* 7,416.

The essential thing is the constraint of the person. This constraint may be caused by threats, as well as by actual force; and the threats may be by conduct or by words. 7 L.R.A. (N.S.)

If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. Unless it is clear that there is no reasonable apprehension of force, it is a question for the jury whether the submission was a voluntary act, or brought about by fear that force would be used. No doubt cases may arise where it will be a question of difficulty to determine how far the free will of the plaintiff was overcome; but that determination rests with the jury. That the imprisonment was without right, and therefore false, must be assumed as the case stood when the nonsuit was ordered. No justification then appeared. The officer was without a warrant as far as we know. He seems to have been also without reasonable grounds to believe that a felony had been committed; for, after the search of the plaintiff's person, he was asked what else he would do with her, to which he replied: "I cannot lock her up. She has not got it on her." Upon the plaintiff's case it appears that the defendants themselves recognized that they had, at the time, no reasonable ground for suspecting the plaintiff of larceny, and that they were then seeking evidence which might give them ground of suspicion. But, even if the case had been such that the officer would have been justified in arresting without a warrant, we think he was not justified in compelling the plaintiff to strip naked. Whether he would have been justified in carrying a search of the person to that point if he had had a warrant is a question not presented. The fact that the officer went to this length might suffice to render him a trespasser *ab initio*. The other defendants stood by, and apparently assented to his conduct and took part in the search. They are therefore liable to the same extent as he.

The judgment must be reversed, and the record remitted for a new trial.

WASHINGTON SUPREME COURT.

ROSENA E. GROVER, Resp't.,

v.

JAMES E. ZOOK, Appt.

(— Wash. —, 87 Pac. 638.)

Breach of promise of marriage—ill health as defense.

A son of consumptive parents will not render himself liable in damages for re-

Case Note.—Ill health as defense to an action for breach of promise to marry: — There are but few cases in which the

tusal to perform his promise to marry a woman afflicted with pulmonary consumption, although he knew at the time of making the promise that she was so afflicted,—at least where such marriage would violate the spirit of the statute against the spread of such disease.

(November 24, 1906.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for breach of promise of marriage. Reversed.

The facts are stated in the opinion.

Messrs. John E. Humphries, George B. Cole, and William E. Humphrey, for appellant:

question as to the ill health of the plaintiff as a defense to an action for breach of promise has been considered. It is clear, however, that the fact that the plaintiff is suffering from a disease which would render marital relations dangerous to the health of either party, or would involve grave danger of tainted offspring, will constitute a good defense to such an action,—at least if the plaintiff's condition was not known to the defendant at the time of his promise. The only reason for doubt as to the correct rule of law to be applied to the facts in *GROVER v. ZOOK* arises from the fact, assumed to be such for the purposes of the case, that plaintiff's condition was known to the defendant at the time he made the promise. As suggested in the opinion, the facts undoubtedly presented a proper case for the application of the maxim that a bad promise is better broken than kept. This, however, merely touches the morality of the defendant's conduct in breaking his promise, and it does not necessarily follow, from the fact that the circumstances acquitted the defendant of any moral dereliction in failing to keep his promise, that they ought to relieve him from legal liability in the premises. Damages for breach of promise to marry are doubtless to be regarded as a substitute for the performance of the promise, and there may be a logical difficulty in holding one liable in damages for breach of a promise which, in the interests of morality and public interest, he ought not to keep. The defendant, however, in such a case, while not at fault in failing to keep his promise, is in fault in making the promise with a knowledge of the plaintiff's condition; and the logical difficulty in permitting a recovery by the plaintiff might, perhaps, if she were herself free from fault, be avoided by treating the making of the promise as a wrong to her and the basis of the action, and its breach as a mere condition or occasion of the injury. Even in this view there is a serious objection, arising from public policy, to allowing a recovery, for the reason that liability to pecuniary damages in the event of his refusal may

If the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable.

Sanders v. Coleman, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 622; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5; *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79; *Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840; *Gould v. Gould*, 78 Conn. 242, 2 L.R.A. (N. S.) 531, 81 Atl. 604.

This court knows judicially that offspring from consumptives have what is known as the hereditary taint of consumption in them, and are liable to become consumptives.

influence one to perform a promise which, in the interests of morality and public policy, ought not to be kept. Conceding, however, the premise of the court's argument in this case, namely, that a marriage in view of the physical condition of the parties, which was known at the time of the promise, would be contrary to public policy, it would seem that the decision against the plaintiff might have been safely and securely put upon the ground that the promise itself was invalid as opposed to public policy, and that the plaintiff was *in pari delicto*, since she doubtless knew at least as much about her own condition as the defendant. As subsequently shown, the rule as thus far applied, which relieves defendant from liability when he is himself suffering from a disease which would render marital relations dangerous to himself or to the plaintiff, or would involve danger of tainted offspring, has been limited to cases where the defendant was not aware of his condition at the time of the promise; and there is at least an implication in the cases that he would be liable, notwithstanding such condition, if it were known to him at the time he made the promise. The distinction between such a case, however, assuming that the plaintiff did not know of the defendant's condition, and a case like *GROVER v. ZOOK*, is apparent, since in the former case there would be no ground for holding the plaintiff *in pari delicto*.

It may, perhaps, be argued against denying recovery upon the ground that the promise was contrary to public policy and the parties *in pari delicto*, that, while the marriage of persons in the physical condition of the parties to this action may be opposed to public policy, yet the marriage, if contracted, would not have been invalid for that reason; and that the court cannot properly refuse, upon the ground of public policy, to grant relief for the breach of an executory contract to do an act which would not of itself be illegal or invalid. It may be said in reply to this argument, however, that, assuming the premise that it is contrary to public policy for such parties to marry, the

Gould v. Gould, *supra*; State v. Main, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; Dorr Cattle Co. v. Chicago G. W. R. Co. 128 Iowa, 359, 103 N. W. 1003; Grimes v. Eddy, 126 Mo. 168, 26 L. R.A. 638, 47 Am. St. Rep. 653, 28 S. W. 756; Furley v. Chicago, M. & St. P. R. Co. 90 Iowa, 146, 23 L.R.A. 73, 57 N. W. 719; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; Re Berry, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44.

And that a person suffering from pulmonary tuberculosis is not fit to consummate the marital relation, and is not fit to produce offspring.

Bradford v. Floyd, 80 Mo. 207; Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538.

reason why the marriage, if actually contracted, would have been held valid, is that the public policy which regards the sacredness and integrity of the marriage relation in this instance overrides the public policy which discountenances the contracting of a marriage between such parties.

The point decided in *GROVER v. ZOOK* does not seem to have been presented in just the same form in any of the other cases in which the plaintiff's physical condition was relied upon as a defense.

In *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100, a substantial recovery by plaintiff was upheld, notwithstanding that it appeared that for some time prior to the courtship, and during the same, she suffered from epilepsy or nervous convulsions, of which fact the defendant was informed during the courtship. In this case, however, the plaintiff's condition was not pleaded as a bar, and the evidence was relied upon merely in support of the defense of no contract and mitigation. The court, after stating that, if two parties make a contract to marry in the future, knowing all the facts about each other's physical, mental, moral, and social conditions, on a breach thereof the jury have the right to consider such conditions in ascertaining the amount of the recovery, said: "Such conditions, under some circumstances when pleaded, will bar a recovery entirely; and in all cases, whether pleaded or not, they are proper in mitigation." Here is, perhaps, a slight intimation that defendant's knowledge, at the time of the promise, of the plaintiff's condition, would not preclude the defense.

In *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841, where the defendant successfully asserted as a defense that the plaintiff's physical condition was such as not to permit of sexual intercourse, even though it was possible to remove the condition by a surgical operation, the defendant adhered to his promise for some time after he was informed of the plaintiff's condition; but this was in reliance upon her promise to submit to an operation.

In *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, the decision was that it was 7 L.R.A. (N.S.)

Mr. John B. Hart, for respondent:

If a person were bedridden it would be a sufficient justification to postpone the marriage ceremony; but it would not be a justification for the breach of the contract.

Smith v. Compton, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386; *Alberts v. Albertz*, 78 Wis. 72, 10 L.R.A. 584, 47 N. W. 95; *Hall v. Wright*, El. Bl. & El. 746; 4 Am. & Eng. Enc. Law, p. 892.

Nothing will excuse the defendant for the breach of his promise, except such a disease or complication of diseases as renders the making of the marriage contract and the consummation of the marriage by marital intercourse impossible.

Vierling v. Binder, 113 Iowa, 337, 85 N. W. 621; *Lohner v. Coldwell*, 15 Tex. Civ.

competent, under the general issue, to show by plaintiff, on cross-examination, that at the time of the engagement she was suffering from a disease which physically disqualified her from entering into the marriage state, and concealed that fact from defendant. The court said that, if such facts appeared from plaintiff's own testimony, they would show a fraud which, even in the absence of any defense, would prevent her from recovering anything except possibly nominal damages.

In *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621, the court said that it was no doubt true that physical defects or disease which incapacitate the woman for the marriage state or the birth of children, if unknown to the other party at the time the contract was entered into, may be pleaded and proved in bar to an action for breach of promise; but such defense is not available where the diseased condition was pleaded merely as tending to show that no contract was made, and not as a bar.

In *Kantzier v. Grant*, 2 Ill. App. 236, it was held error to refuse an instruction, requested by the defendant, to the effect that it would be a defense if the plaintiff was suffering from a venereal disease of which the defendant was not aware and the existence of which he had no reason to suspect at the time of the promise, or to modify it so as to make the defendant's right to rely upon the defense conditional upon his having based his refusal to marry the plaintiff upon that ground.

It is a good defense to an action for breach that, after the promise and without the defendant's consent, the plaintiff voluntarily permitted an unnecessary surgical operation by which she was rendered unable to procreate or bear children. *Edmonds v. Hughes*, 115 Ky. 561, 74 S. W. 283.

In *Atchison v. Baker*, 2 Peake, N. P. Add. Cas. 103, Lord Kenyon decided that a woman was justified in refusing to perform her prior promise to marry a man, upon discovering that he had an abscess in his breast.

It will be observed that the cases above cited lend very little, if any, affirmative support for the defense where the defendant

App. 444, 39 S. W. 591; Rime v. Rater, 108 Iowa, 61, 78 N. W. 835; Alberts v. Albertz, supra; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422.

Root, J., delivered the opinion of the court:

This is an action by respondent to recover damages against appellant for breach of contract of marriage. From a judgment in favor of respondent, the case comes here on appeal.

The principal defense urged by appellant is that respondent, at the time of the mutual promises of marriage, was afflicted with pulmonary tuberculosis (commonly called consumption) in an incurable form, and has

was aware of the plaintiff's condition at the time of the promise. As already intimated, however, there seems to be a substantial ground for denying recovery in such a case if the plaintiff knew of her own condition, and that condition was such as to make it contrary to public policy for the parties to marry.

The weight of authority holds that the fact that the defendant is suffering from a disease, not known to him at the time of the promise, but which, without any intervening fault on his part, supervened or developed after the promise, of a nature rendering it improper for him to assume marital relations, is a complete defense to an action for breach of promise, even though it is not such as would absolutely prevent the consummation of the marriage, or, in the absence of fraud, furnish ground for a decree of nullity or a divorce.

In Trammell v. Vaughan, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79, referred to in the opinion in the reported case, the decision was that a man engaged to marry, in whom there subsequently appears, without any intervening fault on his part, a loathsome venereal and contagious disease, which renders it unsafe or improper for him to marry, is entitled to postpone the marriage until he is cured if the disease is of a temporary character, and to refuse to carry out the contract if the disease is permanent.

In Sanders v. Coleman, 97 Va. 690, 47 L. R.A. 581, 34 S. E. 621, also referred to in the reported case, the decision was that a man is excused for breach of a contract of marriage when, after it was made, he, without fault on his part, developed a grave malady of such a character that marriage would endanger his life or health.

In Gardner v. Arnett, 21 Ky. L. Rep. 1, 50 S. W. 840, the reappearance after the promise, and without any intervening fault on defendant's part, of syphilis, which he had contracted a considerable time before the engagement, but of which he in good faith believed he had been cured, was held to be a good defense.

The cases of Shackelford v. Hamilton, 93 7 L.R.A.(N.S.)

ever since been physically incapable of entering into the marriage relation. It was the contention of the respondent in the trial court and here that this condition of respondent constitutes no defense to her action, for the reason that appellant knew thereof at the time he promised to marry her. It is admitted by respondent that she was afflicted with this disease at the time the engagement of marriage was entered into, although she claims that she did not know at that time that the malady affecting her was consumption. There is a conflict in the evidence as to whether or not appellant knew of the character of her illness at the time of the engagement. He swears that he did not. The question of whether or not he did turns upon the ques-

Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5, and Allen v. Barker, 86 N. C. 91, 41 Am. Rep. 444, involved substantially the same state of facts as the last case; and the decisions therein are to the same effect.

It will be observed that the foregoing cases holding that the physical condition of the defendant rendering marriage improper will relieve him from liability for breach of his promise to marry make his ignorance of his condition at the time of his engagement a condition of the application of the rule. Some of them expressly state that, if he knew of his condition at the time of the promise, it will not constitute a defense.

Thus, the court, in Allen v. Barker, supra, while holding that the defendant's physical condition would constitute a defense if he believed in good faith at the time of the promise that he had been cured, said: "If knowing, or by using extraordinary diligence he might have known, that his infirmity was incurable or of long duration, he entered into a contract with the plaintiff, his subsequent incapacity to perform it would furnish no excuse for its breach,—so far from it, it would amount to a gross aggravation."

So, in Trammell v. Vaughan, supra, it was said, *obiter*: "Of course, if . . . [he had] entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him and to treat his condition as a breach of the contract,—a fraud perpetrated upon her."

In Gardner v. Arnett, supra, however, it was held that the fact that the defendant, after learning of his condition and talking the matter over with the plaintiff, expressed a willingness to keep his promise, did not deprive him of the right to rely upon the defense, as there was not a new contract to marry.

The only case in which the defense has been held good notwithstanding the defendant's knowledge of his condition at the time he made the promise is Gulick v. Gulick, 41 N. J. L. 13, holding that defendant, who, by reason of a surgical operation before the

tion as to when the engagement took place. He claims that they became engaged on the evening of the 6th of January, 1904. She and her mother and stepfather claim that the engagement did not take place until the 10th of January, 1904. It appears that they had some talk about the matter on the evening of January 6th, and it is admitted that she at that time took from her finger a ring, and gave it to him to take to the jeweler's to be used as a measurement for an engagement ring. He took the ring, used it for that purpose, and presented her with the engagement ring on the next Sunday, January 10th. Her mother and stepfather testify that on the latter date they informed appellant that the ailment from which respondent was suffering was consumption, that this information was given him while she was not present, that he said he would marry her notwithstanding this, and that it was then planned by them that she should be sent to Arizona, where it was believed that the climate would cure or ameliorate her diseased condition. Appellant denies that he knew of the character of her ailment until after she had gone to Arizona. Her mother testified that she informed respondent of the nature of the malady after she reached Arizona. A correspondence was maintained during the time she was there, between herself and appellant; he making her many suggestions as to taking care of herself, and as to the character of treatment

she should follow, and sending her books and pamphlets giving such information and directions. She returned in the following April much improved, as she believed. However, she had an attack of appendicitis, necessitating an operation, which seriously weakened her. She was in the hospital sixteen days on account of this operation, leaving there on the 16th of May. It was understood between them that their marriage was to take place in June. On account of her physical condition in June, it was mutually agreed that the marriage should be postponed until autumn. When the latter season arrived, she and her parents requested appellant to carry out his promise of marriage. It seems that there had been an understanding between them that they would get married and attend the World's Fair in St. Louis, in September or October. She and her parents urged upon appellant the carrying out of this plan. He insisted that she was physically unable to be married, but that he would marry her when she recovered. The controversy growing out of the matter occasioned strained relations between the parents and appellant, and he visited their home seldom thereafter. Finally, in December, 1904, he wrote respondent a letter in effect expressing a desire to terminate the engagement.

Upon the trial there was some indefiniteness in the evidence as to the seriousness of her condition. She admitted upon the wit-

engagement, knew that he was sexually impotent, could rely upon such condition as a defense. It appeared in this case, however, that plaintiff knew of the defendant's infirmity, although the decision is not expressly put upon the ground that the parties were *in pari delicto*, but upon the ground that defendant could not bind himself to enter into a marriage which, by force of its own inherent conditions, might be declared by the chancellor to be void *ab initio*, and, that having made such a promise, he had a *locus penitentiae*, and could repudiate it without subjecting himself to a liability to be sued.

It will also be noted that in a number of the cases above cited, in which the defendant's physical condition was held to constitute a good defense, it appeared that his condition was due to his own fault preceding the promise of marriage. That fact, however, was not regarded as affecting his right to avail himself of the defense so long as it was not due to any fault on his part after the promise. Commenting upon this point, the court, in *Allen v. Barker*, supra, said: "We are not unmindful of the fact that the malady under which the party in this instance labored was the legitimate result of his own imprudence; . . . but, if contracted when he owed no duty to the plaintiff, we cannot see how that can vary the case."

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In none of the foregoing cases, with the exception of *Gulick v. Gulick*, supra, was the physical condition of the plaintiff or defendant such as to prevent a consummation of the marriage, or, in the absence of fraudulent concealment, to furnish a ground for a decree of nullity or a divorce. In *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841, it was expressly said that an impediment to sexual intercourse, arising from the plaintiff's physical condition, need not be such as would sustain an action for divorce after marriage, in order to constitute a defense to an action for breach of promise.

In *Smith v. Compton*, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386, however, it is held that nothing will excuse the defendant for breach of promise of marriage except such a disease, or complication of diseases, as renders the making of the marriage contract and the consummation of the marriage by marital intercourse impossible.

The ground and scope of this decision are indicated by the following quotation from the charge of the trial court, which was apparently approved by the supreme court: "The extent to which the evidence for the defense goes is that the consummation of the marriage would be attended with imminent hazard to the defendant's life. However unfortunate that may be for the defendant, assuming it to be true, it is no

ness stand that for about a year prior to the time of the trial she had been sleeping out of doors on the porch at the side of the house, in order to have the benefit of the open air; that while in Arizona she had lived most of the time in a tent, being much of the time confined to her bed, and having night sweats and a cough, and having had several "fainting spells;" that since her return she had been free from the night sweats, but still had the cough; that she had continuously followed, and was then following, the directions and treatment recommended by appellant and the books he had furnished her; that she was taking cod-liver oil and practising the "breathing exercises." The doctors who attended her at the hospital made an examination and found that she was at that time afflicted with pulmonary tuberculosis. One physician who examined her a few days before the trial, at the request of her attorney, testified that she at that time had the disease. In fact, it was not disputed that she had never recovered since the engagement; but she believed herself to be much improved over her condition as it was when she started for Arizona. Her stepfather testified that their family physician had said that he did not deem it advisable for her to get married. Appellant testified that his father and mother had died from this disease, and that he had for many years practised "breathing exercises" for self-protection therefrom. He

urged that, by reason of the diseased condition of respondent and of the taint in himself, the proper functions of marriage could not be consummated, and that their marriage would be detrimental to the health of her, himself, and any issue they might have, and in contravention of public policy.

As to the question of the date of the engagement, and as to whether or not he knew of her having consumption at the time he became engaged to her, while the evidence would seem to make his version reasonable, yet, as the jury evidently reached the other conclusion, we will accept their finding as correct. The trial court ruled upon the evidence, and instructed the jury upon the theory that the appellant was liable for a breach of the agreement, if, at the time of the making thereof, he knew the character of appellant's ailment. Proper exceptions. In different form, questioned the correctness of this view. The question presented to the court is this: Did appellant, under the circumstances, have a legal right to disregard the promise of marriage he had given respondent? In the domain of morals it is a maxim that a bad promise is better broken than kept. Moral considerations must have a predominating influence upon such a question as now confronts us. In fact, they constitute the reason, the basis, and the life of the law applicable in a case of this character. The most profound philosophers join with the wisest statesmen in maintaining

defense to this action. The defendant has made the contract; he has failed to perform it; he must pay the damages for that failure. Contracts the performance of which involves imminent hazard to life are not infrequent. No one would think of excusing a locomotive engineer, or the captain of a ship, from the performance of his duty because of an unexpected danger to his life in the performance." This decision which is referred by the court to the general rule established in New Jersey, that, if the party enters into an absolute contract without any qualification or exception, he must abide by the contract, and either do the act or pay the damages, is diametrically opposed to the cases above cited, many of which are expressly disapproved in the opinion. It is intimated in the opinion that, if properly pleaded, the defendant's physical condition, though not such as to render him incapable of consummating the marriage, might avail him as a justification for postponing the marriage. The court said, however, that in the case at bar the notice to which, by the express provisions of the statute, the defendant is confined, did not set up that he recognized the continued existence of the contract binding him to perform when his disability was removed, and that he was ready to do so; and that therefore the right to postpone as a substantive defense and bar to the action could not be considered.

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The court, in *Smith v. Compton*, supra, relied to a considerable extent upon the case of *Hall v. Wright*, El. Bl. & El. 746. As pointed out in a note to 15 L.R.A. 531, however, that case was decided against strong dissent, the judges of the court of Queen's bench being equally divided, and the judges of the exchequer chamber standing four to three against the right of the defendant to set up his own physical defects as a bar to the action.

The question whether the physical condition of the defendant is available as a defense to such an action was not considered in *Mabin v. Webster*, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863, for the reason that it was not expressly pleaded as a defense. The court, alluding to the paragraph of the answer in which the defendant attempted to plead that he was afflicted with epilepsy, rendering it unsafe and improper for him to make the marriage contract, said that the paragraph was so indefinite and defective in its allegations as to be clearly bad, even if the defense attempted to be pleaded would be good if properly pleaded. It was held, however, that it was competent for the defendant, in mitigation of damages, to prove his physical condition, and that marriage would have an injurious effect upon him, and probably shorten his life.

the proposition that the home is the unit of the state, and that the character of a people and the stability and welfare of the nation must largely depend upon the healthful and wholesome influence of the home life. By reason of this, we find the home and the members thereof, especially the young and dependent, sheltered by the protecting care of various statutes, all being evidences and expressions of that public policy which deems the home and its inmates appropriate objects of the solicitude and care of the state. The paramount consideration involved in the determination of this case is not that appertaining solely to the parties to this action (although as to each of them it is of great importance), but it is as to the community, the state, and to humanity in general. Here we have a man and woman engaged to be married. The man is of a family several members of which have died with pulmonary consumption. The woman is afflicted with the same disease to such an extent that it becomes necessary for her to go to a distant portion of the country to recuperate, which she does, returning with the affliction still upon her, and with small, if any, assurances of recovery. Under these circumstances, if the marriage were to be consummated, what would be the natural consequences to be anticipated? Unconditional promises of marriage, exchanged by a man and woman, imply respectively that each is physically, morally, and legally competent to enter the status of matrimony, and capable, in so far as he or she knows or has reason to believe, of effectuating the principal purposes of the marriage relation. One of the most important functions of wedlock is the procreation of children. Offspring are the natural result, and oftentimes the chief purpose, of marriage. That the thought of bringing a child into the world should be one of the most serious that can engage the mind of a human being needs but to be suggested. Born amidst the most favorable environment, there lies before every babe a life of uncertainty so great that no worthy parent may contemplate it without a tremor of apprehension. Thus launched upon the sea of time and eternity, what parent can dwell upon the birth of his child without the keenest sense of anxiety and responsibility? If the child born in health and with a body of vigor be a matter of deep concern to a parent, what must be said of the advent of a babe burdened with the hereditary plague of consumption? That pulmonary tuberculosis is both contagious and hereditary, as well as infectious, admits of little, if any, doubt. That a mother seriously ill with that disease and a father with a hereditary taint thereof in his blood could bring forth

a child exempt therefrom is unbelievable. For parents thus afflicted to bring into the world a child would be not only detrimental to the welfare of the state and an offense to the instincts of humanity, but it would be, as against the innocent babe, a moral wrong most abhorrent. Such a child must of necessity be a burden to itself and others, and devoid of the joys and blessings that make life endurable. In declining to carry out his promise of marriage, it may be presumed that appellant apprehended the natural and legitimate consequences of such a union. In addition to the thought of progeny, there would be, also, that of the aggravation of the disease as to both himself and prospective wife, the medical expert evidence showing that the intimate association of married life would tend to augment the ravages of the malady upon each.

The apprehension felt by the people of this state from the disease under consideration is evidenced by a statute enacted by the legislature in 1899, entitled: "An Act to Prevent the spread of Tuberculosis," etc. Laws 1899, chap. 71, p. 117. Section 5 of that statute reads as follows: "It is hereby made the duty of every person having tuberculosis, and of everyone attending such person, and of the authorities of public and private institutions, hospitals, or dispensaries, to observe and enforce the sanitary rules and regulations prescribed from time to time by the boards of health of such cities and of the state for the prevention of the spread of pulmonary tuberculosis." Other statutes exist, having for their purpose the prevention of the spread of this and other contagious and infectious diseases. The enforcement of certain rules, and the distribution of literature giving information as to the prevention and treatment of such cases, is enjoined upon boards of health and others. Such a document is the "Circular of Information to Prevent the Spread of Consumption," which is now before us. Besides much other information and many directions, it contains the following items: "Consumption is the most common and the most fatal of all diseases. It is a disease of the lungs caused by a germ which is breathed into the lungs or gets into the body with food. This germ of consumption comes only from some other person or animal that has the disease. . . . A consumptive should never sleep in the same bed with another person. . . . A consumptive mother should never nurse her baby; it is bad for the mother and dangerous for the baby. A consumptive should not cook or prepare food for others. . . . When a consumptive moves to another house, notify the health authorities by phone or card, so that they can see that

the old home is properly disinfected according to law. Do not share a consumptive's bed, or use the personal property, including dishes, belonging to one."

In the face of legal restrictions and requirements of this character, it is difficult to understand how a man or woman afflicted with this plague may legally insist upon the fulfilment of a promise of marriage, which, if consummated, would endanger the health and life of both and blight the life of any offspring that might be born. Any person entering marriage, knowing himself to be seriously afflicted with pulmonary tuberculosis, violates the spirit, if not the exact letter, of the statutes enacted to prevent the spread of that disease. The same is true of one who marries another knowing him or her to be thus afflicted. An agreement which, if executed, would thwart the beneficent purpose of such statutes, ought not to be held binding. The principles we believe controlling here have been recognized and enunciated by the courts in several of our sister states. The supreme court of appeals of Virginia, in the case of *Sanders v. Coleman*, 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621, made use of the following expressions: "Under the expression 'the act of God' is comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence, it is held that 'illness,' being beyond the power of man to control or prevent, is the act of God. *Story, Bailments*, §§ 25, 511; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859. It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health; and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5; *Bishop, Marr. & Div.* § 219. In the case at bar, the evidence,

as to which, in our opinion, there is no real conflict, shows that there was a predisposition, in the defendant's family, to physical trouble of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed and was suffering with a grave malady, involving the urinary organs, . . . and that an indulgence in sexual intercourse would aggravate his disease, and likely shorten his life; and that it would be not only a wrong and injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. . . . Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff." What was there said becomes particularly pertinent to the case at bar; the evidence of the medical experts here being to the effect that copulation would be exceedingly detrimental to one afflicted as was respondent.

Applicable in principle, also, is the case of *Shackleford v. Hamilton*, *supra*, which was based upon facts about as follows: Appellant, prior to his engagement to respondent, had contracted syphilis, but believed at the time of his engagement that he was thoroughly and permanently cured thereof. Some time after his engagement to respondent the effects of this disease again manifested themselves in so serious a form that physicians said it was doubtless incurable. Thereupon appellant informed respondent that he could not marry her. She declined to release him from his promise, and instituted an action for damages. The supreme court of Kentucky, in passing upon the case, said: "When the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agree to cherish each other in sickness and in health, the fact that the social standing of the one party or the other, or their pecuniary condition, was not as represented, will afford no ground for relief; still, when there is a mere agreement to marry, there may be such a condition of the one party or the other as to health or other bodily infirmity arising subsequent to the agreement as would authorize either party to decline to enter into the marriage relation; and to hold otherwise would be to place such a contract upon the same footing with cases

of mere personal chattels. . . . The text-books establish the doctrine that 'without sexual intercourse the ends of marriage, the procreation of children and the pleasure and enjoyments of matrimony, cannot be attained.' The first cause and reason of matrimony, says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence.' 1 Bishop, Marr. & Div. 6th ed. 322. . . . It is impossible for the defendant to fulfil his contract. His disease renders him incapable of marriage without actual damage to the life of the woman he marries by communicating to her and through her to their offspring a loathsome disease that is now, from the testimony in the case, gradually destroying this unfortunate man. . . . No greater crime in law or morals could have been committed by the appellant than a performance of his agreement. The purity of our social system, the interest of the public in preserving sacred the marital relation, the protection of those whose existence may spring from such an unholy alliance, as well as the future welfare and happiness of the parties themselves, require that such a construction should be given this class of contracts; and, if there was no precedent for the recognition of the doctrine announced, we would not hesitate to make one." The same court, in a subsequent case (Gardner v. Arnett, 21 Ky. L. Rep. 1, 50 S. W. 840), approved the decision and reasoning of the case just cited, and, as to the case before it, observed: "He [defendant] owed it to the plaintiff and society to refuse to enter into marriage relations with her, and he had the right to abandon the contract and refuse to marry her at any time before their marriage was solemnized." In *Ryder v. Ryder*, 66 Vt. 159, 44 Am. St. Rep. 833, 28 Atl. 1029, the supreme court of Vermont annulled a marriage because the wife had a venereal disease endangering the health of her husband and any children she might bear. To the same effect, in principle, were the decisions in *Smith v. Smith*, 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933; *McMahon v. McMahon*, 186 Pa. 485, 41 L.R.A. 802, 40 Atl. 795; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120; and *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120. In the case of *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, the supreme court of Michigan said: "While it is the policy of the law to encourage marriage, it is not the policy of the law to encourage unhappy marriages," and the court 7 L.R.A. (N.S.)

then, with express approval, quotes from Mr. Schouler, in 7 Southern Law Rev. 65, the following: "The marriage state ought not to be lightly entered into; that it involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred. . . . From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties,—their opportunity for finding one another out; and, if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off." In the case of *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, the supreme court of North Carolina spoke as follows: "We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself. . . . It is likewise true that whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract, the fulfilment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them? . . . The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are, the comfort of association,—the *consortium vitæ*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And, if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation, and incapable of performing the duties incident thereto, then the law will excuse a noncompliance with the promise,—the main part of the contract having become impossible of performance, the whole will be considered to be so." In *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79, the supreme court of Missouri employed this language: "Marriage is a contract; but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein.

Blank v. Nohl, 112 Mo., loc. cit. 167, 18 L. R.A. 350, 20 S. W. 477; State v. Bittick, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325. Certain marriages are prohibited by law because of their detrimental effects upon society and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. . . . If the disease is of a temporary character,—such as was the case here,—and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; and, if the disease is of a permanent character,—such as was the fact in the North Carolina, Kentucky, and Virginia cases cited,—the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so." In the case of Gring v. Lerch, 112 Pa. 246, 56 Am. Rep. 314, 3 Atl. 841, the supreme court of Pennsylvania spoke as follows: "It is a mistake to suppose, as was assumed in the point, and affirmed by the court, that the impediment must be of such a nature as would be a ground of divorce after marriage. We are not now dealing with a question of divorce. That is a subject that is regulated by statute, and has no necessary relation to the case in hand. We are considering a contract to marry,—a contract which calls for the richest good faith on both sides, and which neither party has the right to enforce against the other if incapable of performing the full marital duties. A man does not court and marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return; and if the woman with whom he contracts be incapable, by reason of a natural impediment, of giving him the comfort and satisfaction to which, as a married man, he would be entitled, [then] there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach." In the early case of Atchison v. Baker, 2 Peake, N. P. Add. Cas. 103, Lord Kenyon said: "It would be most mischievous to compel parties to marry who could never live happily together;" and he cites Lord Mansfield as having held, in the case of Foulkes v. Sellway, 3 Esp. 236, that a defendant was not liable in damages for breach of promise where the character of the woman turned out to be different from what he had reason to believe it, and that an infirmity, either bodily or mental, would excuse fulfillment of the marriage agreement.

It is a fundamental proposition that a contract contravening the provisions or policy of a public law is void or voidable. Macintosh v. Renton, 2 Wash. Terr. 121, 3 Pac. 7 L.R.A. (N.S.)

830; Cannon v. Cannon, 26 N. J. Eq. 316; Bowman v. Gonegal, 19 La. Ann. 328, 92 Am. Dec. 537. Bishop on Contracts, enlarged ed. § 470, reads: "No agreement between parties to do a thing prohibited by law, or subversive of any public interest which the law cherishes, will be judicially enforced." And, at § 473, the following appears "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a contract against public policy (or sound policy), is likewise void." 9 Cyc. Law & Proc. p. 481, says this: "If an agreement binds the parties or either of them, or if the consideration is to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements it would employ its functions in undoing what it was created to do. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it has sometimes been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made; and if this is opposed to the interests of the public, it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance." To the same effect, 15 Am. & Eng. Enc. Law, 2d ed. p. 933.

Counsel for respondent cite us to cases where a man, promising to marry a woman whom he knew to have been formerly unchaste, was held to be bound by such promise. Such a case and this are not analogous. There the man by his promise overlooks the former shortcomings of the woman, and it is a matter concerning him only. She would have the ability to, and presumably would, reform and become a good wife and worthy mother. This is to the advantage of society, and not inconsistent with sound public policy, and the law should interpose no hindrance thereto. But a consumptive woman is physically incapable of becoming a healthful companion or the mother of healthy issue. It is not a condition that she voluntarily created or can

change at will. The evils to follow her marriage could not be confined to herself and husband, but must of necessity concern and injuriously affect others. The nature and natural sequences of a contract of marriage are such that the state is of necessity a third party to, and interested in, every such agreement. Its interests forbid the enforcement of such a contract between parties physically incapable of making the married state beneficial to themselves or society. We are not disposed to take into consideration any matters personal only to the appellant. If he knew of the nature of respondent's ailment when he agreed to marry her and agreed to make her his wife, notwithstanding the same, he ought not to escape responsibility by reason of any inconvenience affecting only himself. But the interests of the community and state step in, and, with the dictates of humanity, demand that no human compact shall be upheld that has for one of its principal objects the bringing into the world of helpless, hopeless, plague-cursed innocent babes. We can sanction the breaking of a promise and relieve from the terms of a deliberate agreement only when the alternative involves results more deplorable. Had these parties married, it is inconceivable that any of the important ends of marriage could have been attained. It is morally certain that sickness, grief, and sorrow must have been the sequence of such a union. These considerations, with the possibility and probability of issue afflicted with this terrible malady, constrain us to hold that the marriage agreement was not binding,—that it was the privilege of either party to withdraw therefrom. Rule 126 of Greenhood on Public Policy reads as follows: "No one can estop himself from proving facts which will show a contract to be opposed to public policy." It having been the privilege, and, as we believe, the moral and legal duty of appellant to decline to carry out the agreement, he cannot be held responsible in damages for so doing. The following authorities bear on some of the questions here involved: *Turnbull v. Farnsworth*, 1 Wash. Terr. 444; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 145; *Graves v. Johnson*, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Ralston v. Boady*, 20 Ga. 449; *Nabin v. Webster*, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; 7 L.R.A. (N.S.)

Gulick v. Gulick, 41 N. J. L. 13; *Kantzier v. Grant*, 2 Ill. App. 236; *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; *Miller v. Rosier*, 31 Mich. 475; *Sprague v. Craig*, 51 Ill. 288; 4 Am. & Eng. Enc. Law, pp. 893, 894, and note; *Wharton*, Contr. 324; *Pollock*, Contr. 377; 2 *Addison*, Contr.; *Gould & Pyle Cyc. Medicine & Surgery*; *Story*, Contr. § 675; *Anders*, Practice of Medicine, 268, 270-272; *Beach*, Modern Law of Contr. 1498, 1499.

The judgment of the honorable Superior Court is reversed, and the cause remanded, with instructions to dismiss the action.

Mount, Ch. J., and Dunbar, Crow, Hadley, Fullerton, and Rudkin, JJ., concur.

Petition for rehearing denied.

COLORADO SUPREME COURT.

ROSE C. NUSLY et al., Pliffs. in Err.,

v.
CLARENCE CHURCH CURTISS et al.,
Exrs., etc., of Eliza C. Gallup, Deceased,
et al.

(— Colo. —, 85 Pac. 846.)

Will—specific legacy—ademption.

A bequest by a woman of all money which may become due from insurance upon her husband's life at the time it shall be actually collected and received by her executors is specific, and adeemed by the collection of the fund by the testatrix and her commingling it with her other funds.

(May 7, 1906.)

Case Note.—Bequest of policy of insurance, or proceeds thereof, as specific legacy:

—Whether or not a bequest of the proceeds of an insurance policy is a general, demonstrative, or specific legacy becomes an important question whenever there is a contention as to the abatement or ademption thereof. Within which class a given legacy shall fall seems to be a matter altogether of the construction of the will, and is governed entirely by the language used by the testator. If the proceeds of the insurance are bequeathed, and there is no intention upon the part of the testator to give a sum of money, either equivalent to the proceeds of such insurance, or to be paid out of such proceeds; in short, if it is the intention of the testator to give such proceeds only,—a legacy will always be held to be specific.

Accordingly, a legacy is specific which is described in a will as "two certain policies of life insurance, amounting to the sum of twenty thousand dollars, made in my favor by" a certain insurance company, naming it. *Platt v. Moore*, 1 Dem. 191.

So, in *Barker v. Rayner*, 5 Madd. 208,

ERROR to the County Court for the City and County of Denver, to review a judgment construing the will of Eliza C. Gallup, deceased. Affirmed.

The facts are stated in the opinion.

Mr. F. A. Williams, for plaintiffs in error:

This was a demonstrative legacy, not subject to ademption.

1 Underhill, Wills, § 406; Armstrong's Appeal, 63 Pa. 312; 2 Wms. Exrs. 1428; Robinson v. Addison, 2 Beav. 515; Roper, Legacies, chap. 5, § 5; Corbin v. Mills, 19

Gratt. 438; Giddings v. Seward, 16 N. Y. 365; Johnson v. Conover, 54 N. J. Eq. 333, 35 Atl. 291; Frank v. Frank, 71 Iowa, 646, 33 N. W. 153; Re Lewis, 17 R. I. 642, 24 Atl. 146; Lee v. Smith, 84 Va. 289, 4 S. E. 717; Hutchinson v. Fuller, 75 Ga. 88; Boykin v. Boykin, 21 S. C. 513; Wheeler v. Hartshorn, 40 Wis. 83; Ives v. Canby, 48 Fed. 718; Clark v. Brown, 2 Smale & G. 524.

The issue was between particular legatees and general legatees. In such case the par-

affirmed in 2 Russ. Ch. 122, it was held that the legacy was a specific gift, and failed altogether by the nonexistence of the policies at the death of the testator, where it appeared that he had bequeathed all his "right, title, and interest in two policies of insurance," upon the life of his wife, and he survived his wife and received the amount of the policies before his own death, and appropriated the same to his own use.

But specific legacies are never favored by the courts, and, if it can be gathered from the will that it was the intention of the testator to give the legatee a sum of money rather than the proceeds of the insurance policy, it will be held to be a general, or a demonstrative, legacy, as the case may be.

Accordingly, that is not a specific legacy, but is "rather in the nature of a demonstrative legacy," where a testator bequeaths a certain sum of money, and directs his executor to pay the same, "out of my life insurance money payable to my executor." *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576. Here the court thought that it was the intention of the testator that this should be treated as a general legacy, to be paid at all events out of the general assets of the estate, unless the money was collected from his life insurance.

And in *Cascaden's Estate*, 8 Phila. 582, a legacy was held not to be specific where a testator, after bequeathing certain legacies, made use of the following language in regard to it: "These legacies I desire my executors to pay out of the proceeds of the policy of insurance which I have effected on my life;" and it appeared after his death that he had in fact no policies on his life, except those payable to his wife, the money due upon which had been paid to her. Here the court deemed it unnecessary to decide whether these legacies were general or demonstrative. To quote from the opinion: "Giving the precatory clause desiring payment to be made out of the policy of insurance the force of a binding direction upon the executors, it amounts to nothing more than a gift of money, to be paid out of a particular fund. There is nothing from which it can be inferred that, if that source failed, the testator did not intend the legatees to be the recipients of his bounty. As that intention must appear in the will, in order to constitute the legacy a specific bequest, it is useless to show from the will that it is clear he intended differently." 7 L.R.A. (N.S.)

. . . This clause . . . being simply precatory, it may be doubted whether it controls the character and quality of the . . . legacies; whether, by any binding direction, a fund is designated 'as pointing out the means of payment;' and whether they are not general, instead of demonstrative, legacies. In any event, however, it is clear they are not specific, and therefore not adeemed by the failure of the policy of insurance."

And in *Re Fisher*, 93 App. Div. 186, 87 N. Y. Supp. 567, a legacy was held to be general, and not specific, where a testator bequeathed the contents of a safe-deposit box, consisting of stocks, bonds, mortgages, and life-insurance policies, to several persons in specified proportions, and the respective securities, because of their unequal value, could not be distributed intact to the respective legatees. To quote from the opinion: "The property in the box is required to be divided into twelfths, two shares to go to one person, and one to each of the other persons named therein. The securities which were found in the box were unequal in value. No particular security was bequeathed to a particular person. Each took a twelfth share in the whole, and it is evident that no one of the legatees could have been compelled to take a particular part of the property as his share. There was, therefore, impossibility of distribution of the specific property into twelfths for the purposes of delivery to the respective legatees. The bequest is specific as to the property bequeathed, but it was not specific as to the particular property to be delivered to a particular legatee, nor could it be made such by any division into twelfths, which the will commanded should be done. The bequest partakes more nearly of a general, and also of a demonstrative, legacy, than of a specific legacy. The interest bequeathed is certain and specific, but the necessity of the case required it to be paid from particular property not separated into parts or bequeathed as such. The intention of the testator is clear to give two twelfths of the property to one person and the remaining ten twelfths to the others. As the nature of the property bequeathed and the character of the bequest required its conversion into money before the distribution could be made, it certainly does not answer the definition of a specific legacy."

ticular legacies do not abate until the residuary legacies are exhausted.

Schouler, Exrs. § 490; 2 Wms. Exrs. 1462; Corwine v. Corwine, 23 N. J. Eq. 368; Re Barklay, 10 Pa. 387.

A legacy is demonstrative where money is given out of a specified fund, as in the case of a bequest of a certain sum out of a particular debt due to the testator, or out of designated stocks or other securities.

Ives v. Canby, supra; 3 Pom. Eq. Jur. p. 1133; Armstrong's Appeal, 63 Pa. 312; Barker v. Rayner, 2 Russ. Ch. 123, 5 Madd. 209.

Where a pecuniary legacy is given, and a particular fund, stock, or other security, is pointed out in the will to satisfy it, although the fund fails, and the stock or the security changes, is called in, or fails, such bequest is to be made good out of the general assets.

Walton v. Walton, 7 Johns. Ch. 262, 11 Am. Dec. 456; Coleman v. Coleman, 2 Ves. Jr. 639; Husbands v. Husbands, 1 Vern. 25; Deane v. Test, 9 Ves. Jr. 146; Lambert v. Lambert, 11 Ves. Jr. 607.

Courts are averse to considering a legacy specific when it may be fairly construed otherwise.

1 Roper, Legacies, pp. 191, 193, 194; Wms. Exrs. 6th ed. 360; Brainerd v. Cowdrey, 16 Conn. 1; Stout v. Hart, 7 N. J. L. 414; Wallace v. Wallace, 23 N. H. 149; Stevens v. Fisher, 144 Mass. 114, 10 N. E. 803.

Mr. William W. Field, with Messrs. Wolcott, Vaile & Waterman and H. H. Dunham, for defendants in error:

This was a specific bequest, pure and simple.

1 Underhill, Wills, 1900 ed. § 413; 2 Redf. Wills, 3d ed. 431; Byrne v. Hume, 86 Mich. 546, 49 N. W. 576; Gilbreath v. Alban, 10 Ohio, 64; Georgia Infirmary v. Jones, 37 Fed. 750; Walls v. Stewart, 16 Pa. 281; Barker v. Rayner, 5 Madd. 209; Stanley v. Potter, 2 Cox, C. C. 180; Ludlam's Estate, 13 Pa. 188; Hoke v. Herman, 21 Pa. 301; Tolman v. Tolman, 85 Me. 317, 27 Atl. 184; Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Starbuck v. Starbuck, 93 N. C. 183.

Where the money is so connected with the fund, or source from which it arises, as to be undistinguishable, it is a specific legacy.

Smith's Appeal, 103 Pa. 559; Walls v. Stewart, 16 Pa. 275.

Campbell, J., delivered the opinion of the court:

In this proceeding the plaintiffs in error asked for an interpretation of the second clause of the last will of Eliza C. Gallup, deceased, under which they claim as lega-

tees. It reads: "Second. Any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband, Francis Gallup, which may heretofore have been insured, payable to me or in my favor, I will and bequeath to the five sisters of my said husband or to such of them as may be living at the time any such insurance moneys shall be actually collected, and received by my executors to be divided equally among said sisters or the survivors of them as hereinbefore provided." The facts pertinent to the only question argued on this review are that before the execution of the will an insurance policy for \$5,000 upon the life of Francis Gallup was issued. About a year after its execution he died, and the amount of the policy on his life (\$5,000) was received by the testatrix herself in her lifetime, which she commingled with her other funds, and afterwards reinvested. Not only was this amount not actually collected or received by the executors, but it was not traceable or identified in their hands. At the time of the death of the testatrix, which was more than eleven years after the will was executed, the plaintiffs in error, the five sisters of Francis Gallup who were mentioned in the will, were all living.

The only question raised and decided below, and the only one presented here, is as to the nature of this legacy. The plaintiffs in error say that it is a demonstrative legacy, and therefore it was not adeemed by the testatrix in her lifetime. The defendants in error say that it was a specific legacy, and was subject to be, and as a matter of fact was, adeemed by the testatrix in her lifetime by collecting and commingling it with her other funds. It is sufficiently exact for our present purpose to say that a general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given. A demonstrative legacy partakes both of the nature of a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is subject to ademption; but such is not true of a general or a demonstrative

legacy. The trial court held that this was a specific legacy, and was adeemed by the testatrix in her lifetime. Hence it construed the will as passing nothing to the plaintiffs in error as legatees. We are of opinion that the county court was right in its decision. Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general, or demonstrative, legacies; but, if the language is clear and unequivocal, and plainly evidences an intent of the testator to create a specific legacy, such effect must be given to that language. In ascertaining the nature of a given legacy, some, but not much, aid is to be derived from the adjudicated cases. The question is one of intent, to be gathered from the language used in creating it, in the light of the circumstances of the testator and the property which he is disposing of in his will. It will be observed that no particular or designated sum of money is mentioned in the clause of the will under consideration. It is a gift of "any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband, Francis Gallup, which may heretofore have been insured." It is only such sums of money that she bequeaths to the five sisters of her husband, or to such of them as may be living when the moneys shall be actually collected and received by her executors to be equally divided among them. This language plainly evidences an intent to bequeath not any particular sum of money to be payable primarily out of the proceeds of the insurance policies, and, if the fund, for any reason, should fail, then out of the general assets of the estate, but, on the contrary, the testatrix thereby intended to give to the legatees named only such sums of money as her executors after her death actually collect and receive on certain insurance policies. The language employed negatives an intention to give them anything whatever if the moneys on the policies are received by her in her lifetime, or if the fund, for any other reason, fails or ceases to exist, as such, at her death.

Not only does the language of this will compel this interpretation, but the application of the appropriate principles of law, and the definition of the different kinds of legacies, lead to the same result. It will further be observed that this is not a gift of money "out of" or "from the proceeds of" any insurance policy, but it is a gift of the entire fund itself. It is just the same as if the policy itself had been bequeathed. The authorities clearly sustain the conclusion which we have reached. Many of them

are collected in 18 Am. & Eng. Enc. Law, 2d ed. pp. 711 et seq. It has been held that a gift of all the money due on a particular bond is as much a specific legacy as a gift of the bond itself. The same principle is applicable to an insurance policy. A gift of an insurance policy is no more specific than is a gift of all the money due thereon. *Ashburner v. Macguire*, 2 Bro. Ch. 108; *Stout v. Hart*, 7 N. J. L. 414; *McMahon's Estate*, 132 Pa. 175, 19 Atl. 68. So a bequest of all or part of a specific fund or money which shall be received under decree in a certain suit, or a gift of "all the amount of moneys and interest that may be recovered of and from K. for the sums due me on the purchase of the (described) estate," each was held to be specific. *Gilbreath v. Alban*, 10 Ohio, 64; *Chase v. Lockerman*, 11 Gill & J. 185, 35 Am. Dec. 277; 2 Wms. Exrs. Perkins's Notes, 1262 et seq., notes D, H, and M.

In *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576, though the particular legacy there was held to be a general legacy, the court, *inter alia*, says: "A specific legacy is a particular and specified thing singled out, or a particular fund; and, if this fund fail, or the specific thing bequeathed is not in existence to be carried over to the legatee, the legacy cannot be paid out of the assets of the estate." That remark is peculiarly applicable here, for the entire fund of the insurance policy was given to those legatees, and, since it was not in existence at the time the will took effect, but had been collected by the testatrix in her lifetime, it became adeemed.

In *Walls v. Stewart*, 16 Pa. 275, 281, the court says: "Where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object." Accordingly, in that case it was held that a legacy charged on certain devised lands was specific, and became adeemed when the land was sold by the testator in his lifetime.

In *Smith's Appeal*, 103 Pa. 559, there was a bequest by a testator to one son of \$2,000 out of the sum of near \$4,000 on deposit in a bank, provided the same was collected, and to another son \$1,500 with the same proviso; and the remaining part of the money that might be collected on this deposit was given in equal shares to the two sons. This deposit was collected by the testator, and the court held that the legacies to the two sons, being specific, were adeemed. The following language from the opinion of the court being peculiarly appropriate to the

case in hand, we quote it: "The whole of the money, the entire fund, is given,—the money and fund are undistinguishable. When the legacy is so connected with the fund out of which it is payable that the legacy and fund are the same, it is specific; as, if I bequeath to B the money now owing to me from A, or in the hands of A, or the money due to me on the bond of A, the legacy is specific; Welch's Appeal, 28 Pa. 363. Certain parts of the money due to the testator on the deposit are given to each son, and the money thus given is the whole deposit owing by the bank. The giving to each a certain portion—to both the whole—is indicative of an intent to give that fund,—not so much money out of the estate if the fund failed. The phrase, 'I give and bequeath to my son Samuel the sum of \$2,000 out of the sum of near \$4,000 now on deposit in the bank,' by itself, would vest a demonstrative legacy; but the testator added, 'providing the said amount and interest is collected from the assets or stockholders of said bank.' Manifestly, the word 'providing' is used in the sense of 'provided,' and means upon condition, or with the understanding, that said \$2,000 shall be collected out of that debt. Then, if it should not be collected out of the specified debt, it was not to be paid. Here, also, the intention seems to be to limit payment of the legacy to the fund itself."

Let us apply the principles of that case to the one in hand. Mrs. Gallup gave to the legatees the entire proceeds of an insurance policy, provided the money was actually received and collected by her executors. The entire fund, or the policies and the money collected thereon, are given. The legacy and the fund are the same and undistinguishable. Her executors did not collect or receive the money. She herself collected it in her lifetime. The legacies, therefore, were specific and became adeemed. In *Smith v. McKitterick*, 51 Iowa, 548, 2 N. W. 390, \$2,000 which the testator received from the estate of his father was bequeathed to the testator's daughters. It was said to be a specific legacy. Certainly, from the language employed in Mrs. Gallup's will, it could not be successfully contended that, if the insurance money had never been collected, the plaintiffs in error would have had any claim upon the general assets of her estate. If that be true, this legacy is specific. There was no gift of any particular or specified amount, but the entire fund, showing an unambiguous intention to confine the gift to the fund itself.

In *Georgia Infirmary v. Jones*, 37 Fed. 750, Wallace, Justice, says: "In determining

whether the legacy is specific or demonstrative, the question always is whether it is a gift out of a specified fund or security, or a gift of a specified sum, with a specified fund as security. If it falls within the former class,"—that is, where it is a gift of a specified fund, or security,—"the legacy fails when the fund or security ceases to exist in the testator's lifetime."

In *Hoke v. Herman*, 21 Pa. 301, 304, it was said that, if the thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, the bequest is gone. "If such legacy be of a debt, payment necessarily makes an end of it." In the case in hand, the money that became due and was payable to the testatrix in her lifetime was a debt, and there was a gift of the entire debt. Since the testatrix in her lifetime collected it and commingled it with her funds, necessarily there was an end of it, and nothing remained at her death to which the legacies here claimed could attach.

Corbin v. Mills, 19 Gratt. 438, is cited by plaintiffs in error as in point. The particular bequest there under consideration was held to be a demonstrative legacy, but the language of the will by which the legacy was created is entirely different from that in the will of Mrs. Gallup. The opinion of the court with reference to this particular point would make the legacy here involved a specific legacy.

In *Barker v. Rayner*, 5 Madd. 208, the testator's will read: "All my right, title, and interest in two policies of insurance [describing them] upon trust to pay," etc. These policies were upon the life of the testator's wife, and were collected by him in his lifetime. The legacy was held to be specific. This bequest in legal effect is precisely the same as the one here where the moneys to be collected on the policy are the subject of the bequest. Such moneys constituted all the right, title, and interest which the beneficiary had in them. This decision by Vice Chancellor Leach was affirmed on appeal by Lord Chancellor Eldon in 2 Russ. Ch. 122. The case is quite in point. *Starbuck v. Starbuck*, 93 N. C. 183; 2 Redf. Wills, 431.

In 1 Underhill on Wills, § 414, the learned author says a legacy of a debt is specific, but a legacy of a particular sum payable out of a debt due to the testator is demonstrative. Applying the doctrine of the text and of the authorities already cited to the case at bar, we have this situation: The thing given by Mrs. Gallup was the entire debt which the insurance company was ob-

ligated to pay to her or her estate upon the death of her husband. There was no particular sum given, nor was that which was given made payable out of the debt due the testatrix, but being the corpus of the debt itself, it was a specific legacy. *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *Maybury v. Grady*, 67 Ala. 147.

Let the judgment be affirmed.

Gabbert, Ch. J., and Goddard, J., concur.

INDIANA SUPREME COURT.

BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY, Appt.,
v.

WILLIAM P. SLAUGHTER.

(— Ind. —, 79 N. E. 186.)

Railroad farm crossing—invitation to use.

1. A railroad company which constructs a private farm crossing, and permits its frequent use by a tenant of the farm for the benefit of which it is constructed, is, in

Case Note.—General nature of the duty owed by a railroad company to one who, with its permission, uses a private crossing constructed by it:—It is a general rule that the bare permission of the owner of private grounds, to persons, to enter upon his premises, does not ordinarily render him liable for injuries received by them on account of the condition of the premises. But, if he expressly or impliedly invites or allures them upon his premises, he is liable in damages to them, in the absence of contributory negligence, for injuries occasioned by the unsafe condition of the premises, if such condition is the result of his failure to use ordinary care to prevent it. The decision in the above case is based upon this principle.

In *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, the plaintiff was injured at a private crossing planked by a railroad company, which kept a flagman at the crossing, and made no objection to its use by the public. The court held that the general rule applicable to this class of cases is that an owner or occupant is bound to use due care to keep his premises in a safe and suitable condition for those who come upon and pass over them, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon.

In *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134, 15 So. 508, it was held that where persons, without objection by the railroad company, cross the tracks at a private crossing, they are entitled to no other privileges or protection than a mere licensee; and the company discharges its duty by using due

care of a negligent injury to the tenant at the crossing, subject to the liability of one who has extended an invitation which has been acted on, and cannot treat the injured person as a trespasser or bare licensee.

Pleading—nonallegation—effect.

2. Failure to allege that a hand car and articles thereon were calculated to frighten horses of ordinary gentleness does not render the complaint demurrable, in an action to recover damages for leaving such car and articles near a railroad crossing, which resulted in the frightening of plaintiff's horses, and consequent injury, where it is alleged that defendant carelessly and negligently placed the car upon the crossing, and obstructed the free use of it, as a direct result of which the accident was caused.

Negligence—proximate cause—anticipation of injury.

3. To entitle one to a trial of the question of another's negligence which resulted in injury, it is not necessary that the effect of the act or omission complained of would in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising

care and reasonable diligence to avoid injuring them after being conscious of their peril.

In *Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270, it was held that the corporation was bound to use due care and diligence towards travelers in running its trains over a private crossing which it had planked and maintained, and permitted the public to use, for over twenty years.

In *Atchison, T. & S. F. R. Co. v. Parsons*, 42 Ill. App. 93, it was held that a railroad company owes only ordinary care toward persons who, with its passive acquiescence, and without the right of an adjoining landowner, for their own convenience, use a farm crossing constructed by it; and it can be held liable only in case the injury is wilful and wanton.

In *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 528, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491, it was held that a railroad company making a flying switch at a crossing which it had kept planked for many years, between shops of a corporation located on both sides of its road, for the use of workmen therein, when it knew that this constituted practically the only entry to the shops on one side of the track, and was used by the workmen in crowds at stated hours of the day, was bound to exercise reasonable care towards them, whether they were to be regarded as licensees or as using the track by invitation.

In *Baltimore & O. S. W. R. Co. v. Keck*, 84 Ill. App. 159, Affirmed in 185 Ill. 400, 57 N. E. 197, an instruction that the law imposes upon a railroad company a less degree of care in the operation of its trains over a

his legal right in an ordinarily careful manner.

Pleading—frightening horse—nonallegation of gentleness.

4. The complaint in an action for injuries resulting from the frightening of plaintiff's horse is not rendered demurrable by failure to allege that the horse was one of ordinary gentleness, if the injury is charged to have been caused by the negligent acts of defendant, the particulars of which are stated.

Railroad—crossing—frightening horse—liability.

5. A railroad company may be liable, for placing an object calculated to frighten horses upon its right of way near a crossing, to one receiving injuries through the frightening of his horse thereon.

(November 13, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Clark County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles L. Jewett, for appellant:

The complaint showed that the appellee was a mere licensee.

Cleveland, C. C. & St. L. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Hall v. Cleveland, C. C. & St. L. R. Co. 15 Ind. App. 496, 44 N. E. 489; Lingenfelter v. Baltimore & O. S. W. R. Co. 154 Ind. 49, 55 N. E. 1021; Lary v. Cleveland, C. C. & I. R. Co. 78 Ind. 323, 41 Am. Rep. 572; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783;

Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Cahill v. Layton, 57 Wis. 600, 46 Am. Rep. 46, 16 N. W. 1.

He was bound to take the private way as he found it.

Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 408, 16 N. E. 121; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 223, 50 Am. Rep. 783; Lary v. Cleveland, C. C. & I. R. Co. 78 Ind. 327, 41 Am. Rep. 572; Cleveland, C. C. & St. L. R. Co. v. Adair, 12 Ind. App. 579, 39 N. E. 672, 40 N. E. 822; Faris v. Hoberg, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; Lingenfelter v. Baltimore & O. S. W. R. Co. 154 Ind. 53, 55 N. E. 1021; Hall v. Cleveland, C. C. & St. L. R. Co. 15 Ind. App. 496, 44 N. E. 489.

The complaint was bad for failing to aver that appellee's team was ordinarily gentle.

Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; Ohio & M. R. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64; Mallory v. Griffey, 85 Pa. 275; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722.

Messrs. L. A. Douglass and H. W. Phipps, for appellee:

Appellee was using the crossing by right, and was lawfully there. Such being the fact, he was not a licensee.

Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43; Glenn v. Lake Erie & W. R. Co. (Ind. App.) 73 N. E. 861.

farm crossing than if the place was a public crossing was held to be as favorable to the railroad company as it had a right to ask, if not more so.

In *Murphy v. Boston & A. R. Co.* 133 Mass. 121, it was held that the trial court rightfully refused to instruct the jury that the planking and paving of a private crossing, and permitting vehicles and persons to cross there, did not create any obligation or duty to provide additional protection by another flagman, or otherwise.

In *St. Louis, I. M. & S. R. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789, it was held that, if the railroad company constructed steps over its right-of-way fence, and expressly or impliedly invited, induced, or led persons to cross the same, it was liable in damages to them for injuries occasioned by the unsafe condition thereof, if it was the result of its failure to use ordinary care to keep the same in safe condition.

In *Yazoo & M. Valley R. Co. v. Watson*, 82 Miss. 89, 33 So. 942, it was held that, whether a road was technically a public or a private road, a railroad company which built approaches to its track, knowing that

the road was used by the public, was bound to make them so that they would not be dangerous for travel by teams and vehicles managed with ordinary care.

In *Morris v. Lake Shore & M. S. R. Co.* 24 N. Y. Week. Dig. 160, it was held that the mere fact of the existence of a farm crossing provided by the railroad company requires of it no signal of the approach of its train or reduction of its speed, but that it owes to the proprietor of the bisected farm the duty not unnecessarily to subject him or his property to injury upon such crossing; and, to that end, its employees engaged in running its trains have the duty of continuous observance of the situation in advance, that no needless injury may be done.

This note, as indicated in the title, is confined to the general measure of care required of the railroad company as affected by the fact that it constructed the private crossing and acquiesced in its use by the injured person. It is not concerned with the question as to specific duties that fall within the general measure of care.

The act of appellant in placing the hand car on the crossing in such a way as to frighten appellee's team was negligence.

Kirland v. Kline, 16 Ind. 313.

Gillette, J., delivered the opinion of the court:

According to appellee's complaint, appellant carelessly and negligently left within the traveled way of a farm crossing, and as an obstruction to the free use of the same, a hand car, having upon it tools, tin dinner buckets, and clothing, and, as a result of the negligence charged, one of the animals, a mule, composing the team which appellee was driving along said way and across said track, became frightened at the hand car and ran away, throwing appellee out of his wagon and injuring him. Appellant, having been defeated in the trial court, prosecutes this appeal, and by its first assignment of error draws in question the propriety of the ruling of the court below in overruling a demurrer to the complaint.

It is contended by appellant's counsel that, so far as the complaint shows, appellee was a bare licensee, and that, having availed himself of the privilege of using the crossing, he was bound to accept it as he found it; or, in other words, that appellant could not properly be charged with negligence in having the car within the way. The allegations of the complaint concerning appellee's authority to use the crossing are as follows: "That said part of said railroad which runs through the said Clark county extends from the city of New Albany to the city of North Vernon, Indiana; that, at a point on said line of road, about 5 miles northeast of the said city of New Albany, Indiana, and about 300 yards northeast of what is called and known as the 'K. and L.' cement mills, defendant had, before the said ——— day of November, 1903, constructed a private wagon road crossing of its said railroad track at said point, and which said crossing was then and there for the use and benefit of the owners of the adjoining lands on opposite sides of said railroad track at said point, and for their tenants, and for all others who might have occasion to cross over and use the same in the use of the said lands aforesaid; that said crossing was, on said day, properly constructed by fastening planks 8 feet wide to the ties in said track and filling in between them with broken stone; and defendant had also constructed approaches, being constructed of earth thrown up in the form of embankments and covered with broken stone; and the said approaches were about 30 feet in length and not to exceed 10 feet in width; that on said day plaintiff was a tenant of the person who owned the ad-

joining lands on either side of said track at said crossing, and had been for more than one year, and had on many occasions before said day used the said crossing in the prosecution of his said work as tenant; and that he cultivated the said adjoining lands as farming lands as such tenant, and on said day was entitled, as such tenant, to use the said crossing with wagons and teams in the prosecution of his said work; . . . that about 5 o'clock in the afternoon of said day the said plaintiff was lawfully driving a team consisting of one mule and one horse, attached to a two-horse wagon, from one portion of his said farm to another on the opposite side of said track of defendant, and, in so doing, had occasion to drive over and upon said crossing." In their statement of the contents of the complaint, appellant's counsel fully admit that it appears that appellee was a tenant of the adjacent farm, and that he went upon the crossing in the prosecution of his farm work. It is doubtless the rule that a bare licensee who goes upon the premises of another for some purpose with which the owner or occupant has no concern, and without any enticement, allurement, or inducement being held out to him by the owner or occupant, assumes the perils arising from defects existing in the premises. Within this class of cases are *Lingenfelter v. Baltimore & O. S. W. R. Co.* 154 Ind. 49, 55 N. E. 1021, and *Cannon v. Cleveland, C. C. & St. L. R. Co.* 157 Ind. 683, 62 N. E. 8.

Putting aside all question as to the effect of the act of April 8, 1885 (§§ 5320 et seq., Burns's Anno. Stat. 1901), we are nevertheless of opinion that the facts charged do not make out a case in which appellee's entry upon the railroad was simply not opposed and prevented. While it is true that it does not appear that the intent of the company in respect to the construction and maintenance of the crossing was ever communicated to anyone, or that appellee acted upon the assumption that the crossing was designed for his use, yet, taking the subjective intent in respect to the purpose of its construction and maintenance, coupled with the fact that the planking of the space between the rails and the building of the long approaches on either side tended to show objectively what the intent was, and adding to this the frequent prior user of the way by appellee, we have a case wherein it appears to us that it would be contrary to good morals to permit appellant in effect to shift its ground, after the injury and after it had been haled into court, by asserting that appellee had ventured upon the crossing without invitation and at his own risk. Not to refine too much, it seems to us now unreasonable that the company should be

subjected in the circumstances to the consequences of having extended an invitation which had been acted on. In *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121, this court said: "When a person has a license to go upon the grounds or the inclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming; and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's lands by another is not sufficient. Such an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication. This general doctrine was affirmed in the case of *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, and it is well supported by a long line of authorities. *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Smith v. London & St. K. Docks Co. L. R. 3 C. P. 326*; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Stratton v. Staples*, 59 Me. 95; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 649, 21 L. ed. 220; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369. See *Lary v. Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Hargreaves v. Deacon*, 25 Mich. 1; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; *Southcote v. Stanley*, 1 Hurlst. & N. 247; *Bolch v. Smith*, 7 Hurlst. & N. 736; *Lygo v. Newbold*, 24 Eng. L. & Eq. 507; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Hardcastle v. South Yorkshire R. & River Dun Co.* 4 Hurlst. & N. 67."

The case as pleaded contains some of the elements of a dedication, and, while we would not be understood as applying that 7 L.R.A. (N.S.)

doctrine to a private use, yet the consideration is not without value in determining whether it is just to hold that appellee occupied no higher plane of right, as respects negligence, than a mere trespasser. In *Bennett v. Louisville & N. R. Co.* supra, we find the court observing that "the deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been in a sense dedicated by the owner." An essentially similar observation is to be found in *Indiana, B. & W. R. Co. v. Barnhart*, supra. But the word "invitation," to which the cases on the subject under consideration so often refer, includes, both in its lexicographical and its legal sense, not only an actual bidding, but also an allurement or enticement. While an invitation may not, at least in most circumstances, grow out of mere passivity as respects the condition of the premises, yet the cases abundantly justify the assertion that where an owner constructs a way over his premises in such a manner as apparently to be for the use of certain persons, with the intent that they should use it, and they continue to enjoy it for a considerable period of time, he owes to them a duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned; and this is especially true as to a new and unapprehended danger. In *Corby v. Hill*, 4 C. B. N. S. 562, the plaintiff was injured while driving along a private road extending from a turnpike to a lunatic asylum, owing to the presence of a quantity of slate which the defendant had deposited upon the way. The latter attempted to justify under the permission of the owners of the soil. *Cockburn, Ch. J.*, said: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question. They held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. . . . Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, *Williams, J.*, said: "I see no reason why the plaintiff should not have a remedy against such a wrongdoer, just as much as if the obstruction had taken place upon a public road.

Good sense and justice require that he should have a remedy, and there is no authority against it." Willes, J., remarked: "The defendant has no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury." It is our conclusion that the facts pleaded show that appellee was more than a bare licensee, and that he was entitled to complain of the negligence charged.

Thus far we have dealt with a question, owing to the generality of the points made, which it was, perhaps, not the intention of counsel for appellant to raise. While it asserts that appellee was a bare licensee to whom appellant was not liable for its negligence, yet its whole ground for this assertion, so far as anything definite in its brief is concerned, is based on the statement in *Bennett v. Louisville & N. R. Co.* supra, to the effect that it is stated by Campbell, in his treatise on Negligence, that the principle "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." But even in the *Bennett Case* the court states that no definite rule can be laid down, and the whole trend of the opinion is against the position of counsel. In the absence of further proof of the circumstances of the party's entry than that it was for his pleasure or benefit, there may be a presumption that he was a bare licensee; but the view is utterly wrong that this fact forms the basis of a controlling principle. In the leading case of *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, the company was held liable for the negligence of its flagman in signalling that the way was clear, at a crossing which belonged to the railroad, but which it had permitted the public to use for the purposes of travel. It was argued on behalf of the company that to hold it liable would involve the anomaly of charging it with a failure to guard a place which it was not bound to keep open; but Bigelow, Ch. J., said: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." And so we find it stated by Judge Cooley that, if one "expressly or by implication invites

others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Torts*, 605.

The next objection which appellant's counsel urge against the complaint is that it fails to aver that the hand car and articles thereon were calculated to frighten horses of ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically alleged. It is charged that the defendant carelessly and negligently placed said hand car lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said hand car, and also that the accident and injuries set forth were caused by, and the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this state and elsewhere, that, in complaints or declarations for negligence, it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion; it cannot be taken advantage of by demurrer. *Brookville & C. Turnp. Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351; *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 Ind. 160; *Cincinnati, I. St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 118 Ind. 152, 20 N. E. 727; *Cleveland, C. C. & I. R. Co. v. Wynant*, 119 Ind. 539, 20 N. E. 730; *Rodgers v. Baltimore & O. S. W. R. Co.* 150 Ind. 397, 49 N. E. 453, and cases cited; *Lake Erie & W. R. Co. v. McFall*, 165 Ind. 574, 76 N. E. 400; and note to *King v. Oregon Short Line R. Co.* as reported in 59 L.R.A. 209. It is not necessary, in order to justify the submission of the question of negligence to a trial, that it should appear that the effect of the act or omission complained of as negligent would, in all cases, or even ordinarily, be to produce the consequences which followed. It is sufficient to present a trial question if it was to be reasonably apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner. *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391, 26

N. E. 64. It is not an uncommon thing, as the courts judicially know, for horses to be frightened at unusual objects. *Billman v. Indianapolis C. & L. R. Co.* 76 Ind. 160, 40 Am. Rep. 230; *Wharton, Neg.* § 107. Whether the act of placing the hand car within the limits of a crossing was so calculated to frighten horses which might pass along the way as to render it negligent to do such an act was a mixed question of law and fact, and it was presented by the issue formed upon the allegation that the act was negligently done. In *Cleveland, C. C. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118, *Mitchell, Ch. J.*, said: "All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. There are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury as applied to all the facts of the particular case before them." But, without further discussion of the objection stated, we content ourselves with the statement that in several cases this court has treated as unnecessary the averment that the object complained of was calculated to frighten horses of ordinary gentleness. *Brookville & C. Turnp. Co. v. Pumphrey*; *Cincinnati, I. St. L. & C. R. Co. v. Gaines*; *Rushville v. Adams*; *Pittsburgh, C. & St. L. R. Co. v. Kitley*; and *Rodgers v. Baltimore & O. S. W. R. Co.*,—*supra*.

The further objection is made to the complaint that it fails to aver that appellee's mule was an animal of ordinary gentleness. The allegation which the complaint contains is that the mule was "well broken and not fractious or balky." If this be not an equivalent allegation, we are nevertheless of opinion that the general charges in respect to negligence rendered the complaint good on demurrer. Conceding, as we do, that there is no liability where the object which occasioned the mischief was not naturally calculated to frighten horses of ordinary gentleness, yet it by no means follows that the owner of a high-spirited horse is remediless for an injury occasioned by its running away, owing to its being frightened by an object naturally calculated to frighten horses of ordinary docility. In view of the statute, we cannot assume that appellee was guilty of contributory negligence in driving the animal in question, and that this element

subtracted from the case as presented by the complaint; appellee appears to be entitled to recover on the facts admitted by the demurrer, as it is averred in the complaint that appellant was negligent in the particulars stated and that such negligence was the cause of, and directly resulted in, the accident and injury. If, without the contributory fault of the driver, a horse runs away, and the negligent act of another is so far an efficient cause that, but for such negligence, the horse would not have run away, it would seem, on general principles that the latter would be liable for an injury thereby caused to the driver. *Grimes v. Louisville, N. A. & C. R. Co.* 3 Ind. App. 573, 30 N. E. 200, and cases cited. This state of facts seems, in legal effect, to be shown by the complaint before us when it is subjected to the rules of construction which govern complaints in negligence cases. It was assumed in *Rushville v. Adams*, *supra*, not only that it is required that the object or obstruction should be one calculated to frighten horses of ordinary gentleness, but also that the particular horse should be of that character. In answer, however, to the objection that these facts did not appear from the complaint, the court in that case said: "The general averment in the complaint before us,—that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy on the street,—we think, makes the complaint good as against the demurrer for want of facts." Bearing in mind the effect of the contributory-negligence statute since passed, the case from which we have just quoted appears to be an apposite precedent in support of the view—whether the character of the particular animal be an element or not—that the general charge of negligence, coupled with the averment that the injury was thereby caused, sufficiently shows that the legal rights of the complaining party have been invaded. See also *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588, 41 N. E. 471. We hold that the complaint is sufficient.

Under an assignment of error based on the overruling of a motion for a new trial, appellant's counsel argue that, in a number of particulars, the evidence fails to sustain the verdict. We have read the testimony, as set out in the bill of exceptions, and are of opinion that it cannot be said that there is an entire lack of evidence in support of any proposition which appellee was called on to maintain under the issues. The point which counsel for appellant places most stress upon under the assignment in question is that the

testimony shows that the hand car was at one side of, and not in, the way; and it is claimed that, for this reason, the evidence failed to maintain the theory of the complaint. There seems to be some confusion in the testimony between the way, as it was graded up, and the ordinary or traveled track. There is some testimony that the hand car was within the way. But, if it can be said that the evidence shows that the hand car was outside of, although very near, the way, yet it does not follow that appellant was not entitled to recover. Where an object calculated to frighten horses is placed near, but not in, a public highway, there would be a question as to the liability of the city therefor, owing to the fact that the municipality did not have control over the place where the object was located. We can perceive no reason, however, for the holding that where the title to a way and the adjoining lands is in the same person there is no liability. Even in the case of a conveyance of a way of a fixed width, it would be to permit the holder of the servient estate to derogate from his own grant to uphold him in his act of placing an object calculated to frighten horses so near the way as to impair the value of the use. The placing of the hand car where it was, if the act was really calculated to produce the mischief complained of, impinged upon the rights of appellee, although perhaps in a lesser degree than would have been the case had there been a physical obstruction of the way. Even in a case of a public road, a municipality may be liable for placing an obstruction calculated to frighten horses within the margin thereof. *Forshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600. As indicated in the latter case, the right to control the whole width of the road gives rise to a corresponding duty. There are perils attending the use of farm crossings which are concomitants of the use, such as the dangers occasioned by the passing of trains and the like; but the act in question caused a wholly unnecessary peril, and one which was in no wise inherent in the use, and it was the invasion of appellee's right in this particular which really constituted the gist of this action. If it can be said that evidence that the hand car was placed on the margin of the way does not substantially prove the allegation as laid, yet, at most, there was but a technical variance, which it is our duty to treat as if the defect had been obviated by amendment. *Farley v. Eller*, 29 Ind. 322; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316; *Latshaw v. State*, 156 Ind. 194, 59 N. E. 471; *Hartwell Bros. v. William E. Peck & Co.* 163 Ind. 357, 71 N. E. 958; *M. S. Huey Co. v. Johnston*, 164 7 L.R.A. (N.S.)

Ind. 489, 73 N. E. 996. This was the holding in *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236, where the supposed variance was of the same character as it is contended existed in this case. We find no error.

Judgment affirmed.

IOWA SUPREME COURT.

SAMUEL L. GRAHAM, Admr., etc., of Roy Graham, Deceased,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appt.

(— Iowa, —, 107 N. W. 595.)

Carrier—vestibule train—attempt to board—duty.

1. A railway company owes no duty to one who, in violation of law, attempts to board a moving train at a closed vestibule door, until his position of danger is made known to employees in charge of the train. Same—negligence.

2. No actionable negligence on the part of a railroad company is shown by the fact that those in charge of a vestibule train, upon receiving notice that an intending passenger was outside of a closed door of the moving train, attempted to rescue him by going the length of the car and opening the door, rather than by operating the emergency brakes.

(May 18, 1906.)

Case Note.—Duty to and negligence of passenger who attempts to board car when door or gate is closed:—The authorities support the rule that a passenger who persists in his attempt to board a car when his entrance thereto is prevented by the fact that the door or gate is closed and fastened, and, as a result, suffers personal injury, is guilty of such negligence as will bar a recovery of damages from the carrier. Thus, in *Sanders v. Chicago, R. I. & P. R. Co.* 10 Okla. 325, 61 Pac. 1075, the court held it to be negligence *per se* for one to remain on the step of a passenger car after the train had started and after the vestibule doors were closed and locked, although he had a ticket for passage on that particular train, thinking that some of the trainmen would discover him and let him in, and who was accidentally thrown from the train while in motion without any force by, or negligence of, the agents of the company. And the court further held that the rule that railway companies are bound to provide proper accommodations, and to use all reasonable precautions, for the safety of their passengers, cannot be invoked to sustain a recovery. But the court said that, if the passenger had been denied a fair opportunity to get on the train after buying his ticket, provided he bought it in time to

A PPEAL by defendant from a judgment of the District Court for Monroe County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Bishop, J.:

Action to recover damages for a personal injury resulting in the death of plaintiff's intestate, Roy Graham. Graham was a young man nearly twenty-one years of age, and his home was in the city of Ottumwa, this state. The accident in which he lost his life occurred September 17, 1901, and in the city of Chicago, Illinois. Stated generally, the circumstances of the accident were as follows: In company with another young man named Hooyer, Graham had gone to Chicago for a visit. On the afternoon of the day of the accident they met a mutual friend, a young man named Newgren, and all three planned an evening visit at De Kalb, 65 miles out of Chicago, and on the line of defendant's railway: They agreed upon taking the train known as the "Overland Limited," at Oakley avenue station. That train was a fast through train, which left the principal station in the city at 6:30 P. M., and was due at Oakley avenue at 6:38

P. M. From there it made no stops until DeKalb was reached. Upon approaching Oakley avenue from the south, the young men discovered the train already standing at the station. They were on the side opposite from the station building and platform, and as they came up the train commenced to move out. It appears that the train was vestibuled throughout, and as the start was made from the station all the vestibules were closed on the south side. When closed the door of the vestibule sets in about 6 inches from the outer line of the car, and the lower edge is on a level with a trapdoor which, when let down over the steps, forms a continuation of the car platform. Graham ran to the moving train and caught on the front end of one of the cars by grasping the hand-holds or rods on each side of the vestibule door, and planting his feet on the lower step. He thus stood facing the vestibule door. As the rear end of the car came up the other boys caught on in like manner. Hooyer remained standing on the step facing the door, while Newgren found a footing between the vestibule ends of the cars. After a time Hooyer succeeding in attracting attention from the inside of the car, and he and Newgren were rescued from

take passage on that particular train, under the rules of the company; and the train was one from which passengers were permitted to alight at his destination; and he had suffered damages by reason thereof,—he could have maintained an action to recover the same; but he cannot recover damages in this instance, because his injury was the result of his own rash act, which imperiled his life from the very moment the train reached full speed.

And in *Robinson v. Manhattan R. Co.* 5 Misc. 209, 25 N. Y. Supp. 91, it was considered to be negligence for a person to board a moving elevated railway train while the gate of the car was being closed, and to persist in clinging to the car until he came in contact with a guard rail at the end of the platform of the station. The court held, that in such a case the gateman was authorized to act upon the assumption that the intending passenger, when entrance into the car was thus denied him, would step back upon the platform.

In a similar action against an elevated railway company for injuries caused by an alleged premature closing of a car gate, the court, at plaintiff's request, charged, in substance, that, under the laws of the state, such railroad companies are not permitted to start a train until every passenger upon the platform or station desiring to board or enter the cars shall have actually boarded or entered the same; and the company shall not start the train until the gates are firmly closed; and that the plaintiff had the right to assume that the train which she attempted to board would be operated in

accordance with such law. The railroad company thereupon asked the court to charge that when people had entered the train, who, in a manner apparent to the guards, actually evinced a desire to board it, at the station where plaintiff attempted to get on, the defendant had the right to close the car gates and start the train; and, even if the guard had closed the gates and started the train before the plaintiff had time to board, and even while she was walking toward the train, this would not justify her in attempting, from a place of safety, to board the train after it had started. The refusal of the court so to charge was held to be error, in *Brown v. Manhattan R. Co.* 82 App. Div. 222, 81 N. Y. Supp. 755, since such request was pertinent in connection with the request of the plaintiff, as it tended to qualify the rule of law applicable thereto in establishing the liability of the defendant if the plaintiff was guilty of contributory negligence; and the defendant was entitled to have this side of the question considered in view of the absolute statutory obligation which the court had charged as imposed upon the defendant.

And in the analogous case of *Clark v. Metropolitan Street R. Co.* 68 App. Div. 49, 74 N. Y. Supp. 267 (Appeal Dismissed in 175 N. Y. 476, 67 N. E. 1081), an intending passenger was held to have taken the risk of injury of being hit on the knee by the lowering of the step which extended along the side of an open street car, while attempting to board the car on that side before it was ready for the reception of passengers.

their position. Upon going to the front end of the car it was discovered that Graham was missing. Shortly afterwards he was found by other parties lying dead beside the track about a mile west of Oakley avenue and near the west end of a viaduct crossing over Kedzie avenue. As no one saw the accident, the manner of its occurrence could not be told. It would seem certain, however, that he either lost his hold and fell against the viaduct structure, or was brushed off by such structure, as fresh blood was found at places thereon. The trial resulted in a verdict and judgment for plaintiff, and the defendant appeals.

Messrs. J. C. Mabry, Clark & McLaughlin, and James C. Davis, for appellant:

In getting upon defendant's train while in motion, plaintiff's decedent was a trespasser, and guilty of negligence.

Raben v. Central Iowa R. Co. 74 Iowa, 735, 34 N. W. 621; Young v. Chicago, M. & St. P. R. Co. 100 Iowa, 350, 69 N. W. 682.

Defendant owed him no duty until he was discovered by its agents in charge and control of the train, and then the only duty was not wantonly or wilfully to injure him.

Sanders v. Chicago, R. I. & P. R. Co. 10 Okla. 325, 61 Pac. 1075; Lauterer v. Manhattan R. Co. 63 C. C. A. 38, 128 Fed. 542; Masser v. Chicago, R. I. & P. R. Co. 68 Iowa, 605, 27 N. W. 776; Burg v. Chicago, R. I. & P. R. Co. 90 Iowa, 119, 48 Am. St. Rep. 419, 57 N. W. 680; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 186, 54 Am. St. Rep. 542, 60 N. W. 503; Thomas v. Chicago, M. & St. P. R. Co. 93 Iowa, 252, 61 N. W. 967; Baker v. Chicago, R. I. & P. R. Co. 95 Iowa, 163, 63 N. W. 667; Earl v. Chicago, R. I. & P. R. Co. 109 Iowa, 15, 77 Am. St. Rep. 516, 79 N. W. 381.

Where agents of a railway company, in control of a moving train, are confronted by a sudden peril or emergency, it is not negligence to choose one of several methods to avert the danger.

Griswold v. Boston & M. R. Co. 183 Mass. 434, 67 N. E. 354; Mobile & O. R. Co. v. Coerver, 50 C. C. A. 360, 112 Fed. 489; Lewis v. Long Island R. Co. 162 N. Y. 52, 56 N. E. 548; Bittner v. Crosstown Street R. Co. 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044; Wynn v. Central Park, N. & E. River R. Co. 133 N. Y. 575, 30 N. E. 721.

Messrs. Chester W. Whitmore and N. E. Kendall for appellee.

It was not considered an act of negligence on the part of the carrier, in *Missouri, K. & T. R. Co. v. Brown* (Tex. Civ. App.) 39 S. W. 326, to have the rear door of its rear coach locked, so that a passenger could not enter his compartment, and consequently was obliged to remain on the rear platform to his injury, where it appeared that it was the rule of the company to keep such door locked at stations, and that the rule was reasonable and known to the passenger.

But the duty of the carrier to an intending passenger was held to have been violated in *Brown v. Manhattan R. Co.* supra, in which it appears that, as a woman passenger was about to board an elevated train, the guard slammed the gate together, catching her dress in the closed gate while she was still standing upon the station platform; and that the train was immediately started, and she was dragged along, her foot going down between the platform and moving car, inflicting serious injury.

And a verdict for the plaintiff was not disturbed in *Ericius v. Brooklyn Heights R. Co.* 63 App. Div. 353, 71 N. Y. Supp. 596, in which plaintiff's evidence showed that, after the signal was given to start an elevated train, the plaintiff's decedent attempted to board one of the cars, and that, after he had stepped upon the car platform, the train started, and the guard or conductor shut the gate in such a way as to imprison his hand, and he was dragged along the track and crushed to death. On behalf of the defendant, evidence was given tending to show that the gate was securely closed and the

train started before the deceased attempted to get on board, and that, while the train was in motion, he seized a hand rail on the edge of the body of the car, and endeavored in some way to secure a footing on the car platform, and, in spite of the cries of the guard to him to "let go," continued to hold on until he reached the railing, where he met his death.

One is not, as a matter of law, guilty of contributory negligence, who, though he might easily have boarded a street car by the rear entrance, attempted to do so by the front entrance, and, in consequence of the front door being locked, was obliged to remain on the platform until he was thrown from the car as it rounded a sharp curve at a high rate of speed; it appearing that the front entrance was like the rear one, and that there was no reason why it should not have been used as well as the rear one. *Townsend v. Binghamton R. Co.* 57 App. Div. 234, 68 N. Y. Supp. 121.

It is a question for the jury whether or not it was contributory negligence for a passenger to ride on the rear platform of a railroad train, where he sustained injury because he was unable to enter the car on account of the rear door being locked, according to a reasonable rule of the railroad company of which he was aware, where he first attempted to enter the car at the other entrance, but was directed by one in charge of the train to go to the rear door so as to enter the compartment provided for those of his race. *Missouri, K. & T. R. Co. v. Brown*, supra.

Bishop, J., delivered the opinion of the court:

Plaintiff's action is grounded upon negligence of the defendant. One of such grounds is that, when advised by Hooyer and Newgren of the peril to which Graham was exposed, the train employees failed to take such prompt and effective means as were within their reach to accomplish his rescue; and as the case went to the jury such was the only ground of negligence submitted. The plaintiff, of course, is not in position to complain of this, and accordingly we shall have no occasion to make inquiry respecting any of the other grounds alleged. By motion for a directed verdict at the close of all the evidence in the case, by request for instruction, and by motion for a new trial, defendant challenged the right of plaintiff to recover for that a case of actionable negligence had not been made out. In the motion for a directed verdict counsel for defendant state precisely the grounds of their contention, and they are as follows: First. The undisputed evidence shows that in boarding the train on the outside of the vestibule Graham acted not only in violation of the statutes of the state of Illinois, but without notice to, or knowledge on the part of, the defendant. He was therefore a trespasser and only entitled to rights as such. Second. The evidence fails to show that defendant's employees in charge of the train were notified of Graham's presence on the train prior to his injury. Third. That, as soon as notified that Graham was riding on the outside, the employees in charge of the train adopted the quickest and safest way to relieve him, by going to the vestibule where, according to the information given them, he was supposed to be riding.

1. That, under the circumstances, Graham was a trespasser, and acted in violation of law, is too clear for argument. The trial court so instructed the jury, and counsel for appellee do not take space to question the correctness of the instruction. Being a trespasser, the defendant owed Graham no duty until his position of danger was made known to the employees in charge of the train, and then only to act with reasonable promptness in adopting such means as were available and appropriate to accomplish his rescue. *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Baker v. Chicago, R. I. & P. R. Co.* 95 Iowa, 163, 63 N. W. 667; *Earl v. Chicago, R. I. & P. R. Co.* 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381.

2. Confessedly, the first information to the effect that Graham had boarded the train on the outside came to the train em-

ployees from Hooyer and Newgren after the latter had been admitted to the train; and, as we have seen, Graham fell or was brushed off at or near the Kedzie avenue viaduct. Of vital importance to plaintiff's case, therefore, is the location of the train with reference to the viaduct when such information was imparted. As we read the record, and we have gone over it with much care, there seems no reasonable ground to conclude otherwise than that at the time in question the train had passed the viaduct. This being true, there is no possible theory upon which the verdict and judgment can be upheld. We shall recite the evidence sufficiently in detail to make clear the situation. The boy Hooyer was the only witness for plaintiff who testified on the subject. He says that he was wholly unacquainted in the neighborhood, that he had never been there before, and has never been there since; that he did not know of the existence of Kedzie avenue or the viaduct. On direct examination, he testified that he had since been informed as to the existence of the viaduct, and as to the distance thereof from Oakley avenue; and he gave it as his judgment that, at the time he was taken into the train, about one third of the distance had been traveled. Being asked as to the rate of speed at which the train was running he answered that in his judgment it was about 15 miles an hour. On cross-examination, he answered that from the time he boarded the car he was standing face inward, hugging close to the vestibule door, and looking steadily through the window in such door; that he gave no attention whatever to landmarks or objects that were being passed by the train; that he realized he was in a position of great peril, and was frightened, and that he kept rapping on the window until the brakeman came to his relief.

On the subject of the speed of the train he answered that there was not very much acceleration as they went on.

Q. They kept increasing speed as you went on?

A. I never took particular notice.

Q. They might have increased in speed, and you not noticed it?

A. Well, they were not going very fast.

Q. Are you a judge of the speed of railroad trains?

A. No, sir.

Q. You cannot tell a vestibule train when you see it?

A. I do not know about that.

Q. But you can judge as to the speed of a train?

A. Well, about as near as anybody in my position, I guess.

Now, for the defendant, Newgren testified

in positive terms that the train had passed Kedzie avenue before he and Hooyer were taken in; that he was familiar with the viaduct, and knew when they passed it. "Yes, sir; I knew it. I had gone over it lots of times. You can tell by the sound. It is just like over a bridge or river. When we went over, the railing of the subway just touched my back, just so I could feel it." The porter of the Pullman car, who, with a brakeman named Wright, was present when Hooyer and Newgren were taken in, testified that they were then near the Kedzie viaduct; that he could not say whether it was just before or just after, but thinks it was just after they passed the viaduct. Two brakemen and the conductor of the train each testified that within his positive knowledge the train had proceeded some distance to the west of the viaduct before the presence of the boys on the train was discovered and they were taken in. Each of such witnesses testified further that at the time the train passed the viaduct the rate of speed at which it was running was from 25 to 30 miles an hour.

We have not overlooked the contention in argument of counsel for appellee to the effect that Hooyer and Newgren must have been taken into the train before the viaduct was reached because the space between the car and the girder of the viaduct was not sufficient to permit of the passage of a man standing on the car steps and clinging to the hand-holds; that accordingly, and if the fact as to the location of the train was otherwise than as testified to by Hooyer, all three of the boys would have brushed off when the viaduct was reached. The trouble with this contention arises out of the proof. The distance between the extreme south edge of the car step and the viaduct girder is shown to be 18 and a fraction inches, while the vestibule door is set in 6 inches from the outer line of the car. There was then a clearance of fully 2 feet. Hooyer was a slender boy, and he says he kept his body close up to the vestibule door, while Newgren, a much larger man, was partially in between the vestibule ends. Such being the facts, it was entirely possible for both to pass through without striking against the girder. Such, then, is, the state of the evidence. As it seems to us, consideration thereof from any point of view must lead to the conclusion that the train had reached the viaduct, and Graham had fallen to his death before any warning of his peril had been given. It must be manifest that at best the estimate of Hooyer as to the distance the train had traveled can be taken for nothing more than sheer guesswork; a present guess as to a matter of fact respecting which he does not claim to have formed an opinion as of the

time, and to which, as he declares, his attention had not been subsequently called until shortly before the trial, some three years after the happening of the accident. Being wholly unacquainted with his surroundings, and giving not the slightest heed at the time to any object which could serve as a basis for computing distance with the eye, judgment on his part as to location was only possible by taking into account the speed of the train and estimating therefrom the distance run. Taking the circumstances as presented, it is inconceivable, within our view, that any judgment could have been formed by him on the subject. Here was an inexperienced boy nineteen years of age in the precarious position of clinging to the outside of a rapidly moving train; he says he fully realized his peril and was frightened thereat; that his attention was centered upon maintaining his hold, and that his hope was to attract attention by continual rapping on the window, and his rescue be thus brought about. It was not a time for judgment as to any matter not directly associated with his peril; it was not a time for thought even, save as connected with his chances for relief. And the witness does not pretend otherwise. His judgment is not as of that time, but of time three years later when a witness on the trial. To permit the mere opinion of such witness, thus formed and expressed, as to the speed of the train, and its location at the time in question, to outweigh the positive evidence of four witnesses, each speaking from knowledge as to the fact involved, would be, in our judgment, at once absurd and wholly unreasonable. 3. But, if it could be said that the conclusion reached by us in the foregoing division of this opinion is open to doubt as to its correctness, still it remains to be said that defendant was entitled to a favorable ruling on its motion for new trial based on the subject-matter set forth in the third ground of the motion to instruct. By the third instruction given, the jury was told that the measure of duty on the part of defendant "was not to wilfully or wantonly injure him after the said Graham had placed himself in a position of danger, and the employees of the defendant in charge and control of the train had actual knowledge of his position of danger, and, by the exercise of reasonable care, could have extricated him from same." In the tenth instruction it was said that, "if the conductor and brakemen, after being notified of Graham's position, could have stepped to the front end of the car and taken him in from the vestibule as quickly as the train could have been stopped by the use of the emergency, then it was their duty to go to the vestibule rather than stop

the train." And in the eleventh instructions this: "In determining whether or not the conductor or brakeman should have stopped the train by using the emergency brake, you must consider the safety of the passengers on the train, and if the use of such brake would have endangered the safety of the passengers there was no duty which defendant owed Graham to so endanger the passengers." And such instructions became the law of the case. *Crane v. Chicago & N. W. R. Co.* 74 Iowa, 330, 7 Am. St. Rep. 479, 37 N. W. 397; *Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167. Now, it is the evidence of Hooyer and Newgren that when they were taken into the car the brakeman, Wright, demanded to know what they were doing out there, and if they had tickets. Hooyer says that he replied saying that "Graham, who was on the other end of the coach in the same position he was in, had the tickets." Newgren says that Wright was told simply that a friend up ahead had the tickets. Both agree that they at once started forward, and when about half way through the car they met the conductor, who demanded their tickets. They told him that Graham had them, and that he was on the front end of that car outside. The conductor turned back and went with them to the vestibule, opened it, and found no one there.

The contention of plaintiff here, as in the court below, is that, upon being informed that Graham was on the front end of the car, it became the duty of the brakeman, and in turn, that of the conductor, to act at once by setting the emergency brakes on the train. And it is the failure to so act that is relied upon to sustain the verdict. A contradiction in the evidence as to what was done by Wright may be here noticed. Hooyer testified that Wright accompanied them as they went forward and met the conductor, while Wright says that he was not told that the boys had a companion on the outside at the head end of the car, and that as the boys started forward he went inside the car and sat down. Now, as bearing upon the phase of the situation instantly under consideration, plaintiff brought forward no evidence save that the conductor who was in charge of the train in question was put upon the stand and testified that the train was equipped with air brakes; that these could be operated either from a valve placed in the closet of each car, or by the engineer upon signal given by pulling a rope which extended through the train and connected with the air whistle located in the cab of the engine. The witness further testified that in his judgment the train, running at 15 miles an hour, could have been stopped in from 450 to 500 feet. On cross-examination the witness answered that stop-

ping a train by use of a valve in one of the cars, called an "emergency stop," would be very unwise, unless in case of very serious accident; that the effect is to lock the wheels on the train, and is liable to injure passengers in the train. For the defendant, several witnesses, including the conductor, brakeman, and a division superintendent, were called, and all agree that an emergency stop, whether made by use of a car valve or from the engine, is fraught with danger; that it is liable to injure passengers by throwing them down if in the car aisles, or out of their seats if sitting; that, if made by use of a car valve, there is especial danger to the train, as it is liable to be torn in two. This is explained by pointing out that the wheels of the train become suddenly locked while the engineer is continuing to work steam; and reference is made to instances of accident and injury thus occurring. In addition to this, said witnesses testify uniformly that less time would be consumed in going the length of a car and opening the vestibule door than would be required to stop the train, whatever the means employed. In the absence of any opposing testimony there can be no reason why such witnesses should not be believed and their evidence given controlling effect. Under the circumstances shown, therefore, it would be unreasonable in the extreme to hold that the conductor was the responsible cause of a wilful or wanton injury. Conceding knowledge of the peril to Graham on the part of brakeman Wright, it must be said for him, that, in view of the uncontradicted evidence on the subject and the law of the instructions as given to the jury, he was doubly justified in not going to the car closet and setting the brakes on the train; there was the danger to the train and its passengers; and the most expeditious method of affording relief was by going to and opening the vestibule door. If then, as testified to by Hooyer, Wright started forward with the boys to go to the rescue,—and plaintiff rested his case upon this theory,—there can be no room for complaint of his action. If, on the other hand, as testified to by Wright, he went into the car and sat down,—a proceeding scarcely believable if it had come to his understanding that Graham was clinging to the outside of the car,—still there is nothing in the record from which it can be said that the work of rescue was interfered with or delayed thereby. The vestibule door was opened just as quick as it would have been, had he also gone to the forward end of the car.

The considerations expressed foregoing lead to the conclusion that the motion of defendant for a new trial should have been

sustained, and the cause will be remanded that such may obtain.

Reversed.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

EDWIN H. PRATT, Appt.

v.

PARMELIA J. DAVIS.

(224 Ill. 300, 79 N. E. 562.)

Trial—burden of proof—harmless ruling.

1. A ruling that defendant in an action for damages for performing an unauthorized surgical operation upon a married woman has the burden of showing leave and license, notwithstanding the declaration avers want of consent by herself "or anyone authorized to act for her," to which defendant pleaded leave and license, which was denied by plaintiff, is harmless, if error, where it is shown that plaintiff herself did not consent, and evidence of the conduct of her husband, the only one claimed to be authorized to consent for her, tends to negative consent on his part.

Surgeon—operation—consent.

2. The consent by a man to an operation upon his insane wife upon taking her to a hospital is exhausted when the operation is performed and she is taken away, so as not to justify another operation if she subsequently returns to the institution.

Same—implied consent.

3. Consent by a man to an operation upon his wife for the removal of her uterus and ovaries is not shown by the fact that, after an operation of a minor nature to which he consented, which did not prove successful, he complied with a direction to bring his wife again to the surgeon for treatment.

Same—pleading—estoppel.

4. An averment of consent to an operation, in the declaration in an action which is disposed of without any determination of the rights of the parties, does not estop plaintiff, in a subsequent suit, to show want of consent.

Appeal—incompetent evidence—harmless error.

5. Error in admitting incompetent evi-

dence in an action tried without a jury does not require reversal if there is abundant competent evidence to justify the finding of the court.

Damages—proof—inference.

6. Proof of pain and suffering following the removal of a woman's uterus is not necessary to render them an element of damages against the one performing the operation, since they are inferred by law.

Surgeon—operation—consent.

7. When a patient consents to an operation, and unexpected conditions develop, or are discovered in the course of the operation; or when a surgeon is called in an emergency, and some immediate action is found necessary for the preservation of the life or health of the patient,—where it is impracticable to obtain the consent of the patient or anyone authorized to speak for him, the surgeon may perform such operation as good surgery demands, without consent.

(December 22, 1906.)

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for trespass in performing an unauthorized operation upon plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Walker & Williams and Roy C. Merrick, for appellant:

The relations existing between appellant and appellee were such as to confer upon appellant, as a matter of law, authority to perform the operation complained of; and the burden of proof to show want of consent was upon appellee.

M'Cullen v. Adams, 19 Pick. 333, 31 Am. Dec. 140; State use of Janney v. Housekeeper, 70 Md. 162, 2 L.R.A. 587, 14 Am. St. Rep. 340, 16 Atl. 382; Beatty v. Cullingworth, 44 Cent. L. J. 153; Littlejohn v. Arbogast, 95 Ill. App. 605; McKee v. Allen, 94 Ill. App. 147; Sims v. Parker, 41 Ill. App. 284.

On petition for rehearing.

A physician or surgeon is liable in damages whenever he fails to give to a case which he undertakes such care and treatment as are dictated by his best judgment.

Case Note.—Liability for performing surgical operation without consent of patient:

—The question of the liability of a surgeon for performing an operation on a patient without consent is practically new. For an exhaustive note upon the subject, see *Mohr v. Williams*, 1 L.R.A. (N.S.) 439. The case of *PRATT v. DAVIS* affirms the decision of the lower court, there referred to and commented upon. The law thus far established is that a physician is liable for operating upon a patient, unless he obtains the consent either of the patient, if compe-

tent to give such consent, or, if not, of someone who, under such circumstances, would be legally authorized to give the requisite consent; that in certain instances consent will be presumed, unless the person operated upon has been the victim of false or fraudulent representations, or has been deliberately deceived, as was the case in *PRATT v. DAVIS*. In addition to the note to *Mohr v. Williams*, see also *Bakker v. Welsh*, post, 612, for rule as to operation on minor without parent's consent.

22 Am. & Eng. Enc. Law, 2d ed. p. 798; *Morris v. Despain*, 104 Ill. App. 452; *Barnes v. Means*, 82 Ill. 375; *Carpenter v. Blake*, 10 Hun, 358; *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333; *Moon v. McRae*, 111 Ga. 206, 36 S. E. 635; *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462; *Beck v. German Klinik*, 78 Iowa, 696, 7 L.R.A. 566, 43 N. W. 617; *Schoonover v. Holden (Iowa)* 87 N. W. 737; *Alexander v. Menefee*, 23 Ky. L. Rep. 1151, 64 S. W. 855; *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945; *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 763; *Moratzky v. Wirth*, 67 Minn. 46, 69 N. W. 480; *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107; *Miller v. Frey*, 49 Neb. 472, 68 N. W. 630; *Challis v. Lake*, 71 N. H. 90, 51 Atl. 260; *Boldt v. Murray*, 2 N. Y. S. R. 232; *Gray v. Little*, 126 N. C. 385, 35 S. E. 611; *Wood v. Clapp*, 4 Sneed, 65; *Brooke v. Clark*, 57 Tex. 105; *Mullin v. Flanders*, 73 Vt. 95, 60 Atl. 813; *Kuhn v. Brownfield*, 34 W. Va. 252, 11 L.R.A. 700, 12 S. E. 519; *Crowty v. Stewart*, 95 Wis. 490, 70 N. W. 558; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924.

As a corollary, he cannot be liable for having performed an operation, or given a treatment, which his learning and judgment tell him is necessary and proper in a given case.

A physician is not bound to inform a patient of the exact nature of his ailment, or of the character of the treatment which is being followed in his case.

Twombly v. Leach, 11 Cush. 397; *Eislein v. Palmer*, 7 Ohio S. & C. P. Dec. 365.

Mr. Samuel J. Howe for appellee.

Scott, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court for the first district affirming a judgment of the circuit court of Cook county in favor of appellee and against appellant, for the sum of \$3,000, in an action for trespass to the person.

Appellant is a physician in the city of Chicago, and at the time of the wrong charged was engaged in conducting a sanitarium on Diversey boulevard. Appellee, a married woman about forty years of age and a resident of the same city, came to this sanitarium for treatment for epilepsy in May, 1896. She had been subject to epileptic seizures for a period of fifteen years, but up to this time she had been able to perform her household duties and had borne four children, three since she first exhibited symptoms of epilepsy. The seizures had gradually been increasing in frequency. Following each of them she would be very weak in body and dazed and uncertain in mind for several hours. The evidence of those who knew her in her daily life is gen-

erally to the effect that her mind, except during the periods immediately following these attacks, was normal. Appellant made an examination of the pelvic organs, and found that the uterus was contracted and lacerated, and that the lower portion of the rectum was diseased. On May 13, 1896, he operated for these difficulties. Thereafter she remained in the sanitarium without improvement several weeks, and then returned home. On July 29, 1896, her brother-in-law, at request of her husband, took her again to the sanitarium, and on the next day appellant performed a second surgical operation upon her, removing her ovaries and uterus. She continued at the sanitarium until the 8th day of August, 1896, and then was removed to her home. Neither operation was successful, so far as improving her health was concerned. She grew gradually worse mentally, and on August 25, 1898, was adjudged insane and sent to the state asylum at Kankakee, and was not a witness in the trial of this case. The cause of action is based on the removal of the uterus at the second operation. It is not claimed that the operation was unskillfully performed, but that it was performed without the authority or consent of appellee, and constituted a trespass to her person.

The declaration, so far as now material, averred that appellee had placed herself under the care of appellant, and that he, without her consent or the consent of anyone authorized to act for her, anesthetized her and removed the uterus. Appellant interposed the general issue and a special plea of leave and license for doing the acts complained of. To the special plea a replication was filed during the leave and license. There is no pretense that appellee herself consented to the removal of the uterus. In fact, appellant himself testifies that he told Mrs. Davis just enough about her condition, and what he proposed to do, to get her consent to the first operation, and says, quoting his own language: "I worked her deliberately and systematically, taking chances which she did not realize the full aspect of, deliberately and calmly deceiving the woman; that is, I did not tell her the whole truth." And, referring to the first operation, he says: "She knew that the womb was to be operated upon, and she was willing that should be done. Consent for further work was not obtained." The record does not disclose the circumstances under which the anæsthetic was administered prior to the second operation. Appellant, however, contended that the appellee was so mentally unsound as to be incapable of consenting, or of giving intelligent consideration to her condition; and that her husband authorized the second operation. Whether

appellee was then mentally incapable of consenting was a question as to which the evidence was conflicting. The trial court held a proposition of law stating that the burden of proof was upon the appellant to show leave and license; and it is said that this was improper in view of the averments of the declaration. If the declaration made necessary proof of the fact that the operation was performed without the consent of appellee or someone who, under the law, could act for her, the plea setting up leave and license was plainly useless. Ordinarily, where the patient is in full possession of all his mental faculties, and in such physical health as to be able to consult about his condition without the consultation itself being fraught with dangerous consequences to the patient's health; and when no emergency exists making it impracticable to confer with him,—it is manifest that his consent should be a prerequisite to a surgical operation. Where the *narr.* shows the act to have been a trespass to the person, or avers it to have been without the consent of the patient, it would seem to be unnecessary to go farther and negative the fact that some other person lawfully authorized to act for the patient consented. The question of the consent of such other person, if in the case, might well be left to be presented by a plea in bar.

We have carefully reviewed the evidence as abstracted, and are satisfied that it does not tend to show that the husband consented to the second operation. He testified that he did not, and that, when he first took his wife to the sanitarium, appellant told him the operation would be a trifling one; and appellant says that, while he may have said this, "Davis said he was willing that I should do anything I thought necessary; only he made the request that I do as little as possible;" and that appellant then told Davis, in substance, that two operations might be necessary. Following that conversation, the first operation was performed, and later the woman went home. While she was at home, appellant says: "Mr. Davis, plaintiff's husband, told me she was no better. I told him to bring her back for the finishing work. I did not tell him what the finishing work would be. I had but one comprehensive talk with him. That was the time he was there with the plaintiff." These two conversations are relied upon by appellant as authority given by the husband for the second operation. Without deciding what legal effect should be given to the husband's request or consent that a grave surgical operation be performed upon his insane wife, we think it manifest that the authority given by the husband in the conversation first above quoted from appellant's

testimony was exhausted when the first operation was performed and the patient taken away. While it is true that appellant says he told the husband in that conversation that he could not tell the extent of the surgery that would be necessary, and says that Davis gave him *carte blanche* to do whatever he saw fit, it is yet apparent that neither then contemplated that the wife would be taken home after the first operation and later brought a second time to the sanitarium for the purpose of undergoing a second operation; and we think it equally apparent from appellant's testimony that the husband did not, at the time he was directed to bring his wife again to appellant for treatment, understand that any such operation as the removal of the ovaries and the uterus was to be performed, and that the mere fact that he, after that conversation, had his brother take appellee to the sanitarium, is not to be regarded as tending to show consent to surgery of that character. As appellee did not consent, and the evidence does not tend to show consent given by the husband, it is unnecessary to determine whether the holding of the trial judge to which we have above adverted was correct in the anomalous state of the pleadings. In any event it was harmless.

Appellant then contends that, in the absence of express authority to remove the uterus, the law will imply the necessary consent from the fact that consent was, as he says, obtained for the removal of the ovaries. Before bringing this suit, appellee instituted a former suit against appellant, which seems to have been disposed of without any determination of the rights of the parties. In that suit the declaration, which was filed on September 11, 1896, averred that the ovaries had been, with the consent of appellee, removed at the first operation upon the promise of appellant that their removal would cure plaintiff, but that their removal, instead of alleviating her condition, aggravated her troubles; and that she thereafter returned to the sanitarium, and that appellant then, without her consent or that of her husband, removed the uterus. In this suit the only claim is for damages occasioned by the removal of the uterus; and in the course of the trial of the case now at bar counsel for appellee stated that he was claiming nothing on account of the removal of the ovaries. Appellant argues that it appears from the facts thus recited that consent was obtained for the removal of the ovaries, and that correct surgical practice requires, that, when the ovaries are removed, the uterus should also be removed, and that, consent for the removal of the ovaries having been obtained, the right to remove the uterus followed. Appellee, by

her brief, says that consent was given for the first operation, and that when she brought the first suit she erroneously believed that the ovaries were removed at that operation. Be this as it may, the declaration in the first suit does not estop appellee to show that she never consented to their removal, and, as there is no evidence which tends to show that any permission was obtained for the second operation, when they were in fact removed, there is therefore nothing to raise the implication in question.

It is also urged that consent is to be implied from the relation of the parties; and the following proposition of law was submitted as embodying that defense: "The court holds, as a proposition of law, that, when a patient places herself in the care of a surgeon for treatment, without instructions to the surgeon or limitations upon his authority, she thereby, in law, consents that he may perform such operation as in his best judgment, care, and skill is necessary, proper, and essential to her welfare; and, in case the surgeon performs an operation upon the plaintiff, and there is no complaint against the surgeon for want of the exercise of care and skill, there can be no recovery." The court held this good as an abstract proposition of law, but did not regard it as controlling here, for the reason, as we must assume, that the evidence did not show a state of facts that made this proposition determinative of the controversy. We are therefore not called upon to decide whether this was a correct statement of the law.

Complaint is made of the action of the court in overruling objections to testimony elicited by appellee from her expert medical witnesses in answer to hypothetical questions. This was a trial without the intervention of a jury, and errors in this regard, if they exist, do not require reversal, as there is in the record abundant competent evidence to justify the finding of the court. *Merchants' Despatch Transp. Co. v. Jøesting*, 89 Ill. 152.

It is next urged that the evidence shows no actual damages, that the judgment must therefore be made up of nominal damages and exemplary damages, and that this is not a proper case for the infliction of a penalty; wherefore the judgment should be reversed. The claim that there is no proof of actual damages is based upon this statement found in appellant's argument: "There is nowhere in the record a syllable showing any pain or suffering as a result of the removal of the uterus." Some facts require no direct proof. That pain and suffering follow the removal of the uterus is one of such facts. The law infers pain and suffering from personal injury. 1 Sutherland, *Damages*, 1st ed. p. 766.

7 L.R.A. (N.S.)

Further objections are made to the action of the court in passing upon the propositions of law submitted. These objections, in so far as they are worthy of serious consideration, are disposed of by what has already been said in this opinion. Where the patient desires or consents that an operation be performed, and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon, in dealing with these conditions, to act on his own discretion, making the highest use of his skill and ability to meet the exigencies which confront him; and, in the nature of things, he must frequently do this without consultation or conference with anyone, except, perhaps, other members of his profession who are assisting him. Emergencies arise; and when a surgeon is called, it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one, or of anyone authorized to speak for him. In such event, the surgeon may lawfully, and it is his duty to, perform such operation as good surgery demands, without such consent. The case before us, however, does not fall within either of these two classes.

The judgment of the Appellate Court will be affirmed.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

JAN BAKKER, Admr., etc., of Stephen Bakker, Deceased, Plff. in Err.,
v.

D. EMMETT WELSH et al.

(— Mich. —, 108 N. W. 94.)

Surgeon—operation on child without consent—liability.

Failure to obtain the father's consent before administering an anæsthetic to a youth seventeen years old, who, in company with adult relatives, has applied to a surgeon to be relieved from a small tumor, will not render the surgeon liable to the

Case Note. — Liability for performing surgical operation on minor without parent's consent: — The case of *BAKKER v. WELSH* is the only one in which the question whether the parent's consent is necessary to authorize an operation by a physician on a minor has been actually discussed and passed upon. For an exhaustive note upon the general subject of operations without consent, see *Mohr v. Williams*, 1 L.R.A. (N.S.) 439. See also *Pratt v. Davis*, ante, 609, on the same subject.

father for the death of the boy under its influence.

(July 3, 1906.)

ERROR to the Superior Court of Grand Rapids to review a judgment in favor of defendants in an action brought to recover damages for the death of plaintiff's son, which was alleged to have been caused by defendants' wrongful act. Affirmed.

The facts are stated in the opinion.

Messrs. Lombard & Hext, for plaintiff in error:

The contract of a minor cannot supersede or waive the rights of a father.

21 Am. & Eng. Enc. Law, p. 1041.

Messrs. Crane & Norris, for defendants in error:

An infant has a right to contract for medical services, and to bind himself by so doing.

Tyler, *Infancy & Coverture*, 69; Co. Litt. 172; *Huggins v. Wiseman*, Carth. 110; *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Carstens v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159; *Schouler*, Dom. Rel. 548; 1 Bl. Com. 466; *Strong v. Foote*, 42 Conn. 203; *Werner's Appeal*, 91 Pa. 222; *Squier v. Hydliff*, 9 Mich. 274.

Even if the infant's consent or contract be regarded as voidable, the infant is the only one who can repudiate it.

Dunton v. Brown, 31 Mich. 182; *Stokes v. Brown*, 4 Chand. (Wis.) 39; *Armitage v. Widoe*, 36 Mich. 124; *Lansing v. Michigan C. R. Co.* 126 Mich. 663, 86 Am. St. Rep. 567, 86 N. W. 147.

The father's consent is unnecessary.

State use of *Janney v. Housekeeper*, 70 Md. 162, 2 L.R.A. 587, 14 Am. St. Rep. 340, 16 Atl. 382; *Carstens v. Hanselman*, supra.

Moore, J., delivered the opinion of the court:

Stephen Bakker died upon the operating table at a hospital in Grand Rapids, while defendant Apted was administering to him chloroform preparatory to the removal of a tumor by the defendant Welsh. The plaintiff is the father of the deceased, and, after being appointed administrator of the estate of deceased, brought this suit; his counsel stating upon the trial that his claim was under what is known by the lawyers and the courts as the "death act." The trial judge directed a verdict in favor of the defendants. The case is brought here by writ of error.

Stephen Bakker was seventeen years old. He lived with his father on a farm. He was a large, healthy-appearing person. He had a tumor upon his left ear about the size of a dove's egg. Some time before his death he had received treatment, and the tumor nearly disappeared; but prior to the middle of

February, 1904, it reappeared, and he came to Grand Rapids to consult some physician about it. He had an aunt about sixty years old and two adult sisters living in Grand Rapids, with whom he went to the office of the defendant Welsh, who was a specialist and had practised medicine and surgery a long time. After an examination he was told it would be necessary to have a microscopic examination made to determine the character of the growth, and he was sent to Dr. Williams, another specialist, who made an incision and obtained a specimen from the tumor, and young Bakker returned to his father's. On the following Saturday or Sunday he again went to the office of Dr. Welsh, accompanied by at least one of his sisters, and was informed of the report made by Dr. Williams, and was told it would be best to have the tumor removed by a surgical operation at the hospital.

The testimony is somewhat conflicting as to what was said. The sister claims Stephen objected to taking an anæsthetic, and was told there was no danger. The doctor says that he told him there was always some danger in taking an anæsthetic, and that he advised him to have the operation performed. On Tuesday afternoon Stephen, with his aunt and at least one sister, went again to the office of Dr. Welsh and was sent from there to the hospital, where they all understood an operation should be performed the following day. In the meantime Dr. Welsh had arranged with Dr. Apted, an expert in the administration of anæsthetics, to administer the chloroform. A careful examination of the heart and lungs of the young man was made. They appeared to be normal, and in the presence of the hospital nurse and the doctors, with the usual appliances for successful operations at hand, young Bakker was put upon the table. Dr. Apted began to administer chloroform by means of the mask and drop method, and had administered about one third of an ounce, taking from seven to ten minutes in which to do it, and Dr. Welsh was just about to commence the operation, when suddenly the heart of the patient stopped beating. Every means known to the profession was used to revive the patient, but he was already dead. The record shows the father did not know an operation was to be performed. There were two counts in the declaration. Stripped of legal verbiage the first count stated that Stephen Baker was a minor, and it was known to the defendant Welsh he was a minor, and that it was Dr. Welsh's duty to inform the father and get his consent before entering upon this operation. The second count charges what is known as malpractice or want of skill in the operation, and that young Bakker died by reason

of an improper administration of an anæsthetic. The record, instead of disclosing want of skill in the operation, shows quite the contrary. We have no hesitancy in saying the trial judge was quite right in so saying when he directed a verdict.

We then come to the question: Are defendants liable in this action because they engaged in this operation without obtaining the consent of the father? Counsel for the plaintiff are very frank with the court, and say in their brief: "We are unable to aid the court by reference to any decisions in point. We have devoted much time and research to this interesting question, but have been unable to find any decisions of a higher court either supporting or opposing the plaintiff's contention, and we will therefore have to be content by calling the court's attention to such general reasoning as leads us to take the view herein contended for." They then argue at length and with a good deal of force that, as the father is the natural guardian of the child and is entitled to his custody and his services, he cannot be deprived of them without his consent. We quote: "We contend that it is wrong in every sense, except in cases of emergency, for a physician and surgeon to enter upon a dangerous operation, or, as in this case, the administration of an anæsthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian. It is against public policy and the sacred rights we have in our children that surgeons should take them in charge without our knowledge, and send to us a corpse as the first notice or intimation of their relation to the case." On the part of defendants, it is contended: (1) Consent of the father was unnecessary. (2) The lack of consent was not the cause of the boy's death, hence not actionable. (3) That, if it were, the action does not survive under the death act. (4) That the action, if any, is in the father; not in the administrator.

We do not think it necessary to a disposition of the case to decide all of the defenses interposed by the defendant. The record shows a young fellow almost grown into manhood, who has been for a considerable period of time, while living with his father, afflicted with a tumor. He has attempted, while at home, to have it removed by absorption. It does disappear, but after a time it reappears. He goes up to a large city, and with an aunt and two sisters, all adults, submits to examination, receives some advice, and goes back to his father with an agreement to return later to receive the report of the expert who is to make the microscopic examination. He returns accordingly, and with at least some of

his adult relatives arranges to have a surgical operation of a not very dangerous character performed. Preparations are made for its performance. There is nothing in the record to indicate that, if the consent of the father had been asked, it would not have been freely given. There is nothing in the record to indicate to the doctors, before entering upon the operation, that the father did not approve of his son's going with his aunt and adult sisters, and consulting a physician as to his ailment, and following his advice. We think it would be altogether too harsh a rule to say that, under the circumstances disclosed by this record, in a suit under the statute declared upon, the defendants should be held liable because they did not obtain the consent of the father to the administration of the anæsthetic.

Judgment is affirmed.

KENTUCKY COURT OF APPEALS.

GEORGE SCHWER, Appt.,

v.

WILLIAM MARTIN.

(29 Ky. L. Rep. 1221, 97 S. W. 12.)

Way—inconsistent agreement—tenant.

1. An agreement by a tenant to pay rent for the use of a right of way over adjoining property which is appurtenant to the estate is not binding on his lessor if made without his knowledge.

Same—estoppel.

2. The acknowledgment by a tenant that a right of way over adjoining property is permissive and subject to revocation will not bind him after he secures title to the landlord's estate, to which the right of way is appurtenant.

Same—right to close—burden of proof.

3. One undertaking to close a pass way

Case Note.—Effect of acts or agreement with respect to real property, made by one while a tenant of such property, to estop him after he has purchased the fee:—

The only case, aside from *SCHWER v. MARTIN*, strictly in point, seems to be *Noyes v. Morrill*, 108 Mass. 396, holding that declarations of a tenant in possession of land, to which he afterwards acquires the title, that another has a right of way across the land so occupied by him, are not admissible against declarant's grantees, when it is sought to charge the land with such easement. The court said: "The declarations of Watt in 1833 were not admissible to charge the plaintiff's estate with an easement in favor of those under whom the defendant claims. There was no evidence that Watt was then the owner of the land, or claimed any interest therein. At most, he was only in the occupation of the premises, and acquired title afterwards by the deed

over his land, which has been enjoyed by a neighbor for nearly fifty years, has the burden of showing that the use was merely permissive, and to explain away the presumption that it was under color of right.

Same—permission—absence of—effect.

4. The mere facts that one using a pass way over another's land never asked permission, and that the owner of the land never gave it, are not of themselves sufficient to overcome the presumption, arising from long-continued use, that it was claimed as matter of right.

(November 1, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Kenton County in plaintiff's favor in a suit to enjoin interference with a right of way. Affirmed.

The facts are stated in the opinion.

Mr. Robert C. Simmons, for appellant:

The change from an amicable to a hostile user of a pass way, in its origin merely permissive, must be evidenced by some affirmative step or act brought to the notice of the owner of the servient estate.

Patterson v. Griffith, 23 Ky. L. Rep. 334, 62 S. W. 884; Washb. Easements, 154; Monmouthshire Canal Co. v. Harford, 1 Crompt. M. & R. 614; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Taylor v. Gerrish, 59 N. H. 569; Arbuckle v. Ward, 29 Vt. 52; 22 Am. & Eng. Enc. Law, 2d ed. p. 1198.

The written agreement between Stuntebeck and appellee's vendor, Joseph Martin, besides furnishing conclusive evidence of the permissive use of the pass way in question, estops appellee to question the permissive character of such use.

Douglass v. Scott, 5 Ohio, 198; Wright v. Williams, 25 Ky. L. Rep. 1379, 77 S. W. 1128.

Mr. Frank M. Tracy, for appellee:

The use of a road for fifteen years under claim of right creates the presumption

of a grant, and vests the title to the road in the claimant.

Hall v. McLeod, 2 Met. (Ky.) 102, 74 Am. Dec. 400; Benedict v. Johnson, 19 Ky. L. Rep. 937, 42 S. W. 335; Burch v. Blair, 19 Ky. L. Rep. 641, 41 S. W. 547; Wilkins v. Barnes, 1 Ky. L. Rep. 328; Clay v. Kennedy, 24 Ky. L. Rep. 2034, 72 S. W. 815; Browning v. Davis, 21 Ky. L. Rep. 786, 53 S. W. 9; Thomas v. Bertram, 4 Bush, 318; Talbott v. Thorn, 91 Ky. 417, 16 S. W. 88; Lisle v. Embry, 19 Ky. L. Rep. 867, 42 S. W. 98; Bowen v. Cooper, 23 Ky. L. Rep. 2065, 66 S. W. 601.

A deed or a contract relating to lands will estop a party only in the character in which he executed it.

11 Am. & Eng. Enc. Law, p. 397; Sheffield v. Griffin, 21 Kan. 417; Freeman v. Thayer, 29 Me. 369; Wright v. De Groff, 14 Mich. 164; Kellerman v. Miller, 5 Pa. Super. Ct. 443.

Carroll, C., filed the following opinion:

The appellee, alleging that he was entitled to the use of a pass way leading from his land over the land of appellant to the Dudley road, brought this action against appellant to enjoin him from obstructing the pass way. About sixty years ago, William McCarthy owned the land now owned by appellee, and a Mr. Sandford owned the land now owned by appellant. At this time the land of Sandford was a woodland, and there was a pass way over Sandford's land for the use of the McCarthy place. About this time, Sandford built a new fence along the road, and left a place for a gate that was erected by McCarthy. McCarthy's son testified that his father told him that Sandford said, if he would put the gate there, he could use the pass way as long as he lived. Whether Sandford made this statement or not, it is established conclusively that, from that time, down to 1878, a period

to him in 1835. The nature of his tenancy before that does not appear. The declarations of a former owner are admissible to qualify or disparage his title to the exclusive use and occupation of the estate which he holds. If made while the title is in him, they are evidence against another who is privy in estate. They cannot affect any estate subsequently acquired by the person who makes them. It is the title derived by Watt in 1835, to which the plaintiff stands in privity, and that title is not to be thus qualified."

A somewhat similar case is that of Tyler v. Mather, 9 Gray, 177, where it was held that admissions as to the extent of another's right to flow lands by means of a dam, and to raise the water above a certain rock in a pond, made at a time when declarant had no interest or title in the premises afforded no interest or title in the premises af-

fect, title to which he afterward acquired, and through whom defendants claim, were incompetent. The court said: "At the time when he [declarant] had the conversation of which testimony was allowed to be given to the jury, he had no interest of any kind in the mill, or dam, or lands above it. . . . But the principle which makes the admissions of persons, not parties to the record, yet interested in the event of the suit, competent evidence, restricts the proof to such statements and declarations, only as were made at times when they had some interest in the matter in controversy. . . . Applying this restriction to the evidence of the declarations of . . . [declarant], it is obvious that those which were proved, having been made before his interest accrued, were inadmissible, and should have been excluded."

of thirty years or more, this pass way was used by McCarthy and persons going to and from his premises without interference or disturbance of any kind by any person, although the Sandford land was sold to other parties in 1858. In 1874, Charles H. Stuntebeck became the owner of the Sandford land, now owned by appellant, and held it until December, 1879, when he sold to one Jacobs. During the time that Stuntebeck owned the land, Joseph Martin, the father of appellee, was occupying the McCarthy land as a tenant of McCarthy, and in 1878 Stuntebeck and Martin entered into a written agreement which set out that in March, 1877, Stuntebeck granted to Martin the use of the wagon road over the pass way in controversy for the period of one year; Martin paying \$10 for the privilege. The agreement provided that the privilege should continue for another year, or until March, 1879, Martin paying the same amount; and further provided that Martin was not to permit any other person to use the pass way, except by the consent of Stuntebeck, and was to keep all gates and fences fastened; and, upon the failure of Martin to comply with the conditions imposed on him, the contract should become null and void, and Stuntebeck had the right to prevent any further use of the road by Martin. In February, 1879, this contract was renewed for the year ending March 1, 1880. In 1879 Stuntebeck sold to Jacobs, and in 1884 Jacobs sold to Duckee, and the land passed through the hands of several persons before appellant became the purchaser of it in 1903.

It appears that the agreement between Stuntebeck and Martin was delivered to each successive owner of the land, but neither of them exacted from Martin any compensation for the use of the pass way, nor was any effort made to enforce in any way its provisions; and from the time Jacobs became the owner of the land in December, 1879, until appellant purchased it in 1903, the pass way was used without interruption by appellee, Martin, and his father, Joseph Martin, who purchased the land from McCarthy's heirs about 1883, and sold it to appellee in 1905. It will thus be seen that this pass way was used and enjoyed by the occupants of the McCarthy farm for more than fifty years without objection or interference, excepting the three years from 1877 to 1880 that Stuntebeck required the tenant of McCarthy to pay an annual sum of \$10 for its use. When appellant purchased the land over which the pass way ran, it was a well-defined, clearly marked road, sufficient to put the appellant upon notice that it was used as a pass way through the place. *Wright v. Willis*, 23 Ky. L. Rep. 565, 63 S. 7 L.R.A. (N.S.)

W. 991; *Sparks v. Rogers*, 29 Ky. L. Rep. 1170, 97 S. W. 11. The evidence does not disclose why Stuntebeck exacted the agreement from Martin or why Martin entered into it; but, whatever the reasons for its execution were, it was not binding upon McCarthy, who was then the owner of the land occupied by Martin as his tenant, as the evidence does not disclose that McCarthy had any knowledge whatever of the contract, and at the time it was made the use of the pass way had continued for such a length of time, and been used in such manner, as to invest McCarthy with the right to enjoy it without interference by Stuntebeck.

Counsel for appellant insists that the use of the pass way had its origin in the permission of Sandford, and that, as the right to its enjoyment was obtained in the first place by permission, this right did not ripen into a grant that could not be revoked; and that, when Martin and Stuntebeck entered into this agreement, it was an acknowledgment of the fact that the use of the pass way was merely permissive, and that the owner of the servient estate had the right to revoke it at pleasure. This position is not tenable for the conclusive reason that Martin, with whom the agreement was made, was not the owner of the estate to which the pass way was an appurtenant, and could not bind the owner by any contract made without his knowledge or consent, or estop him from insisting on his right to the use of the pass way, or preclude him from its future enjoyment; nor does the fact that Martin, after the execution of this contract, became the owner of the McCarthy land, affect the question. When Martin purchased from McCarthy, his purchase invested him with all the rights, privileges, and easements connected with or appurtenant to the land that McCarthy was entitled to enjoy, and, this pass way being an easement appurtenant to the land, it passed to him, as neither McCarthy, nor any person authorized to act for him, had divested him of the easement in this pass way. The writing executed by Martin only affected him in the character in which he executed it; that is, as tenant of McCarthy. It was a personal matter between Stuntebeck and Martin as tenant. So that this case must be determined without reference to this written agreement, and as if it had not been made. It has been adjudged in a number of cases that, where the use of a pass way is merely permissive on the part of the owner of the land, a privilege extended by him to his neighbors, without any intention on his part to surrender his right to it, or purpose on their part to assert claim, and when there is no act or conduct by

either that will indicate that allowing the use of the way was other than a neighborly act, and it is recognized that the privilege is one that may be revoked at any time by the owner of the land, its use for even fifty years will not confer the right to claim it as against the owner, or prohibit him from closing it. But, where the use has extended over a long period of years, very slight evidence will be sufficient to show that it was enjoyed under a claim of right; and, when the proprietor undertakes to close a pass way, the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment for more than fifteen years was not exercised under a claim of right. The mere fact that the owner of the servient estate never gave, and the persons using the pass way never asked, permission, is not in itself sufficient to overcome the presumption in their favor arising from the long-continued use of the way.

This pass way having been used and enjoyed by the owners of the land now occupied by appellee for more than fifty years, without interruption or interference, the presumption must be indulged, in the absence of satisfactory evidence to the contrary, that its use was enjoyed as a matter of right, and it is now too late for the owner of the servient estate to close or discontinue this pass way. *Smith v. Pennington*, 28 Ky. L. Rep. 1282, 91 S. W. 730; *Anderson v. Southworth*, 25 Ky. L. Rep. 776, 76 S. W. 391; *Bowen v. Cooper*, 23 Ky. L. Rep. 2065, 66 S. W. 601; *Clay v. Kennedy*, 24 Ky. L. Rep. 2034, 72 S. W. 815; *Lisle v. Embry*, 19 Ky. L. Rep. 867, 42 S. W. 98; *Benedict v. Johnson*, 19 Ky. L. Rep. 937, 42 S. W. 335.

The judgment of the lower court is affirmed.

MICHIGAN SUPREME COURT.

GRACE E. KNAPP, Admr., etc., of Freeman Fishbeck, Deceased,
v.

ALMA JESSUP et al., Plffs. in Err.

(— Mich —, 109 N. W. 666.)

Administrator—deposit—loss of funds.

1. An administrator who deposits funds in a bank in good standing in the community, and promptly distributes the interest

to the next of kin, is not liable for losses caused by the failure of the bank, no negligence on his part being shown, and the exigencies of administration requiring the fund to be kept on hand.

Same—retention of funds.

2. The retaining in a bank, by an administrator, for three months, of money received by him, instead of distributing it, does not make him liable for its loss through failure of the bank, where he had a right to retain money for the use of testator's widow, which might be called for at any time.

Same—payment of unallowed claims.

3. Next of kin cannot complain of the payment of an item by the administrator without its allowance by the court, where it is less in amount than the balance due the administrator for overpayment in the distribution of the estate.

Same—construction of burial vault.

4. An administrator is entitled to credit for an item for the construction and repair, at reasonable expense, of a vault for the remains of the dead, according to the expressed wish of intestate.

Same—uncanceled mortgage—interest.

5. The estate of an administrator is not chargeable with interest on a mortgage which was part of the assets, which came into his possession and was paid, but not discharged, since the presumption is that it was promptly collected and included in the appraisal of assets.

Same—fees.

6. No fault can be found with the allowance of statutory fees to an administrator, where he collected the funds of the estate, cared for the real estate, looked after the widow, and promptly divided to each heir his share of the estate.

(November 13, 1906.)

ERROR to the Circuit Court for Livingston County to review a judgment affirming an order of the Probate Court settling the accounts of the administratrix *de bonis non* of Freeman Fishbeck, deceased. Affirmed.

Statement by Grant, J.:

Freeman Fishbeck died July 21, 1882, leaving a widow and five children,—three sons, named William, Charles, and John, and two daughters, Mrs. Ida Smock and Alma Jessup. Upon the petition of Mrs. Jessup, Charles was appointed administrator, and filed a bond with John and William as sureties. September 6, 1882, an in-

Case Note.—Liability of executor or administrator for loss of bank deposit:—It is generally held that, with reference to funds coming into their hands, executors and administrators are bound to the observance of fidelity and such diligence as men of 7 L.R.A.(N.S.)

ordinary intelligence observe in managing affairs of their own. In other words, they must exercise that degree of care and prudence that ordinarily prudent men exercise in regard to their own affairs.

If the executor or administrator, there-

ventory was filed showing an appraisal of personal property of \$11,752.47, real estate, \$2,500,—total, \$14,252.47. The personal property consisted of notes, merchandise, farm stock, tools, and household goods. Charles continued as administrator until his death, March 21, 1903. He never rendered an annual or final account, and no account was found showing an itemized statement of receipts and disbursements. For four years he was also judge of probate. No commissioners on claims were appointed, and no claims were presented to or allowed by the probate judge. His widow lived upon the small farm, the homestead, about 17 acres of which only was improved, until her death in 1892. Her estate was never probated. She had nothing except that to which she was entitled from her husband's estate. No allowance was made for her support and maintenance, neither was a dower admeasured to her. The small farm was leased, evidently, with the understanding on the part of all the heirs, to a tenant, who took care of their mother, with what assistance Charles provided her with out of the estate. Mrs. Smock testified that she was

"perfectly willing Charles should take whatever needed, and pay it to her. I thought he was doing it." On January 1, 1883, the administrator distributed among the heirs \$7,500; April 15, 1885, \$1,000; May 20, 1892, \$3,250. In all he has distributed to each of his brothers and sisters out of the estate the sum of \$3,146.05, making a total, including the same amount to himself, of \$15,730.25. Upon the death of the administrator, his daughter Grace Knapp was appointed administratrix *de bonis non*, and filed an account as near as it could be ascertained of receipts and disbursements by her father. To this allowance Mrs. Smock and Mrs. Jessup objected. The account was allowed by the probate court, and an appeal taken to the circuit court. The trial was there had before a jury. The account as filed showed credits of \$19,843.18 and debits amounting to \$19,266.28. In this account the jury made one correction, charging the administrator with an item of \$355.47. Among the items so allowed was an item of services by the administrator for 21 years of \$750. The court, in rendering judgment, reduced this item to the statutory allow-

fore, deposits funds of the estate to the credit of the estate in a reputable bank, selected by him with that degree of care which the law exacts, he is ordinarily not liable for any loss which may occur through failure of the bank. *Guthrie v. Wheeler*, 51 Conn. 207; *Officer v. Officer*, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; *Harding v. Canfield*, 73 Minn. 244, 75 N. W. 1112; *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Cox v. Roome*, 38 N. J. Eq. 259; *People ex rel. Nash v. Faulkner*, 107 N. Y. 488, 14 N. E. 415 (*obiter*); *Robinson's Appeal*, 2 Walk. (Pa.) 544; *Re Law's Estate*, 144 Pa. 499, 14 L.R.A. 103, 22 Atl. 831; *Seymour's Estate*, 43 Phila. Leg. Int. 58; *Twitty v. Houser*, 7 S. C. N. S. 153; *Re Kohler*, 15 Wash. 613, 55 Am. St. Rep. 904, 47 Pac. 30.

And he is not liable, although a director in the bank, if he believed it to be solvent. *Re Maxwell*, 23 Abb. N. C. 23, 3 N. Y. Supp. 422.

If, however, the bank fails shortly after he makes the deposit, and he is cashier of the bank, and should know of its failing condition, he is liable. *Re Scudder*, 21 Misc. 179, 47 N. Y. Supp. 101.

In *Germania Safety Vault & T. Co. v. Driskill*, 23 Ky. L. Rep. 2050, 66 S. W. 610, it was held that, where the president of a trust company, acting as administrator, was also president of the bank where the funds of the estate were deposited, he must have known the condition of the bank, and the trust company would not be permitted to rely on the bank's reputation for solvency; and, in such case, the trust company would be held liable for the funds lost by reason of the bank's failure.

Where the money was deposited by the decedent during his lifetime, and the ac-

count, being in a bank of good repute, is transferred to the administrator, as administrator, and is left there by him, he is not liable for its loss upon failure of the bank. *Sheerin v. Public Administrator*, 2 Redf. 421; *Boore v. Eure*, 101 N. C. 11, 9 Am. St. Rep. 17, 7 N. E. 471; *Hanbest's Appeal*, 92 Pa. 482; *Re Seamans*, 2 Lack. Legal News, 271.

In *Seidler's Estate*, 5 Phila. 85, it was held that, although the executor was paying and receiving teller of the bank where the testator had deposited the money, he was not liable for leaving the deposit there, if he had no knowledge of the bank's actual condition.

But in *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739, it was held that, where the administrator left the decedent's deposit in the same bank for over a year, during which time it had the reputation of being unsafe and weak, which reputation he could have learned by using reasonable or ordinary diligence, he was liable for its loss upon failure of the bank.

In *Cook v. Barnes*, 19 Ky. L. Rep. 1533, 43 S. W. 682, the executor was held not liable for failure to withdraw the entire amount left on deposit by the testator, though he knew of the weak condition of the bank, but was advised by testator shortly before his death, and by prominent business men, that to attempt to withdraw the entire amount would precipitate the failure of the bank, and cause the loss of the entire fund, and that to draw out small amounts at a time was the safest way of getting the whole of the deposit.

If, however, the executor or administrator deposits the funds in his individual name, he will be personally liable to the estate if

ance, so that the judgment as rendered made the credits \$19,330.37 and the debits \$19,266.28. It thus appears that the administrator had paid out \$64.09 more than he received. The objections relate (1) to amount paid heirs at law; (2) to a loss by the administrator of funds deposited in a bank known as the "Weimeister Bank;" (3) to the payment of certain debts without their allowance by commissioners, or by the probate judge acting as commissioner; (4) expenses in erecting the vault; (5) a mortgage known as the "Yelland mortgage;" (6) administrator's fees; (7) the item of \$750, allowed to the administrator as paid to the widow of Freeman Fishbeck.

No appearance for plaintiffs in error.

Messrs. Louis E. Howlett and William P. Vanwinkle, for defendant in error:

If an administrator has a good reason for depositing funds belonging to his estate in a bank, and deposits them in an institution of that character bearing a good reputation, he is not liable for the loss sustained.

Re Grammel, 120 Mich. 487, 79 N. W.

they are lost by the failure of the bank. *Ditmar v. Bogle*, 53 Ala. 169; *Allen v. Leach*, 7 Del. Ch. 83, 29 Atl. 1050; *Corya v. Corya*, 119 Ind. 593, 21 N. E. 968, 22 N. E. 3; *Lagarde's Succession*, 20 La. Ann. 148; *Milmo's Succession*, 47 La. Ann. 126, 16 So. 772; *Com. v. McAlister*, 28 Pa. 480.

And this is true, although he has no other funds deposited in that bank (*Re Arguello*, 97 Cal. 196, 31 Pac. 937; *Harward v. Robinson*, 14 Ill. App. 560; *Summers v. Reynolds*, 95 N. C. 404; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274), and places the money there for the express purpose of keeping it separate from his individual funds (*Re Arguello*, supra).

Nor will the fact that he informed the officers of the bank, at the time of making the deposit, that the funds were trust funds, relieve him of liability for a loss due to the bank's failure, if the deposit was made in his individual name. *Harward v. Robinson*, supra; *Re Horner*, 66 Mo. App. 531; *McAlister v. Com.* 30 Pa. 536; *Williams v. Williams*, supra.

However, in *Atterberry v. McDuffee*, 31 Mo. App. 603, it was held that, where the bank cashier knew that the money belonged to the estate; and the executor did not direct, nor intend, that it should be placed to his individual credit; and it was entirely the fault of the cashier that it was not properly accredited; and the executor had no individual account at the bank,—he was not liable for its loss by reason of the failure of the bank.

The executor or administrator will be held liable for such a loss if he loans the money to a bank for a fixed time, instead of depositing it subject to withdrawal at pleas-

706; *Woerner*, Am. Law of Administration, 197.

The statutes of this state do not imperatively require the appointment of commissioners on claims.

Willard v. Van Leeuwen, 56 Mich. 16, 22 N. W. 185; *Ewers v. White*, 114 Mich. 266, 72 N. W. 184; *Ames v. Jackson*, 115 Mass. 508.

The administrator should be credited with the amount of money used by him in the purchase of a burial lot and the erection of a vault.

Pistorius's Appeal, 53 Mich. 350, 19 N. W. 31; *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 848; *Re Shipman*, 82 Hun, 108, 31 N. Y. Supp. 571.

Grant, J., delivered the opinion of the court:

Freeman Fishbeck left no debts except the expenses of his last sickness, and perhaps two other small items. These were paid by the administrator. The contestants, *Mrs. Smock* and *Mrs. Jessup*, admit, in their answer, that the charge of \$132.52 for services of physicians during their father's illness

ure. Caruthers v. Caruthers, 99 Ill. App. 402; *Bear's Appeal*, 127 Pa. 360, 4 L.R.A. 609, 18 Atl. 1.

And he will be liable for loss of the deposit by reason of the bank's failure, if he might and ought to have made final settlement and distribution long before the failure of the bank. *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739.

In *Mandeville v. Arnoult*, 9 Rob. (La.) 447, the executor was held liable for the loss, where he permitted the money of the estate to lie two years or more in the bank, and there was no proper desire manifested to pay existing debts and legacies until the bank had suspended payment in specie.

In *Wood v. Myrick*, 17 Minn. 408, Gil. 388, the executor was held liable for loss by failure of the bank, he having kept the money on deposit for more than five years, and having made no effort to settle the estate.

In *McNabb v. Wixom*, 7 Nev. 163, the administrator was held liable for the loss due to the failure of the bank, where he allowed the money of the estate, which he had deposited in the bank, to remain there after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled to it.

An executor who needlessly deposits or keeps money of the estate in a bank, when it is wanted for the immediate payment of debts of the estate, and pays these debts out of his own funds, will not be allowed, after the failure of the bank, to charge to the estate the amounts so paid. *Guthrie v. Wheeler*, 51 Conn. 207; *Woodley v. Holley*, 111 N. C. 380, 16 S. E. 419.

was reasonable and a fair charge, that the funeral expense was also reasonable and a proper charge, and that the physicians' bills for their mother should be allowed. The holding of this court in *Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011, speaking through Justice Cooley, is applicable to this case: "A probate case on appeal is to be tried and determined on the same principles that would be administered by the probate court itself. That court, in adjusting the accounts of administrators, is governed by broad principles of equity; and it is at all times competent for the administrator, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and to restrict the amount for which he should be held liable to that which equity demands." This case must be examined and determined upon equity principles. The contestants are presumed to know the law. There is no claim that they did not. The first distribution gave each of the heirs the full amount of the personal property aside from that which should have been assigned to the widow. There was no necessity of administration, except to pay the insignificant amount of the debts and distribute the estate. While there is no evidence of any express agreement between the heirs of Freeman Fishbeck that the estate should be divided without further expense of administration, the conclusion is irresistible that they trusted their brother Charles, the administrator, to divide the estate, which he promptly did, to retain enough for the care of their mother, and to preserve the homestead for her use while she lived. That the administrator faithfully and honestly did this is beyond dispute. Upon the death of the mother the real estate was sold by the heirs and the amount received divided between them.

We will now discuss the several claims of the respondent:

1. Without entering much into detail, we think it is clearly shown by the evidence that both contestants received each the same amount as the brothers received, to wit: \$3,146.05. Mrs. Jessup was not a witness, neither was her deposition taken. The dispute in her case arises over a certificate of deposit for \$700. It is sufficient to say that she received it from the administrator, and it was a payment upon her distributive share. Mrs. Smock claims that her amount is \$300 short. This \$300 is accounted for by the fact that her husband received it for her, and with the understanding that he received it as a part of her distributive share. She testified: "If my husband got it, I am willing to have it apply on my share." He testified that he did

get it, and that it was to apply on her share of the estate.

2. The administrator deposited money as administrator in the Weimeister Bank. The bank then had good credit and standing in the community. It subsequently failed. The percentage received by the administrator from the bank was promptly divided among the heirs and receipted for by them. There is nothing in the record to show that the administrator was guilty of negligence in so depositing the funds. The law, therefore, does not hold him liable for the loss. *Re Gammel*, 120 Mich. 487, 79 N. W. 706, and authorities there cited. It is, however, claimed that the administrator's estate is liable for the loss, because he was dilatory in the settlement of the estate, and that, had he divided the estate seasonably, the loss would not have occurred; citing *Wood v. Myrick*, 17 Minn. 408, Gil. 386; *Re Palmer*, 1 Dougl. (Mich.) 422; 7 Am. & Eng. Enc. Law, p. 352, and note. This money was received by the administrator in payment of a mortgage on June 18, 1889. The bank failed three months and seven days thereafter. The administrator had the right to retain funds in his hands for the care of his mother, and it was evidently so understood by all the heirs that he should do so. She might at any time apply for her share of the estate. The principle of those cases therefore does not apply.

3. Whether, under any circumstances, an administrator may pay the debts of the estate which have not been allowed by commissioners or by the probate judge, we find it unnecessary to determine. The administrator kept no regular book account. In a tin box were found some receipted bills and memoranda of payments made by him for various items. Some are dated and some are not; the receipted bills not being printed in the record and the date not given. They were in evidence before the jury and the court. All the record shows in regard to the item of \$35.50 for merchandise, purchased from Hickey & Goodnoe, appears from a witness who produced the papers from the tin box. After testifying to certain small items, consisting of repairs upon the barn, dated July 12, 1892, the witness said: "The next item of merchandise to Hickey & Goodnoe, \$35.50, I got from the items in the tin box." Its date is not shown, and we cannot determine whether it was incurred by the deceased in his lifetime, or expended by the administrator for the support of his mother, or for repairs. As already stated, the answers of the respondents conceded the correctness of the services for medical attendance. This concession eliminates them from consideration. Aside from these items, the

amount is so small that it is not equal to the balance due the administrator as allowed by the court.

4. The administrator was allowed \$450 for the construction of a vault, and subsequently other items were allowed for repairing it. The three brothers contributed \$200 apiece out of their own funds towards its construction. Mrs. Jessup subsequently contributed \$100 towards repairing it. This repair was necessary for the preservation of the vault and the bodies there reposing. The erection of the vault was in accordance with the expressed wish of the father. The amount was reasonable and was properly allowed. *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 846. To construct a vault for the repose of the dead is as proper as the erection of a monument. *Re Shipman*, 82 Hun, 108, 31 N. Y. Supp. 571. The two cemetery lots were purchased on which to erect the vault. The title of one lot was taken in the name of the mother. The title of the other was taken in the name of the three sons and the mother. It is immaterial that the title to the lots was taken in the names of the mother and the sons. *Birkholm v. Wardell*, 42 N. J. Eq. 337, 7 Atl. 569. The expenditure of a reasonable amount of money to keep the vault in repair was a proper charge against the estate. *Bell v. Briggs*, 63 N. H. 592, 4 Atl. 702.

5. One of the assets of the estate was a mortgage, dated February 27, 1877, due five years from date, and given by one Yelland for \$700. This mortgage was found among the papers of the administrator after his death. The administratrix with the will annexed, in the honest belief that this had not been paid, commenced foreclosure suit. The bill was dismissed; the court finding that the mortgage had been paid. The foreclosure proceedings are not in the record, and it does not appear when the mortgage was paid to the administrator. He was charged with the face of the mortgage and the interest up to the time of the appraisal of the assets of the estate. It is stated in the brief of counsel for the appellee that the court found that the mortgage must have been paid soon after the death of Freeman Fishbeck, or soon after it became due. Why it was not discharged does not appear. In the absence of proof, the presumption is that past-due debts of the estate were promptly collected by the administrator. The court so held. It follows that the administrator is not chargeable with interest on this item.

6. The administrator was allowed the statutory fees. Considering that the administrator collected the funds of this estate, took care of the farm, looked after the care of his mother, and promptly divided to

each his share, the court might with propriety have allowed some extra compensation. The petitioners cannot justly find fault with the allowance of the statutory fees.

7. It is evident that the mother could not be properly cared for upon the income from the little farm on which she lived. It is shown from the memoranda made by the administrator, found in the tin box, that from July, 1882, to October 4, 1884, he paid her cash amounting to \$171.75. In making out the account the administratrix *de bonis non* credited him with \$75 a year for the benefit of the mother. We think the evidence justifies this allowance.

8. It is entirely clear that the administrator acted with promptness in the collection and distribution of the estate among his brothers and sisters; that by the assent of all he provided for his mother, took her to his home during her last illness, paid her physicians' bills and funeral expenses; and that after her death he promptly divided among them what he had retained for her support. It is impossible to read this record without reaching the conclusion that he acted honestly, that none of the estate remained in his hands, and that all understood that the entire estate was divided. The contestants and their brothers were intelligent, were fully cognizant of their rights, and it is impossible to believe that they would have waited twenty years after the death of their father and ten years after the death of their mother, if they had supposed that their brother still retained in his hands moneys belonging to them. Undoubtedly the discovery of the Yelland mortgage after his death caused the proceedings for the appointment of an administratrix *de bonis non*. It proved that there was no estate left to administer.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

JAMES T. ELWELL, Resp't.,

v.

EDGAR F. COMSTOCK, Appt.

(— Minn. —, 109 N. W. 698.)

Elections—secrecy.

1. Section 6 of article 7 of the Constitution, providing that all elections, except for town officers, shall be by ballot, was intended to secure to the elector the privilege of exercising his right of franchise secretly.

Headnotes by BROWN, J.

Case Note.—Use of voting machine as violation of constitutional requirement that all elections shall be by ballot: —

and effectively; in view of which, it is held that any method of conducting elections, sanctioned by legislative authority, which will secure and effect that right, is a substantial compliance with the constitutional mandate.

Same—voting machine.

2. Chapter 267, p. 400, Laws 1905, providing for and authorizing, under certain conditions and restrictions, the use of voting machines at elections in this state, does not contravene the provision of the Constitution that all elections shall be by ballot.

Legislature—delegation of authority.

3. The legislature may delegate the power to determine some fact upon which a statute makes its own action depend.

Same—efficiency of machine.

4. The power delegated to the voting

machine commission created by chapter 267, p. 400, Laws 1905, to determine the efficiency of the voting machine thereby authorized to be used at elections in this state, is neither legislative nor judicial, but administrative, in character.

Election—marked ballot.

5. A ballot cast at an election, which is so marked by the elector that his identity is thereby disclosed to any person other than the voter, is void.

Same—intent.

6. When such a mark of identification appears upon a ballot, the elector who cast it cannot be heard to say that he did not intend the mark for that purpose.

Assignments of error.

7. Assignments of error respecting the action of the trial court in counting and re-

There are but two other decisions on the point which were rendered under a constitutional provision in this identical form. Both of these cases, however, cite two previous decisions rendered under a somewhat different constitutional provision.

The first of these four cases in chronological order is that of *Re McTammany Voting Machine*, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716, in which the governor requested the opinion of the justices as to the legality of the adoption of a voting machine under a constitutional provision that voting shall be by ballot; "and in all cases where an election is made by ballot or paper vote, the manner of balloting shall be the same as is now required in voting for general officers, until otherwise prescribed by law." The court said: "The purpose of the Constitution is evidently to provide a record more permanent than that of counting hands, and the like, by which the declared result may be verified. That the manner of securing this might be changed is evident from the use of the phrase 'until otherwise prescribed by law.' We think, therefore, that the present proposal is within the terms and purpose of the Constitution." One of the justices dissented on the ground that the mechanism of the machine was not visible to the voter, and he would have no knowledge through his senses that he had voted or how he had voted.

In *Re House Bill No. 1291*, 178 Mass. 605, 54 L.R.A. 430, 60 N. E. 129, the question presented to the court by the house of representatives was as to the right to adopt voting machines under the Constitution, which required that representatives "shall be chosen by written vote." Three of the justices rendered an opinion in which it was said: "No doubt the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript, but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act and the relative privacy incident to doing that act 7 L.R.A. (N.S.)

in silence. They did not require the signature of the voter, or any means of identifying his vote as his after it had been cast.

. . . It seems to us that the object, and even the words, of the Constitution in requiring 'written votes,' are satisfied when the voter makes a change in a material object,—for instance, by causing a wheel to revolve a fixed distance,—if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device." A fourth justice concurred in this opinion provided the result of the action of the machine in registering each vote cast was visible to the voter casting the vote, and the work of the machine, in adding up the votes cast, was done under the supervision of some person duly charged with counting the votes cast. Three of the justices dissented, and held that the choice of the voter under the Constitution must be indicated by some kind of writing upon some material thing which could be handled, sorted, and counted, and kept in a material form after the closing of the election.

The third case was that of *Detroit v. Inspectors of Election*, 139 Mich. 548, 69 L.R.A. 184, 111 Am. St. Rep. 430, 102 N. W. 1029, in which the court held, after hearing arguments of counsel, that a statute permitting the use of a voting machine which assured secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate, did not contravene a constitutional requirement that all votes at elections shall be given by ballot.

The next and only other case to decide the precise question prior to *ELWELL v. COMSTOCK* was *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723. The conclusion reached in this case was the same as that in the Michigan case just cited. Like that case, it also was decided after argument by counsel; and all the justices concurring in the opinion.

fusing to count certain ballots considered and disposed of.

(November 16, 1906.)

APPEAL by contestee from a judgment of the District Court for Hennepin County in favor of contestant in a proceeding to contest the validity of a certificate of nomination for public office. Affirmed.

The facts are stated in the opinion.

Messrs. Welch, Hayne, & Hubáček and Hale & Montgomery for appellant.

Messrs. George S. Grimes and John H. Steele for respondent.

Brown, J., delivered the opinion of the court:

James T. Elwell and Edgar F. Comstock were rival candidates for the Republican nomination for senator of the twenty-ninth senatorial district at the primary election held on the 18th day of September, 1906, and the proper canvassing board duly declared Comstock for nominee, issuing to him the usual certificate of nomination. Whereupon Elwell commenced this contest, under the provisions of § 203, Rev. Laws 1905, basing the same on several grounds, claiming that a majority of the legal votes at said election were cast for him. Issue was joined, and the matter came on for hearing before the court below, where it was found as a conclusion of fact that contestant had received a majority of one over contestee, and judgment was ordered declaring him the nominee. Contestee appealed.

Several questions are presented for consideration, which we dispose of in the order of their presentation on the argument. The city council of the city of Minneapolis, in which the senatorial district in question is located, had, under the provisions of chapter 267, p. 400, Laws 1905, prior to the election in question, provided for and authorized the use in certain of the precincts of this senatorial district of the Dean ballot machine, a mechanical contrivance for voting without the use of paper ballots, and such machines were used in two of the precincts of that district. A majority of the votes so cast were in favor of contestant, which, if declared illegal, would throw the nomination to contestee. It is contended by counsel for contestee that the use of these machines was illegal, and the votes cast thereon should be excluded from the canvass. This contention is based upon the claim that chapter 267, p. 400, Laws 1905, providing for and authorizing the use of the same, is unconstitutional and void. It is urged that the statute is void for the reasons: (1) That the subject-matter thereof is not sufficiently expressed in the title; (2)

that it violates § 6, art. 7, of the Constitution, which provides that all elections shall be by ballot, except for town officers; and (3) that it violates § 1 of article 3 of the Constitution, in that it delegates legislative and judicial powers to the voting machine commission therein created.

1. The act is entitled "An Act to Authorize the Use of Voting Machines at Elections, and to Authorize Cities, Villages, and Towns to Issue Bonds to Defray the Cost of the Purchase Thereof, and to Repeal Existing Laws Relating to Voting Machines." Under this title, the legislature enacted generally for the purchase and use of voting machines under prescribed conditions and restrictions, and by § 3 created the "Minnesota voting machine commission," consisting of three members, including the attorney general of the state. The powers and duties of the commission are defined, and upon the result of its investigation and determination of the question whether a particular voting machine may be used effectually to express the will of the voters rests the authority of the municipality, through its legislative body, to sanction and provide for its use. The point made against the sufficiency of the title of the act is that the creation of this commission is not referred to, or in any way expressed, thereby, and consequently the act must fall. The objection is not sound. The object of the statute was to provide for the use of voting machines in this state, presumably as an experiment, and the creation of the commission to inspect and determine the efficiency of machines to do the work contemplated is clearly germane and within the comprehensive scope of the title to the act. The provisions for the commission were in no proper sense foreign or dissimilar to the principal subject of the legislation, but, on the contrary, are appropriately adapted to it. Within our decisions the title is sufficient. *Ramsey County v. Heenan*, 2 Minn. 330, Gil. 281; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *State ex rel. Olsen v. Board of Control*, 85 Minn. 165, 88 N. W. 533. See also *Flecken v. Lamberton*, 69 Minn. 187, 72 N. W. 65. In that case it was contended that the act of the legislature of 1893, providing for the erection and construction of a new state capitol (chap. 2, p. 6, Laws, 1893), was unconstitutional for the reason, among others, that the subject-matter thereof was not sufficiently expressed in the title. The act was entitled "An Act to Provide a New Capitol for the State of Minnesota." Among its numerous provisions, was one creating a capitol commission, with power to purchase or condemn a site, select plans, erect and construct a new state building. The court held that the provisions for this

commission were not foreign to the subject of the act, as expressed in its title, and the statute was upheld. The creation of the commission in that statute, as in the statute here under consideration, was a mere detail of the legislation, and in no way disconnected with or impertinent to the subject-matter expressed in the title.

2. It is next contended that the statute contravenes § 6, art. 7, of the Constitution, which provides that all elections, except for certain town officers, shall be by ballot. This provision of our fundamental law was construed in *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825, to mean a mode of designating an elector's choice of a person for an office by the deposit of a ticket bearing the name of such person in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for. "The privilege of secrecy," said the court, "may properly be regarded as the distinguishing feature of ballot voting." The voting machine is of recent origin and invention. It was neither known or thought of at the time of the adoption of the Constitution. The framers thereof did not have in mind any such method of conducting elections. What they had in view, and intended to secure, was, as held in the *Brisbin Case*, the privilege of the citizen to exercise his right of franchise in secret, as distinguished from the yea and nay method. Though the method of voting at the time the Constitution was adopted was, and since has been, by printed ballots or tickets, the Constitution should not be restrained to the strict sense in which, and in reference to which, its language was employed, if its main purpose may be otherwise fully attained. If, by any method substantially in accordance with its spirit, secret and effective exercise of the elective franchise may be accomplished, that method should not be held in violation of the fundamental law merely because not in accord with its letter.

Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and conditions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men. We cannot do better than to quote on this subject from Chief Justice Parker in *Henshaw v. Foster*, 9 Pick. 312, a case involving this immediate question. It appears from that case that the Constitution of Massachusetts provided that elections should be by written ballots; that at an election held in that state certain electors tendered their printed ballots, which were rejected as

not in conformity with the Constitution. The court held that, though voting by printed ballots was unknown at the time of the adoption of the Constitution (1790), that method came fairly within the scope of the law, and that the printed ballots were improperly rejected by the election officers. In the course of the opinion Justice Parker said: "We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce." The same question came up in the state of Maine in an early day, and a change from a written to a printed ballot was upheld. In *Opinion of Justices*, 7 Me. 495, it was said in that case that the framers of the Constitution intended by the provision that elections should be by written ballots to exclude all other modes by which elections are often decided in popular assemblies, and that the word "ballot" was used in contradistinction to voting by ayes and nays or the uplifted hand. Other authorities are in line with this view of the law. *Ex parte Arnold*, 128 Mo. 260, 33 L.R.A. 386, 49 Am. St. Rep. 557, 30 S. W. 768, 1036; *Temple v. Mead*, 4 Vt. 535; *Williams v. Stein*, 38 Ind. 90, 10 Am. Rep. 97.

The statute under consideration provides that voting machines may be used and employed at elections, when so constructed and operated as to secure to every elector an opportunity to vote in secret, to permit him to vote once for all candidates of his choice, whether of the same or different political parties, and to prevent a person from voting for more than one candidate, unless lawfully entitled to vote for more than one, and shall record his vote as cast. We are not concerned with the question whether the machine involved in the case at bar, or any similar machine is, or may be, so constructed and operated as to meet the requirements of the Constitution respecting the right of secrecy, or whether it enables the elector to express his choice of candidates understandingly and with the assurance that his vote

will be counted as cast. The machine is not before us, and we are not advised of its mechanism. We assume, for the purposes of the case, that by the use of the machine every elector may thereby fully and fairly exercise his constitutional rights in this respect. The only question presented in this connection is whether this method of voting conforms to the constitutional mandate that all elections shall be by ballot. The precise question has been before the courts of our sister states. In Rhode Island under a constitutional provision like our own, it was held that the legislature had the power to authorize the use of the McTammany voting machine, of the precise mechanism of which we are not informed, but presume that it is substantially like the one used in this election (Re McTammany Voting Machine, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716; Re McTammany Voting-Machine, 23 R. I. 630, 50 Atl. 265); and by a divided court, in Massachusetts (Re House Bill No. 1291, 178 Mass. 605, 54 L.R.A. 430, 60 N. E. 129). By the supreme court of Michigan (Detroit v. Inspectors of Election, 139 Mich. 548, 69 L.R.A. 184, 102 N. W. 1029), the question is discussed at some length, and pertinent authorities are there collected and commented upon; also by the supreme court of Illinois (Lynch v. Malley, 215 Ill. 574, 74 N. E. 723).

In view of the objects sought to be attained and secured by the framers of the Constitution, it is unnecessary to consult the lexicographers for a definition of the word "ballot." It was not employed in its literal sense, but only for the purpose of designating a method of conducting elections which would insure secrecy and the integrity of the ballot. From the earliest days of popular elections, constant improvement is shown in the methods of conducting the same, to the end that there may be a free and honest expression of choice at the polls. Every step has been contested in the courts only to be approved and upheld. The Australian ballot law, and the primary election for the nomination of candidates for office, on the whole a wise regulation of an important step in the selection of public servants, and designed to relieve in a measure party managers of the burdens heretofore cast upon or assumed by them respecting the management and results of political conventions, were both assailed as innovations upon constitutional rights, but have been sustained by the courts. The voting machine at this date is an experiment, and, if capable of accomplishing what is claimed for it, will overcome in a striking degree many of the evils now said to surround the conduct of elections. If by the use of the machine the main purpose of the Consti-

tution can be effectuated, if the elector may cast his ballot in secret with the assurance that it will be counted as cast, there can be no sound reason why it should be dismissed as an innovation upon the letter of the law. It is of no material consequence that each elector is not supplied with a separate ballot, so long as he may register his choice secretly, upon an official record, in the charge of and under the control of public officers, whose sworn duty it is to observe the requirements of the law respecting the conduct of the election, which includes the preservation and report of the result of the ballot. For these reasons we hold that the use of the voting machine does not violate the constitutional requirement that all elections shall be by ballot.

3. It is also contended that the statute is unconstitutional, in that it delegates judicial and legislative functions to the commission therein designated. We find no special force in this contention. The statute expressly provides for the use of the machines under the restriction that they will permit an elector to exercise his right of franchise in accordance with the constitutional guaranty. The only question left or delegated to the commission for determination is whether any machine submitted for use will permit the accomplishment of that end. This amounts to no more than a condition upon which depends the right to use the machine, and not a conditional taking effect of the statute itself. It is well settled that the legislature may delegate the power to determine some fact or state of things upon which a statute makes, or intends to make, its own action depend. 8 Cyc. Law & Proc. p. 830, and cases cited. The law on this subject is clearly and correctly summed up by Justice Mitchell in *State ex rel. Hagestad v. Sullivan*, 67 Minn. 379, 69 N. W. 1094, wherein the validity of chapter 229, p. 575, Laws 1895, providing for the establishment of municipal courts in certain cities, was involved. It was contended in that case that the statute there under consideration was unconstitutional, because it delegated legislative powers to the electors, in that it provided that the act should not go into effect except upon a four-fifths vote of the municipal council. In disposing of the question, Justice Mitchell said: "But it is equally well settled that it is not always essential that a legislative act must in any event take effect as law after it leaves the hands of the legislature. If the law is, in its provisions, a complete statute in other respects when it leaves the legislature, its taking effect may be made conditional upon some subsequent event. When that event happens, the statute takes effect, and becomes the law, by force of legislative action, as fully

as if they had unconditionally fixed the time when it should take effect." The statute there under consideration, unlike the one in the case at bar, did not go into effect until favorable action by the municipal council, yet the court held it valid legislation. The voting machine statute goes into effect by its own terms from and after its passage, it being left to the commission to determine whether a particular voting machine will meet its requirements.

The "boiler inspector act" (chapter 253, p. 406, Laws 1889), providing for the inspection of steam boilers, was sustained in *State ex rel. Graham v. McMahon*, 65 Minn. 453, 68 N. W. 77, against the contention that the provisions thereof which exempted from its operation boilers which had been inspected by certain insurance companies and certified to be safe were a delegation of legislative power. Other cases in this court are to the same effect. *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782. This view of the question is upheld by other courts. A very similar case is *Leeper v. State*, 103 Tenn. 500, 48 L.R.A. 167, 53 S. W. 962. In that case, a "uniform text-book act" authorized the selection and adoption through a commission of a uniform series of text-books for the schools of the state. It was contended that the statute was unconstitutional, in that it delegated legislative power to the commission. The court held that it conferred executive or administrative functions only; that the act took effect from and after its passage, though details of administration of the act were, of necessity, put in the hands of a commission. See also *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677; *Turner v. Detroit*, 104 Mich. 326, 62 N. W. 405; *State v. Williams (State v. Thompson)* 160 Mo. 333, 54 L.R.A. 950, 83 Am. St. Rep. 468, 60 S. W. 1077; *Haney v. Bartow County*, 91 Ga. 770, 18 S. E. 28; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716.

Our conclusion upon this branch of the case is that the duties imposed upon the voting machine commission by the statute are administrative in character, and in no proper sense either legislative or judicial.

4. It is further contended by contestee that the voting machine in question was never approved or its use authorized by the commission. Though the proceedings in this respect are somewhat indefinite, and perhaps irregular, we hold that sufficient authority was given by the commission to use the machine. At any rate, any irregularity in this respect should not result in disfranchising

the electors. No fraud is charged, and, from aught that appears, the election was fairly and honestly conducted. *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002; *State ex rel. Murphy v. Bernier (Minn.)* 38 N. W. 309.

5. It is also contended that the court below erred in counting and refusing to count certain of the ballots cast at the election, and in the admission and exclusion of evidence in connection therewith. We find no error in this branch of the case sufficient to change the result reached by the trial court. A number of the ballots cast bore marks evidently placed thereon for the purpose of identification. The names of the electors were plainly written upon the face or back of the ballots, by which the identity of the voter was disclosed. The court below properly rejected all these ballots. *Pennington v. Hare*, 60 Minn. 150, 62 N. W. 116. In one or two instances the elector wrote his name on the back of the ballot, and then completely erased it, so it could not serve as a mark of identification. These were properly counted by the trial court. There were other ballots upon which appeared capital letters, apparently the initials of the name of the elector, such as "W. K." and "W. S. F." These came within the statute prohibiting the identification of ballots, and were illegal. It may be stated as a general rule that where an elector places upon his ballot some mark, whether by writing thereon the initials of his name or otherwise, the result of which is to identify the ballot cast by him and to disclose for whom he voted, he violates the statute and destroys his vote. It is unnecessary that the mark be of such a character as to enable every person inspecting it to identify the voter. The purpose of the statute in prohibiting marks of identification is not wholly that of secrecy, but in part, perhaps mainly, to prevent the corruption of the voter and to secure a free and untrammelled expression of the popular will. Any mark placed upon a ballot, therefore, by which the voter may be identified by any person, vitiates the ballot. The particular mark may be agreed upon by a corrupt elector with his corruptor, which might be wholly unintelligible to all other persons, yet the statute would be violated just as completely as though fully understood by all. Where such a mark appears upon a ballot, distinguishing it from others, the natural inference of which, and which the court can clearly say, is one of identification, the person who cast it cannot be heard to say that he did not intend to identify it. To permit explanations of this sort would open the door to gross frauds and corruption, which public policy and the law demand should be guarded against. In the

case at bar, two electors indorsed the initials of their names upon the ballots cast by them immediately under the names of the judges of election. On the trial they were called as witnesses and testified that they had no intention of identifying their ballots, but understood the judges of election to direct them to indorse their initials thereon. In this particular case the explanation may be true. It undoubtedly is. But, if the statutes are to be enforced, and the purpose thereof effectuated, explanations of this kind must be excluded. The initials upon the back of these ballots were clearly in violation of the statute, and the court properly excluded them.

One of the contested ballots, which the trial court counted, had opposite the name of one of the candidates for mayor the word "nit." Upon another were written, after the names of the candidates for alderman, the words, "May the best man win." It is clearly apparent that these ballots were not so labeled for the purpose of identification, and they were properly counted, within the rule of *Truelsen v. Hugo*, 81 Minn. 73, 83 N. W. 500.

A number of other ballots were challenged by the respective parties, to which we deem it unnecessary to refer. Except in one or two instances, the rulings of the trial court were correct. Errors in this respect were on both sides, and neutralized each other.

Our conclusion is that of the legal votes cast at the election in question, contestant received a majority of two, instead of one, as found by the trial court; and he was therefore the regular nominee for the office of senator.

The action of the court below is affirmed.

MISSISSIPPI SUPREME COURT.

PRESIDENT, ETC., OF INSURANCE COMPANY OF NORTH AMERICA, Appt.,

v.

D. W. PITTS.

(— Miss. —, 41 So. 5.)

Insurance—sole ownership—vendor's lien.

1. One holding real estate under a conveyance in fee is sole and unconditional owner, within the meaning of a fire-insur-

ance policy, notwithstanding he owes a portion of the purchase price, for which the statute gives a vendor's lien.

Same—vacancy—reoccupancy—revival of policy.

2. Reoccupancy, before the fire occurs, of an insured building after a vacancy, sufficient to avoid the policy under a condition against vacancy, revives the policy, so as to permit a recovery in case the fire occurs during the occupancy.

(June 4, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Tallahatchie County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire-insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Williamson, Wells, & Peyton for appellant.

Messrs. Dudley & Boatner and Harris & Powell for appellee.

Calhoon, J., delivered the opinion of the court:

The insurance company sought to defeat recovery of a fire loss because of two clauses in the policy, declaring that it should be void: (1) "If the interest of the insured be other than unconditional and sole ownership;" (2) if the building "be or become vacant or unoccupied, and so remain for ten days."

As to the first, the facts are that at the date of the policy Pitts was in possession under a conveyance of title in fee simple. But the conveyance recites a cash payment of \$200 and four deferred annual payments of \$200 each. It does not expressly reserve a vendor's lien to secure the deferred payments, but our law gives that. It is to be noted in this record that there was no written application for the insurance, nor any representations made. The policy was issued pursuant to telephonic request to an agent, and so the reliance of the company is on the terms of the policy itself, with no pretense of any misrepresentations. We have no trouble in taking alignment with those decisions holding that Mr. Pitts was sole and unconditional owner in the purview of the law, notwithstanding there was a debt for purchase price. *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; *Milwaukee Mechanics' Ins. Co.*

tional, and sole ownership. It is well settled that this provision is not violated by the existence of a vendor's lien upon the insured property, in the absence of any willfully false and fraudulent misrepresentations or concealment by the insured; and nearly all the authorities are in accord with the *PITTS CASE* upon this proposition.

Case Note.—Vendor's lien as affecting sold and unconditional ownership:—

Fire-insurance policies generally contain a provision similar to that found in the one sued upon in *INSURANCE CO. OF N. A. v. PITTS*, that the policy shall be void if the insured's interest in the property covered by the policy is any other than the entire, unconditional, and sole ownership.

v. Rhea, 60 C. C. A. 103, 123 Fed. 9; Ellis v. Insurance Co. of N. A. 32 Fed. 646; 19 Cyc. Law & Proc. p. 693; Morotock Ins. Co. v. Rodefer, 53 Am. St. Rep. 846, and notes (92 Va. 747, 24 S. E. 393). Strict construction as against the insurer is the rule, and the clause relates to the legal character of the title. In Liverpool & L. & G. Ins. Co. v. Cochran, 77 Miss. 348, 78 Am. St. Rep. 524, 26 So. 932, there was a written application for the insurance, and in it a deliberate misstatement that the applicants were the sole and unconditional owners, whereas, in fact, they owned only an undivided one-half interest. This case can have no influence on that at bar. The decision was

clearly correct. In *Rosenstock v. Mississippi Home Ins. Co.* 82 Miss. 674, 35 So. 309, *Rosenstock*, the insured, was the vendor of the property, not in his possession, but of which he had put his vendee in possession, to whom he was under written agreement to convey on payment of a purchase price of which he had actually received much more than one half. He could not be regarded as unconditional owner. He was owner only on the express condition to convey. This decision does not affect the case before us, as its reasoning demonstrates.

On the second contention, the facts are that, pending the policy, the premises were at one time vacant for more than ten days,

Thus, in *Planters' Mut. Ins. Asso. v. Hamilton*, 77 Ark. 27, 90 S. W. 283, the court deemed it well settled that the encumbrance of a vendor's lien would work no forfeiture of a policy of fire insurance, though it contained the sole-ownership provision.

So, in *McClelland v. Greenwich Ins. Co.* 107 La. 124, 31 So. 691, it was held that the fact that the land upon which the insured building was located was still encumbered with the vendor's privilege to secure part of the original purchase price did not invalidate an insurance policy containing such provision, in the absence of a showing by the defendant "that a particular statement of interest had been required of the insured, and he had made fraudulent concealment or misrepresentation of such interest." Here the insured property was still further encumbered by a judgment lien and a mortgage. The court said that the mere fact that the insured owed debts which operated as liens on his property did not violate the unconditional, sole ownership requirement of the policy.

And in *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L.R.A. 915, 82 Am. St. Rep. 892, 62 S. W. 149, it was held that neither the existence of a vendor's lien on insured property, nor the institution of proceedings to foreclose it, would avoid a policy with such a provision.

And in *Liverpool & L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. 248, it was held that a policy containing such provision would not be invalidated by the insured's failure to disclose that there were unpaid purchase-money notes outstanding against the insured property, and that the vendor had reserved a lien to secure their payment. Here the insured made no representation whatever to the company as to his ownership; nor was any inquiry made of him in regard thereto; and there was no part of the purchase money due at the time of the fire; nor had the insured made any default in the payment thereof; and, after the fire, he settled in full with his vendor for the notes.

The same result was reached in *Alamo F. Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126, in which it was held that the 7 L.R.A. (N.S.)

unconditional-ownership clause referred to the quality of the title, and not to liens and encumbrances upon the property, and that therefore a policy of insurance that contained such clause would not be invalidated by the fact that there were purchase-money notes outstanding against the property. It was contended in this case that there was a vendor's lien upon the land by reason of these notes, and that therefore the policy was forfeited; but the court did not commit itself as to whether or not there was a vendor's lien under these circumstances.

Altogether similar in principle is *Woody v. Old Dominion Ins. Co.* 31 Gratt. 362, 31 Am. Rep. 732, though the policy sued upon contained a somewhat different provision as to the ownership, as follows: "Any interest in property insured, not absolute, or that is less than a perfect title, . . . must be specifically represented to the company and expressed in this policy in writing; otherwise the insurance shall be void." It was held that the assured's failure to disclose a vendor's lien upon the property insured did not avoid the policy. The court was of the opinion "that, under no proper construction, can these words be taken to have been intended to guard against mere encumbrances. If such had been the intention, language more appropriate for the purpose would have been employed, as we find in policies where disclosure of encumbrances is required. In such the requirement is generally plainly expressed. The mere failure, therefore, of the appellant to make known the existence of the lien which appeared on the face of the deed (the policy not requiring such disclosure, and no inquiries being made) did not vitiate the insurance, there being no fraudulent intent."

There seems to be some doubt whether this rule is altogether accepted by the Kentucky courts, and the only cases throwing any doubt upon it are found in that jurisdiction. Thus, in *Security Ins. Co. v. Bronger*, 6 Bush, 146, a policy of insurance containing the sole-ownership clause was held to be avoided, where it appeared that the houses covered by such policy were encumbered not only by a lien for the whole consideration which insured had bid for them

but actual possession was resumed, and some time afterwards, and while occupied, the fire occurred. If the loss had occurred during the prohibited vacancy, there could be no recovery. This is everywhere held, and so decided by our own court in *Home Ins. Co. v. Scales*, 71 Miss. 975, 42 Am. St. Rep. 512, 15 So. 134. Authorities are not wanting to sustain the views of learned counsel for appellant, and they are sustained also, by Mr. Ostrander on *Fire Insurance*, 2d ed. 1897, § 145, and the numerical weight of the decisions he cites in note 5. We prefer to stand on the manifest trend and weight of modern authority, *Born v. Home Ins. Co.* 110 Iowa, 379, 81 N. W.

676, and on *Freeman's* note to that case in 80 Am. St. Rep. 310; *Elliott, Ins.* § 205, and the other citations of the briefs for appellee. If the insurance had been for three years or more, and the premium paid, and the vacancy during the first or last month, and the fire afterwards and during occupancy, it would be very unfair to deprive the insured protection. The common people who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy.

Affirmed.

at a decretal sale, but also by his wife's dower, as the widow of a former husband (as whose property, excepting the dower, it was sold), and at the date of the insurance policy, and even at the time of the trial, none of the purchase money had been paid. Here the policy provided that the ownership should be for the use and benefit of the insured in addition to requiring it to be entire, unconditional, and sole. It further appeared, however, in this case that the insured represented his title to the insurance company's agent as unencumbered, which statement was also made by him in his application, coupled with the further assertion that his title was exclusive, and that no other person had any interest in the property. In this the court deemed him guilty of voluntary fraud. It does not specifically appear that the legal title to the property covered by the policy was in the insured, but such is a fair presumption from the language of the opinion.

And in *Farmers' & D. Ins. Co. v. Curry*, 13 Bush, 312, 26 Am. Rep. 194, the foregoing case was followed, and a similar policy was held to be avoided, because the assured had failed to inform the company that the property covered by the policy was encumbered by a vendor's lien for unpaid purchase money, though there was nothing in the opinion to show that there was any fraudulent concealment or misrepresentation on the insured's part. The court said that the insured "held the property in trust for her vendor until the purchase money was paid. . . . Her ownership was therefore conditional, and to the extent of the unpaid purchase money was not for her use and benefit, but for the use and benefit of her vendor, and, her interest being untruly stated, the policy was void by its express terms."

But the strictness of the two preceding cases has to a great extent been modified by the later decisions of the same court, for in *Phoenix Ins. Co. v. Coomes*, 13 Ky. L. Rep. 238, it was held that an encumbrance upon the property insured would not invalidate a policy containing such a provision as to ownership, unless it was material to the risk, and that therefore a vendor's lien,

which, together with the amount of the insurance, came to \$500 less than the actual value of the property would not defeat a recovery by the assured.

And in *Fireman's Fund Ins. Co. v. Meschendorf*, 14 Ky. L. Rep. 757, it was held that the failure of an applicant for fire insurance to state the existence of a vendor's lien upon the property sought to be insured would not invalidate a policy containing a sole-ownership clause, where no inquiries were made by the insurance company as to that matter, unless the existence of the lien was intentionally and fraudulently concealed. Here the property was worth \$300 more than the amount of the insurance and the lien together. The court said: "The lien retained by the vendor of personality is in effect a mortgage; nothing more . . . and will not, even where the fact is misrepresented, when the misrepresentation is not fraudulently made, affect the assured's right of recovery, unless it is such as to make his interest probably less than the amount of the insurance. But, when no inquiry is made of the assured as to his title or the encumbrances upon it, and there is no fraud upon his part, the assured, notwithstanding the provisions of the policy that, 'if he is not the sole, absolute, unconditional owner, etc., the policy shall be void', should be allowed to recover the loss which he has sustained."

A different question, and one not within the scope of this note, which is confined to those cases where the legal title is in the assured, is presented where the assured has but an equitable interest in the property covered by the insurance, while the legal title is vested in another. Still another and a different question, of course, arises where the policy contains a provision avoiding it if all encumbrances are not disclosed, and it is sought to defeat recovery upon the policy upon that ground. The question whether the holder of the legal title, who is under contract to convey, can be regarded as the sole and unconditional owner, is discussed in *Insurance Co. of N. A. v. Erickson*, 2 L.R.A. (N.S.) 512, and the note thereto.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, Resp't.,

v.

ZACH MULHALL, Appt.

(199 Mo. 202, 97 S. W. 583.)

Evidence—contradiction of witness—absence of party.

1. After a witness for defendant in a criminal case has testified on cross-examination designed to show his interest, that he did not have a certain conversation with the prosecuting witness, evidence of such conversation may be admitted to contradict him, although accused was not present when it occurred.

Shooting at another—statutory offense.

2. The wounding of one while shooting at another with intent to kill will not sustain a prosecution for shooting the former with intent to kill, under a statute providing that every person who shall shoot at another with intent to kill such other shall be punished.

(November 20, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis convicting him of assault with intent to kill. Reversed.

Statement by Fox, J.:

This cause is here upon appeal by the de-

fendant from a judgment of the circuit court of the city of St. Louis convicting the defendant of an assault with intent to kill. Omitting formal parts, the information upon which this judgment of conviction is based charges: "That Zach Mulhall on the eighteenth day of June in the year of our Lord, one thousand nine hundred and four, at the city of St. Louis aforesaid, with force and arms, in and upon one Ernest Morgan feloniously, wilfully, on purpose, and of his malice aforethought, did make an assault; and the said Zach Mulhall, with a certain weapon, to wit, a pistol loaded with gunpowder and leaden balls, then and there feloniously, wilfully, on purpose, and of his malice aforethought, did shoot off, at, against, and upon the said Ernest Morgan, then and there giving to the said Ernest Morgan with the pistol aforesaid one wound, with the intent then and there him, the said Ernest Morgan, feloniously, wilfully, on purpose, and of his malice aforethought to kill; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." To this charge there was waiver of formal arraignment and plea of not guilty, and at the December term, 1904, the defendant was put upon his trial.

In order to determine the legal propositions presented by the record in this cause,

Case Note.—Charging assault with intent to kill when actual intent directed against another:—The court, in the above case, seems to have cited and discussed all the cases which support the position it takes upon this question, except *Scott v. State*, 49 Ark. 156, 4 S. W. 750. There are, however, a number of authorities which are not in harmony with the doctrine of those cases.

Thus, in *Callahan v. State*, 21 Ohio St. 306, the prosecution was under a statute which provided "that, if any person shall maliciously shoot . . . any other person with intent to kill, wound, or maim such person, every person so offending shall be deemed guilty of a misdemeanor." It was held that the law will not permit such reckless disregard of and indifference to results to pass with impunity, but will hold the intent to have embraced the victim, where a shot discharged at one injures another who is at the time known to be in such position or proximity that his injury may be reasonably apprehended as a probable consequence of the act; and the principle is the same whether one or many are imperiled. The indictment in this case charged the intent to kill the person who was actually wounded. The dissimilarity of the statute in this case and that upon which the prosecution was based in *STATE v. MULHALL* is not sufficient to justify the adverse conclusions of the two courts. But a distinguishing feature lies in the fact that in the one case the defendant saw and knew

of the proximity of the injured party, while in the other he did not.

In *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686, it appeared that the statute under which defendant was indicted provided: "Whoever attempts to commit murder, . . . by any means, shall be guilty of the crime of an assault with intent to commit murder;" and the theory of the defense was that, if defendant intended to kill anyone, it was not the one he actually wounded; and, being charged with an assault with intent to murder the one he actually wounded, instead of the one he really intended to kill, he could not be guilty under the indictment. The court said: "The reasoning on this branch of the case is too subtle to be adopted with safety. Undoubtedly there are cases that hold the doctrine contended for, and so many of the earlier text writers wrote; but the better and more modern doctrine is against the position taken. Conceding, as is done, [that] had the shot fired by defendant killed Hendrickson, it would have been murder, the proposition [that] the severe wounding by the same shot would not have been done with intent to commit murder—that is, to commit the greater crime that might have been the result—finds no sanction either in reason or the analogies of the law."

In *Mathis v. State*, 39 Tex. Crim. Rep. 549, 47 S. W. 464, the court stated that "an assault with intent to murder can be committed with implied, as well as with

it is only necessary to make a brief statement of the facts developed upon the trial. On the part of the state, the testimony tended to show that in the month of June, 1904, the defendant was connected with what was known as a "wild west show" giving exhibitions at the World's Fair in the city of St. Louis. The prosecuting witness, Ernest Morgan, who was about eighteen years of age, testified that he resided in the city of St. Louis, and on the 18th day of June, 1904, was in attendance at the World's Fair, and at about 9 o'clock in the evening of that day went to the Cummins's Wild West Show. According to his testimony the show concluded about 10 o'clock, and he started to leave the building. As he was going out of the show he saw about four or five men directly in front of him engaged in a scuffle, and then he heard a shot. He immediately turned to go back and get away, and when he had gone back four or five steps he heard a second shot. He turned around to see where the shots came from, and saw the defendant, a short distance away, holding a gun in his hands and pointing it directly towards him, the prosecuting witness; then a third shot was fired which prosecuting witness says struck him, and he fell to the ground dangerously wounded. Prosecuting witness testified that he knew the defendant, having seen him in a show before, and

at five or six different times in the two or three years preceding the shooting. This witness further testified that when he saw the defendant pointing the revolver towards him he saw a man backing away from the defendant towards and very near to where the prosecuting witness was standing, and that the defendant was looking directly in the direction of Morgan, the prosecuting witness, and that the man who was backing away from defendant had his back toward Ernest Morgan, and was slightly to one side, but nearly in line and between defendant and Morgan. After the shooting, the defendant went through some adjoining buildings, and was making his way toward the rear of the yard of the Siberian Railway Building when arrested. When the defendant was arrested he had in his possession a 38-caliber Smith & Wesson revolver, long barrel. The bullet taken from Morgan's hip was a "38-Long Colt," also known as a "38-calibre Colt bullet." Prosecuting witness at the hospital, the defendant being brought into his presence, identified him as the man who fired the shot. He also identified him at the trial.

The defense interposed in this case is that whatever shots were fired by defendant were at a man by the name of Frank Reed, and that they were fired in proper defense of his person. On the part of the defense

express, malice, and the statute defining this offense does not restrict the intent to kill to the person assaulted;" and thereupon held that if A shoots at B with intent of his malice aforethought to kill and murder B, but accidentally shoots C, and inflicts a wound upon him, the malice is carried over to C, makes it an assault with implied malice to murder C.

In *Reg. v. Smith*, 33 Eng. L. & Eq. 567, it appeared that the prisoner intending to murder one M., and, supposing one T. to be M., shot at and wounded T. It was held that the prisoner, on the above state of facts, had been properly convicted of wounding T. with intent to murder him.

In *Walker v. State*, 8 Ind. 290, the defendant was indicted and convicted under a statute of that state which declared that "every person who shall perpetrate an assault, or an assault and battery, and an intent to commit a felony, shall, upon conviction thereof, be imprisoned in the state prison;" and the defense insisted upon was that the defendant did not intend to shoot the prosecuting witness, and, therefore, the intent to murder, as laid in the indictment, was not proved. It appeared that defendant deliberately shot into a crowd of persons, among whom was the prosecuting witness, who was wounded by the shot. Although defendant may have intended to murder another person in the same crowd, it was held that, he having committed a battery on the prosecuting witness with a weapon likely to

cause death, the jury was authorized to find the intent as charged in the indictment, on the principle that every man is supposed to intend the necessary consequences of his own act.

In *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257, the indictment charged an assault with intent to kill. If the prosecution was under statute there is no intimation in the opinion as to its phraseology. It appeared that the defendant deliberately discharged a loaded gun into a crowd. It was held proper to charge the jury that the intent to kill characterizes the act,—goes with it; and, if the blow reaches any person, it carries with it the criminal intent to kill and murder; and, if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit.

In *Jennings v. United States*, 2 Ind. Terr. 670, 53 S. W. 456, where it appeared that defendant fired into a body of men indiscriminately, it was held proper to refuse an instruction that, before the jury would be authorized to convict him of assault with intent to kill, it must appear from the evidence that he fired at the party named in the indictment with the specific intent to take his life, and that it would not be sufficient to authorize a conviction that he may have fired at someone else.

there was evidence tending to prove that after the Wild West Show was over, between 10 and 11 o'clock, the defendant and three or four friends together started to leave the show, and go out on what was called "the Pike," and that the defendant's attention was called to the fact that Frank Reed might undertake to kill him. There was testimony tending to show that Reed and the defendant had had previous trouble, and that Reed had made threats against the defendant. As the defendant, with these other parties, was walking toward the exit of the show ground and near the outer gate some one hollowed, "Look out, Colonel," and the defendant claims that he observed Reed starting to draw his pistol, and that he drew his revolver, and threw it into the face of Frank Reed; then a scuffle ensued and there were three shots fired from the pistol of the defendant, one of the shots striking Reed. L. S. Corbett and George H. Williams, two of the parties with the defendant, both testified as to the trouble between Reed and the defendant. Corbett testified to seeing, during the trouble, a stout, heavy-set man, and saw in his hand what appeared to him to be a Derringer pistol pointing toward Mulhall. He also testified to several shots being fired, but did not state positively as to who fired the shots. Witness Williams testified as to the scuffle, and that there were several shots fired, and that he saw Mr. Reed during the time working for his gun. He further testified as to a conversation between himself and the prosecuting witness, but as to such conversation there was a conflict between the testimony of the prosecuting witness and Williams and Corbett. There was also a conflict in the testimony offered by the state and the defendant as to the manner of the shooting and the position of the parties.

The defendant, Zach Mulhall, testified in his own behalf. He testified that he saw the prosecuting witness after he was wounded that night, and states that he never saw him before that time to his knowledge or recollection.

He gives his version of the difficulty as follows:

Q. Now, Mr. Mulhall, just state all that occurred with reference to this shooting from the time you left the show up to the time that you were brought in the presence of Morgan.

A. I left the show after the show was over, and went to the dressing room to change my clothes. I had been told several times that evening that Reed had made a threat that he was going to kill me. Well, I didn't pay much attention to it. I didn't care anything about it. He had made several of those kind of threats to the cowboys there, and had been put in jail for it on 7 L.R.A. (N.S.)

one or two occasions, and tried for it. And after the show was over, I changed my clothes, and I walked down the entrance to the Pike with Mr. Williams—the two, Mr. Williams and Mr. Corbett, and that was all, I think, three of us—and myself. And on our way down, Johnny Murray and another cowpuncher by the name of Jourdan says, "Yes, you better look out for him. He says he is going to kill you." I never expected he would. I didn't care. I didn't think anything of it. Just before I got out of the entrance I saw him standing up alongside of one of the pillars, and just as I got my eye on him he put his hand behind him for his six-shooter, and I grabbed and threw a six-shooter in his face, and told him to stop it. And Johnny Murray and he grabbed my gun, and they both had a hand apiece on it, and he had his hand on the gun back in his hip pocket. I had one of my hands on this gun, and with the other I reached over and got his hand, and jerked it away from it, and slapped it down on this gun of mine, and held it there, and, in the tussle, this gun of mine went off, and hit Johnny Murray, and when I hit Johnny Murray, he fell back.

Q. That was the first time that the gun exploded?

A. Yes, sir.

Q. That the cartridge exploded?

A. Yes, sir.

Q. Where did it strike Murray?

A. Hit him right in here and out right below the nipple (indicating). Then he fell back and that let me loose, and I jerked the gun on Reed, and told him to stop, and he pulled his gun,—he was reaching for it all the time. It seemed he couldn't get it out.

Q. Did you see the gun at the time?

A. I never saw it. No, sir. I never fired until I did see it. And he had some difficulty in getting the gun out of his pocket and I told him to stop. I says, "Quit now, quit." And he couldn't get it out. And he reached both hands around for the gun, and when he pulled it I threw the six-shooter at him, and shot him in the arm. I had aimed at his arm, and broke his arm. When I hit him he jerked the gun in his hand (indicating), and pulled down on me, and I pulled down on him.

Q. Did the second shot hit him again?

A. Yes, I hit him again.

Q. Where?

A. Right in the neck there (indicating).

Q. Your gun exploded three times, the first time it went off as you were scuffling, the second time it struck Reed in the arm?

A. Yes, sir.

Q. And the third time it struck him in the neck?

A. Yes, sir.

Q. How large a man was Reed?

A. I think Reed was about my size.

Q. Well, about what height are you?

A. About 5 feet 10½, weight about 190. He might have weighed 200, I don't know. About 190 or 195 pounds.

Q. How often did Reed shoot at you, do you know?

A. Reed shot at me three times.

Q. Was there any other shooting besides that?

A. There was other shooting. Yes, sir.

Q. Now, was there anyone in the line between you and Reed in the rear of Reed at that time that you shot the third shot, or the second shot, either one of those times?

A. Not a soul, anyways in line with Reed and myself; that is, my line to Reed, not a soul.

Q. Had any threats been communicated to you that Reed had made about you, about "doing you up" or killing you?

A. Yes, sir; he made open threats there that evening that he was going to kill me.

There was testimony offered in rebuttal by the state, that, when Reed was backing away from the defendant, he was not trying to get a pistol out of his pocket, and other testimony which was in conflict with that offered by the defendant. This is a sufficient indication of the nature and character of the testimony offered upon which this cause was submitted to the jury. At the close of the evidence the court instructed the jury. The record discloses that counsel for appellant properly preserved objections and exceptions to each and all of the instructions given by the court, for the reason that each and all of said instructions are erroneous. Further objections and exceptions were preserved to the failure of the court to fully instruct the jurors on all questions of law arising in the case necessary for their information in the determination of the cause. We deem it unnecessary to reproduce here in full the instructions given by the court. They will be given proper attention during the course of the opinion. The cause was submitted to the jury upon the testimony introduced and the instructions of the court, and they returned a verdict finding the defendant guilty of an assault with intent to kill without malice aforethought, and assessed his punishment at three years' imprisonment in the penitentiary. Timely motions for a new trial and in arrest of judgment were filed by the defendant, and by the court taken up and overruled. From the judgment and sentence entered in this cause the defendant prosecutes his appeal to this court, and the record is now before us for consideration.

7 L.R.A. (N.S.)

Messrs. T. J. Rowe and Henry Rowe, for appellant:

A witness cannot be cross-examined as to a collateral matter merely for the purpose of contradicting him.

1. Greenl. Ev. 13th ed. 449; Roscoe, Crim. Ev. 181; Feltner v. Com. 23 Ky. L. Rep. 1110, 64 S. W. 959; Caskey v. La Belle, 101 Mo. App. 590, 74 S. W. 113; Continental Nat. Bank v. First Nat. Bank, 108 Tenn. 374, 68 S. W. 497; Rupe v. State, 42 Tex. Crim. App. 477, 61 S. W. 929; McKern v. Calvert, 59 Mo. 243; Iron Mountain Bank v. Murdock, 62 Mo. 70; McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; State v. Rogers, 108 Mo. 202, 18 S. W. 976; Harper v. Indianapolis & St. L. R. Co. 47 Mo. 567, 4 Am. Rep. 353.

There was no evidence that defendant shot at Ernest Morgan on purpose, with intent to kill Ernest Morgan.

State v. Reed, 40 Vt. 603; State v. Schuchmann, 133 Mo. 117, 33 S. W. 35, 34 S. W. 842.

Messrs. Herbert S. Hadley, Attorney General, and John Kennish for the State.

Fox, J., delivered the opinion of the court:

The record in this cause presents numerous complaints of error on the part of the appellant as grounds for the reversal of the judgment in this cause; however, it is manifest from a careful analysis of the record before us that the most vital and important questions are presented in the sixth and eighth grounds alleged in the motion for new trial, which are as follows: "Sixth, The court erred in permitting the prosecuting witness, Ernest Morgan, in rebuttal, to testify to conversations with one George H. Williams, when defendant was not present. Eighth. The court gave erroneous, illegal, and improper instructions." It is the propositions involved in these two complaints of error to which learned counsel for appellant, in his brief, particularly calls our attention. We shall therefore direct our attention to the consideration of the propositions as suggested and indicated above.

1. It is sufficient to say upon the complaint that the court erred in permitting the prosecuting witness, Ernest Morgan, in rebuttal, to testify to a conversation with one George H. Williams when the defendant was not present, that we have examined the record as to the conversation referred to, and are of the opinion that there was no error in the admission of this testimony. The record discloses that Williams was a friend and witness for the defendant, and while on the stand, evidently for the purpose of showing his interest in the case and for the purpose of affecting the weight of his testimony, he was asked upon cross-examination if he did

not say to Morgan at the hospital, soon after the shooting, "that a brother of his had seen the shooting, but that he hadn't;" that he stated to Morgan in the conversation that he "called to see how he was getting along, and as soon as he was well enough he wanted him to go to Texas with him, and that he would make a man of him." The witness stated that he had no such conversation. This witness having denied any such conversation, there was no error in the court permitting the prosecuting witness to contradict him, and state in fact what conversation occurred. It is true the defendant was not present, but this testimony was simply admissible for the purpose of indicating the interest of the witness in the case that the jury might take such fact into consideration in weighing his testimony.

2. This brings us to the consideration of the most serious proposition with which we are confronted by the record in this cause; that is, that the court gave erroneous, illegal, and improper instructions to the jury. This proposition necessitates a most careful consideration of the section of the statute upon which this prosecution is based, as well as the tendency of the testimony introduced at the trial, and the theory upon which this cause was submitted to the jury by the instructions of the court. The information in this cause is predicated upon § 1847, Rev. Stat. 1899, which provides: "Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish, or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not exceeding ten years." It is apparent from the instructions given by the court that this cause was submitted to the jury upon two theories: First, that the defendant shot at and assaulted the prosecuting witness, Ernest Morgan, with intent to kill him; second, that he shot at and assaulted one Frank Reed with the intent to kill him, and in making such assault upon Frank Reed shot and wounded the prosecuting witness, Ernest Morgan. The first theory is indicated by instruction No. 1, which in plain and unambiguous terms required the jury to find that the defendant wilfully, on purpose, and with malice aforethought did shoot at and wound Ernest Morgan with the intent to kill him. The second theory is clearly manifested by instructions Nos. 3 and 4, in which the court declared the law as follows: "Third, if, from the evidence and under these instructions, you find and be-

lieve that the defendant, Zach Mulhall, on purpose and of his malice aforethought and with the intent to kill, and under the circumstances set out in instruction No. 1 above, shot and wounded Ernest Morgan, then it is no defense that his intent to kill may, as a matter of fact, have been against one Frank Reed, and that his desire was to assault Frank Reed rather than Ernest Morgan; for if a man with intent to kill one person wilfully, unlawfully, and on purpose, and of his malice aforethought shoots to accomplish such intent, but, as a matter of fact, the bullet flies towards and strikes and wounds another whom he did not intend to injure, he is guilty of the same offense as though the bullet had struck and wounded the one whom he intended to kill. Fourth, unless from the evidence and under these instructions you believe and find that defendant, Zach Mulhall, on or about the 18th day of June, 1904, or at any time within three years next before the filing of the information herein, at the city of St. Louis and the state of Missouri, did wilfully, on purpose, and of his malice aforethought, shoot and wound Ernest Morgan with a pistol loaded as aforesaid, and with the intent to kill him, or did at said time and place wilfully, on purpose, and of his malice aforethought, and with the intent to kill Frank Reed, shoot to accomplish such intent, and that the ball struck and wounded Ernest Morgan, then you will acquit the defendant." This last theory is further indicated by instruction No. 5, which was one upon the right of self-defense, in shooting at and assaulting Frank Reed. In other words, that instruction, practically construed, means this,—that, if the jury believe and find from the evidence that the shooting was at Frank Reed with intent to kill, but that the prosecuting witness, Ernest Morgan, was wounded, although he was not in fact shot at, unless the jury reached the conclusion that the defendant Mulhall was justified in shooting at Reed, they could not acquit the defendant on the charge contained in the information, for shooting at Ernest Morgan.

It is made manifest from the declarations of law in this case, that the trial court took the position that it made no difference, so far as the commission of the offense defined by § 1847 is concerned, whether the defendant shot at the prosecuting witness and wounded him, with intent to kill him, or whether he shot at Frank Reed without justification, with intent to kill him, and in the commission of such wrongful act the prosecuting witness was wounded; under either state of facts the defendant would be equally guilty of the offense defined by the statute. We are unable to give our assent to that position. It will be observed that this

charge is predicated upon that subdivision of the statute which provides that "every person who shall, on purpose, and of his malice aforethought, shoot at . . . another with intent to kill." In other words, the information charges that the defendant, Zach Mulhall, shot at Ernest Morgan, with a pistol, with the intent to kill him. It is clear that, under that provision of the statute, there are two essential elements necessary to constitute such offense: First, that the defendant shot at Ernest Morgan, and second, that he did so with intent to kill him; and before a conviction can be had upon this charge, it is incumbent upon the state to establish by the proof both elements of such offense. It is not enough that the defendant shot at Ernest Morgan, but as well that at the time of such shooting he intended to kill him. The fact that Ernest Morgan was seriously wounded, and such wound may have been occasioned by a shot from the pistol of the defendant, is not enough, for the fact that he was so wounded must not be confounded with the essential elements to constitute the offense with which he is charged. While the wound may be shown in evidence, and its character, for the purpose of establishing the essential elements of the crime,—that is, that he shot at him with intent to kill,—yet such wounding does not constitute any part of the offense. The charge of the offense is complete when it is alleged that the defendant shot at Ernest Morgan with a pistol with intent to kill him. As was said by Sherwood, J., in *State v. Agee*, 68 Mo. 264, "it is as much an offense under that section to shoot at a man and miss him, as to shoot at him and hit him." While, as before stated, the wounding of Ernest Morgan was competent evidence for the jury to consider in determining the intent of the defendant, yet such wounding does not constitute any essential element of the offense; and, unless such wounding was the result of the commission of the acts necessary to constitute such offense as defined by the statute,—that is, that he shot at Ernest Morgan with the intent to kill him,—then there can be no conviction for an assault with intent to kill.

The supreme court of California, in the case of *People v. Keefer*, 18 Cal. 636, clearly announced the principle applicable to the case at bar. In that case the defendant was indicted for an assault with intent to murder one John R. Evans, and convicted of the crime of an assault with a deadly weapon, with intent to do great bodily harm. The trial court instructed the jury that, if a loaded gun was presented within shooting range, at Wilson or Evans, or at the dog, under circumstances not justified by the

law, and under circumstances showing an abandoned and malignant heart, and that the gun was fired off, and inflicted a dangerous wound upon the witness Evans, then the crime of an assault with a deadly weapon, with intent to inflict a bodily injury upon the witness Evans, has been proved; and it would only remain for them to inquire whether or not the defendant was guilty of the crime. The pertinency of this charge, as we gather from the case, was shown by proofs which conduced to prove that Keefer fired a gun in the direction of Wilson and Evans and of a dog near them, there being some dispute as to whether with the intent to kill or wound the dog, or these men, or one of them. Baldwin, J., who delivered the opinion of the court in that case, in discussing the correctness of the instructions of the trial court, said: "It is true that a person may be convicted of murder or of an assault, though no specific intent may have existed to commit the crime of murder or assault upon the person charged. The familiar illustration is that of a man shooting at one person and killing another. In these cases, the general malice and the unlawful act are enough to constitute the offense. No doubt exists that a man may be guilty of manslaughter under some circumstances, by his mere carelessness. But this rule has no application to a statutory offense like that of which the defendant was convicted. This is an assault with a deadly weapon, with intent to do great bodily harm to another person. The offense is not constituted in any part by the battery or wounding, but is complete by the assault, the weapon, and the intent, as, if A snaps a loaded pistol at B within striking distance, the offense would be no more under this clause of the statute if the shot took effect. It could scarcely be contended, if a man shot at another's dog or chicken, when such shooting would be a trespass and wholly illegal, that the trespasser was guilty of this crime of assault upon a man with intent, etc., merely from the fact that the owner of the animal was near by and within range of the shot, or the shot went through his hat or clothes; and yet the reason of holding thus in that case is as great as in this. So, if a man carelessly handling bricks on the roof of a house should throw them into the street below, though he might be liable, civilly and criminally, for injury done to persons thereby, he could not be guilty of the statutory offense of assault with intent to kill. The words of the statute, 'with intent to do great bodily harm to a person' (*Wood's Dig.* 335), are not merely formal, but they are substantial,—they constitute the very gravamen of the offense; and the statute, like all other penal laws, must be strictly

construed. It is nothing, in this view, that the defendant is guilty of some crime; he must be guilty of the very crime charged, which cannot be unless the elements of the crime, as defined by the legislature, appear. This is the universal rule applicable to criminal proceedings; and it is as plainly supported by common sense as by technical law. We cannot make the proposition plainer by illustration." So it may be said as to the case at bar. If the defendant shot at Ernest Morgan with a pistol, with the intent to kill him, and missed him, the offense would be just as complete as if such shot had taken effect; and, on the other hand, if he did not shoot at him, and did not intend to kill him, although he may have wounded him in the commission of some other unlawful act, there being an entire absence of the necessary elements of the offense as defined by the statute,—that is, that he shot at him with a pistol with intent to kill him,—there could be no conviction of that statutory offense.

The fundamental error assumed by the contention on the part of the state in this prosecution is the confounding of the purely statutory offense of an assault with intent to kill, which is defined by the statute to be the commission of certain acts with a specific intent, with that line of cases where the party shoots at one man and kills another. There is no dispute as to the law applicable to cases where the party is killed. In those cases the common-law rules are strictly applied, and the text writers and the rules announced by this court, as well as the courts in all other states where the question has been brought before them, are uniform in announcing the principle that, "where the party shoots at one man, and kills another, malice will be implied as to the latter, and the felonious intent is transferred on the same ground as where poison is laid to destroy one person, and taken by another;" and with the rules announced in the leading cases in this state upon that subject (*State v. Payton*, 90 Mo. 220, 2 S. W. 394; *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359, 912; *State v. Pollard*, 139 Mo. 220, 40 S. W. 949, and *State v. Clark*, 147 Mo. 20, 47 S. W. 886) we are entirely satisfied. But, on the other hand, that there is a clear distinction between those cases where the common-law rules are most strictly applied and the clearly defined statutory offense of an assault with intent to kill by shooting at another with a pistol with intent to kill, we have no doubt; and the appellate courts of the various states that have had this question before them and the question sharply presented and carefully considered by such courts have in no uncertain terms recognized such distinction. As was 7 L.R.A. (N.S.)

said by the California court in the *Keefer Case*, "if a man carelessly handling bricks on the roof of a house should throw them into the street below, though he might be liable, civilly and criminally, for injury done to persons thereby, he could not be guilty of the statutory offense of assault with intent to kill." No one, however, would contend for a moment that if the bricks thrown from the house into the street should have killed an individual that the party could not have been charged with some grade of crime for causing the death of the individual. The offense with which the defendant in this case is charged is clearly defined by the statute, consisting of shooting at another with intent to kill him; and he cannot be guilty of such offense unless the elements of the crime defined by the lawmaking power appear.

The high court of errors and appeals of the state of Mississippi had in judgment before it the case of *Morgan v. State*, 13 Smedes & M. 242, which is so strikingly similar to the case at bar, upon a statute substantially the same as the statute upon which the prosecution in this case is based, that we cannot better discuss this proposition than by reproducing at length the rules so clearly announced in that case. The provisions of the Mississippi statute upon which the charge against the defendant in that case was predicated, were that "every person who shall be convicted of shooting at another, with the intent to kill, maim, etc., such other person, shall be punished by imprisonment in the penitentiary for a term not exceeding ten years." Mr. Justice Smith thus stated the case in discussing the legal propositions involved: "Upon the trial of the issue, the prisoner, by his counsel, requested the court to charge the jury 'that, under this indictment, it is necessary for the prosecution to prove that said defendant shot at Foster (the person on whom the assault was alleged to have been committed) with the intent to kill said Foster, before the defendant can be legally convicted.' This instruction was refused; whereupon the counsel for the state requested the court to charge the jury as follows: (1) 'That, if the jury believe, from the evidence, that the prisoner shot into the crowd with the intention of killing anyone in the crowd, but not with the intention of killing Foster; and that the shooting was not, at the time, in the necessary self-defense of the prisoner, they should find him guilty.' (2) 'That, if the jury believe that Morgan shot at Loftin with a premeditated design to kill him, Loftin; and that said shooting was not in the necessary self-defense, although he missed Loftin and shot Foster, they should find him guilty, though he entertained no

malice towards Foster.' The correctness of these instructions presents the first question for the consideration of this court; and it is obvious that, if the former be correct, the latter must be erroneous.

"It is a universal principle of evidence that a man shall be understood to intend that which he does, or which is the natural and necessary consequence of his act. Hence, in the absence of any explanatory testimony, we should be bound to presume that the prisoner intended to perpetrate the assault charged, upon the person of Foster; and to hold the offense as charged clearly made out. But the instructions asked for, as well by the state as by the prisoner, clearly show that evidence had been adduced on the trial, which tended to establish the fact that Loftin, and not Foster, was the object of the assault. The instructions, then, did not propound abstract propositions, which could in no wise affect the verdict of the jury. It is a well-understood rule of law, where a general felonious intention is sufficient to constitute the offense, that it is no ground of excuse, where a party who intended to commit one felony has committed another. 2 Starkie, Ev. 5th Am. ed. p. 416; East, P. C. 514. In the case at bar the malicious intent might be clearly inferred from the character of the weapon used; and, if the alleged attempt had been consummated in the death of Foster, the prisoner would have been guilty of murder, although he entertained no malice as to him. This principle, however, is applicable only to cases where one felony is contemplated, and another committed. But the offense of which the prisoner stands convicted is, we apprehend, no felony by the laws of this state. If, however, the offense here charged be in fact a felony, nevertheless, this rule does not apply; for an essential ingredient of the offense created by the section of the statute above quoted, and charged in the indictment, is the specific intention of killing the person shot at. In the case of *Jones v. State*, 11 Smedes & M. 315, this court expressly recognized this construction of the act. They say this statute 'specifies the intent to kill the person shot at, as one of the intents made essential to constitute the offense.' The same construction has been given by the English courts to the statute of 9 Geo. IV. chap. 31, §§ 11 and 12, which is similar to our own (*Rex v. Holt*, 7 Car. & P. 518); and we hold it to be correct. If, then, the specific intention of killing the particular person alleged to have been shot at be 'an essential ingredient of the offense charged in the indictment,' proof of a general felonious or malicious intention was not sufficient. It was incumbent on the state to prove the

specific intent as charged. 2 Starkie, Ev. 5th Am. ed. p. 416, note s; 7 Car. & P. 518. The charge requested by the prisoner's counsel was correct, and the court erred in refusing it."

The court of appeals of Kentucky, in the case of *Com. v. Morgan*, 11 Bush, 601, ruled that, under a statute which provided that "if any person shall wilfully and maliciously shoot at and wound another with an intention to kill him," in order to warrant a conviction for such offense it was essential to prove all of the elements constituting the offense. In that case the defendant shot and wounded one W. T. Buntin. The indictment and proof showed that he shot at one Asa Oliver, and not at the prosecuting witness. The representative of the state, upon the facts developed upon the trial, requested the following instruction: "If the jury believe from the evidence, beyond a reasonable doubt, that in Anderson county, and before the finding of this indictment, the accused, North Morgan, wilfully and with malice aforethought shot at Asa Oliver with the intent to kill him, and, missing his aim, wounded W. T. Buntin, then he is guilty of malicious wounding; and so they must find, and fix his punishment at confinement in the penitentiary for not less than one, nor more than five years;" which was refused by the court. In discussing the action of the court in refusing this instruction, Judge Lindsay, speaking for the court, said: "The statute provides that, 'if any person shall wilfully and maliciously shoot at and wound another with an intention to kill him, so that he does not die thereby, with a gun or other instrument loaded with a leaden bullet, or other hard substance, . . . he shall be confined in the penitentiary not less than one nor more than five years.' The language of the statute does not embrace the offense for which the appellee was put upon his trial. To constitute the statutory crime it is necessary that the party accused 'shall wilfully and maliciously shoot at and wound another, with an intention to kill him.' Here he did not wound the person at whom he shot, on the one hand; nor did he shoot at the person whom he did wound, on the other. The two facts essentially necessary to constitute the felony do not conjoin, and hence the instruction asked for was properly refused."

In *Jones v. State*, *supra*, which was referred to and approved in the case cited, of *Morgan v. State*, the objection was urged that the intent was not sufficiently averred in this, that the act was not alleged to have been done with the intention of killing some particular person. The statute in judgment in that case was substantially the same as the statute upon which the case at bar is

predicated. The court, in discussing that case, said: "The objection is that the intent is not sufficiently averred in this,—that the act is not alleged to have been done with the intention of killing the said *Mixon* or any other person. The statute (*Howard & H.* 698, § 33), quoted above, specifies the intent to kill the person shot at, as one of the intents made essential to constitute the offense. Such being, probably, the main intent in this case, the indictment should have charged that intent. *Rex v. Gillow*, 1 *Moody*, C. C. 85; *Rex v. Duffin*, *Russ. & R. C. C.* 365. The indictment is uncertain. There is no allegation of an intent to kill any particular person. In *Rex v. Holt*, supra, the indictment framed under the statute 9 *Geo. IV.* chap. 31, §§ 11, 12, was for shooting 'at one *John Hill*, with intent to murder the said *John Hill*.' The jury found the prisoner guilty of shooting at *Mr. Hill*, with intent to do *Mr. Lee* some grievous bodily harm. The court ordered a verdict of not guilty to be recorded. To come, therefore, within this statute, we think the accused must be charged with having shot at a certain person, with intent to kill that person." In the case of *Morman v. State*, 24 *Miss.* loc. cit. 57, the rules as announced in the foregoing cases of *Morgan v. State* and *Jones v. State*, supra, were followed and approved. To the same effect is *Barcus v. State*, 49 *Miss.* 17, 19 *Am. Rep.* 1. In *People v. Robinson*, 6 *Utah*, 101, 21 *Pac.* 403, it was expressly ruled that, "where the indictment charged that defendant assaulted *H* with a pistol, and shot at *H* with intent to kill him, and the evidence showed that defendant shot at *J* intending to kill *J*, but accidentally hit *H* because he missed *J*, a conviction for assault with intent to kill cannot be sustained." In the supreme court of *Arkansas* in *Lacefield v. State*, 34 *Ark.* 275, 36 *Am. Rep.* 8, the rules announced in the foregoing cases were followed, and it was held by that the court, "when one, intending to kill *A*, shoots and wounds *B*, or if it be doubtful which he shoots at, he cannot be convicted of an assault with intent to kill *B*." The rules of law so clearly announced in the foregoing cases cited, in our opinion, correctly announce the law as applicable to an offense of an assault with intent to kill. The principles announced in those cases are predicated upon statutes substantially the same as the one upon which the offense at bar is predicated. However, upon this proposition we are confronted with two cases in this state directly in conflict with the conclusions herein reached. *State v. Jump*, 90 *Mo.* 171, 2 *S. W.* 279, and *State v. Montgomery*, 91 *Mo.* 52, 3 *S. W.* 379. Doubtless the learned trial judge, recognizing the rule that the decisions of this court furnish a

rule to govern as well as to guide, followed those cases and submitted this cause to the jury upon the theories as indicated by the instructions.

It is apparent from an examination of those two cases that the proposition confronting the court was not discussed. In neither of them were any briefs filed by the appellant, and a careful analysis of those cases makes it manifest that the distinction between murder cases and cases of assault with intent to kill, defined by the statute, was not sharply presented to the court for their consideration. This is made apparent by the citation of authorities in support of the rules announced. In support of the *Montgomery Case*, the case of *State v. Henson*, 81 *Mo.* 384, and *State v. Payton*, 90 *Mo.* 220, 2 *S. W.* 394, are cited as expressly approving the principles announced. In *State v. Jump* no authorities are cited, and the learned and esteemed judge simply says that, if some point is overlooked, the defendant has no right to complain, for the reason that no suggestions by brief or otherwise are made as to the questions involved. The cases of *State v. Henson* and *State v. Payton*, supra, cited in support of the conclusions reached in the *Montgomery Case*, were murder cases, and therefore, in accordance with the conclusions as herein reached, are not applicable to the offense charged in the case at bar.

We have endeavored to point out the distinction that should be observed in the application of the rules of law between cases of murder or manslaughter and the offense of an assault with intent to kill as defined by the statute. The cases cited as supporting the conclusions we have reached in this cause had in judgment the identical question, under substantially the same statutory provisions as are involved in the case at bar; and the rules announced in those cases upon which we predicate our conclusions are fully supported by both reason and authority. The learned judges who wrote the opinions in the *Montgomery* and *Jump Cases*, heretofore referred to (there being no presentation by brief or otherwise of the propositions involved), doubtless concluded that the same rules of law were applicable to those cases as had previously been applied to cases of murder or manslaughter; and we are convinced that, had the question been sharply and fully presented to the court in those cases, the same conclusions would have been reached as is herein indicated in the case at bar.

After diligent search we are unable to find any authority in support of the rules announced as applicable to the *Jump* and *Montgomery Cases* by this court, except the principle announced applying to murder

cases; and we have heretofore pointed out the distinction between those two classes of cases. With the greatest deference and respect for the opinions of the learned judges who announced the conclusions in the *Jump* and *Montgomery* Cases by this court, we are unable to concur with their views, and, after a full discussion and consideration of the proposition confronting us, and a careful examination of the authorities upon the subject, we are convinced that the conclusions reached in those cases are unsound and not supported by well-considered authority; therefore they should no longer be followed as announcing the correct rule applicable to the question in the case at bar.

The conclusions reached upon this proposition by no means relieve the defendant of punishment, if he is guilty of the commission of a wrongful act. The statutes of this state cover every phase of this case. First, if the defendant shot at Frank Reed without being justified, with a pistol, with the intent to kill him, the state may proceed against the defendant, upon that charge; second, if the defendant, without being justified, made an assault with a pistol upon Frank Reed, and in the commission of such unlawful act maimed, wounded, or disfigured Ernest Morgan, and such wound was inflicted under circumstances which would have constituted murder or manslaughter if Ernest Morgan had died, the defendant may then be prosecuted under the provisions of § 1849, Rev. Stat. 1899; and third, if the testimony on the part of the state is sufficient to show that the defendant shot at Ernest Morgan with intent to kill him, as charged in the information in this prosecution, the defendant may be prosecuted and convicted of that offense. However, if it is sought to convict the defendant under this information for shooting at Ernest Morgan with the intent to kill him, as indicated from the conclusions reached in this cause, the court should avoid submitting the cause to the jury upon the erroneous theory that if he assaulted Frank Reed with intent to kill him, and, in the commission of such offense, he wounded Ernest Morgan, he might be convicted of an assault with intent to kill Ernest Morgan. The statute defining the offense of an assault with intent to kill by shooting at another with intent to kill should be held to mean what it says; and, to constitute such offense and authorize a conviction of the defendant for shooting at Ernest Morgan with intent to kill him, it is essential that both elements of that offense be established by the testimony in the cause: First, that he shot at Ernest Morgan; secondly, that he did so with the intent to kill him. This is the only practical and common-sense interpretation of the statute 7 L.R.A. (N.S.)

which defines the offense with which the defendant is charged. We have thus indicated our views upon the most vital propositions involved in this prosecution. It was error on the part of the court to submit this cause to the jury as indicated by the instructions heretofore pointed out, upon the theory that the defendant shot at Frank Reed with intent to kill him and in the commission of that act wounded Ernest Morgan, and instructing the jury that upon that state of facts they would be warranted in convicting the defendant of an assault with intent to kill Ernest Morgan, as charged in the information.

For this error the judgment should be reversed, and the cause remanded for the purpose of giving the state an opportunity of proceeding against the defendant in accordance with the views herein expressed, and it is so ordered.

All concur.

MISSOURI SUPREME COURT.
(Division No. 1.)

KANSAS CITY, Respt.,
v.
LOUIS K. HYDE, Appt.

RE TWENTY-FIRST STREET.

(196 Mo. 498, 96 S. W. 201.)

Highway — opening — public benefit — evidence.

1. In a proceeding to open a street, which, as proposed, would result in a mere cul-de-sac, and therefore be of no benefit to the public, evidence is admissible of a proposal to extend another street at right angles to its termination, and thereby secure the necessary thoroughfare and public benefit.

Ordinance—illegality—evidence.

2. A property owner may, upon an attempt by a municipal corporation to apply a street-opening ordinance to the injury of his

Case Note.—Fraud in proceedings for opening or extending highway as defense to proceedings to acquire property for that purpose: — As a general proposition, the courts will not question the motive which prompts the institution of proceedings to open or extend a highway; but, when fraud or illegality taints the proceedings, then the courts will not hesitate to interfere in behalf of one whose property is to be taken against his will. In addition to the authorities set out in the above opinion, the only case in point which a search has disclosed is *Parham v. Inferior Ct. Justices*, 9 Ga. 341, in which the court enjoined proceedings to open a new public road which would pass through uninclosed lands of the complainant, who alleged that the petition pre-

property rights, show, if possible, that its passage was obtained by fraud or other unlawful means, or for an unlawful purpose. **Eminent domain—purpose of exercise—evidence.**

3. One whose property is sought by right of eminent domain to widen a street may introduce evidence to prove that the purpose of the widening is to accommodate a railway connection with private property. **Highway—switch tracks.**

4. A street cannot be created under the power of eminent domain, to be devoted to the purpose of railway switch tracks for the benefit of business concerns in the vicinity.

Ordinance—invalidity—adjudication.

5. The court will adjudge void municipal ordinances passed for the purpose of opening and widening streets for the extension of railway switches for the accommodation of private business enterprises.

Eminent domain—evidence.

6. That a jury in an eminent domain proceeding is impaneled merely to try the question of damages does not preclude the admission of evidence, for the consideration of the court, that the proceeding is instituted for private, and not for public benefit.

(May 30, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County fixing the compensation in a proceeding to condemn land for the opening of a street. Reversed.

The facts are stated in the opinion.

Messrs. Lathrop, Morrow, Fox, & Moore, for appellant:

The ordinance is unreasonable, and operates to deprive the appellant of his property without just compensation.

McQuillin, Mun. Ord. § 550; Corrigan v. Gage, 68 Mo. 541; Halpin v. Campbell, 71 Mo. 493; Morse v. Westport, 136 Mo. 276, 37 S. W. 932; Armstrong v. St. Louis, 3 Mo. App. 151; Heman v. Handlan, 59 Mo. App. 490; Skinker v. Heman, 64 Mo. App. 441; Norwood v. Baker, 172 U. S. 269, 43

L. ed. 443, 19 Sup. Ct. Rep. 187; Field v. Barber Asphalt Pav. Co. 117 Fed. 925; Hawes v. Chicago, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; Allen v. Drew, 44 Vt. 174; Wistar v. Philadelphia, 80 Pa. 505, 21 Am. Rep. 112, 111 Pa. 604, 4 Atl. 511.

The purpose of the proceeding is to appropriate private property for a private use. Glaessner v. Anheuser-Busch Brewing Asso. 100 Mo. 508, 13 S. W. 707; Morse v. Westport, 136 Mo. 276, 37 S. W. 932; State ex rel. Belt v. St. Louis, 161 Mo. 371, 61 S. W. 658; State ex rel. Abel v. Gates, 190 Mo. 540, 89 S. W. 881.

Messrs. Edwin C. Meservey and John H. Thacher, for respondent:

The use or necessity of the public for the proposed street is not a proper matter for the jury to consider or determine.

Savannah v. Hancock, 91 Mo. 54, 3 S. W. 215; Kansas City v. Baird, 98 Mo. 215, 11 S. W. 243, 562; Cape Girardeau v. Houck, 129 Mo. 618, 31 S. W. 933; Kansas City v. Bacon, 157 Mo. 468, 57 S. W. 1045.

The city ordinance, showing on its face that the lands taken herein are for public use, is conclusive against the appellant's contention that this is a proceeding to take private property for private use.

Kansas City v. Baird and Cape Girardeau v. Houck, supra; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Kansas & T Coal R. Co. v. Northwestern Coal & Min. Co. 161 Mo. 288, 51 L.R.A. 936, 84 Am. St. Rep. 717, 61 S. W. 684.

This city ordinance is presumptively valid.

Kansas City v. Morton, 117 Mo. 454, 23 S. W. 127.

Valliant, J., delivered the opinion of the court:

Re Twenty-First street. This is a proceeding under an ordinance of the city to extend Twenty-first street into certain property of the defendant, Hyde, and for that purpose to assess his damages for the property to be taken or damaged, and to

sented for the opening of the road was signed by many persons who did not live in the neighborhood; that the same was gotten up not for public convenience, but by persons interested in having a road to a certain landing on a river; that the court evidenced its partiality in the appointment of reviewers and commissioners to open the road; and that the same were not proper and discreet persons,—one of them wished the road to pass his house, where he kept liquors for sale, another had but lately moved into the county, and the third had acted as principal agent in procuring signatures to the petition. The complainant further objected to the appointment of anyone because this road would not be the nearest 7 L.R.A. (N.S.)

and most practicable route between the points specified as the termini of the road, because it would cause irreparable injury to his land and crops, and because he offered to the court, at his own expense, to cut out and open a shorter and better road between the points designated.

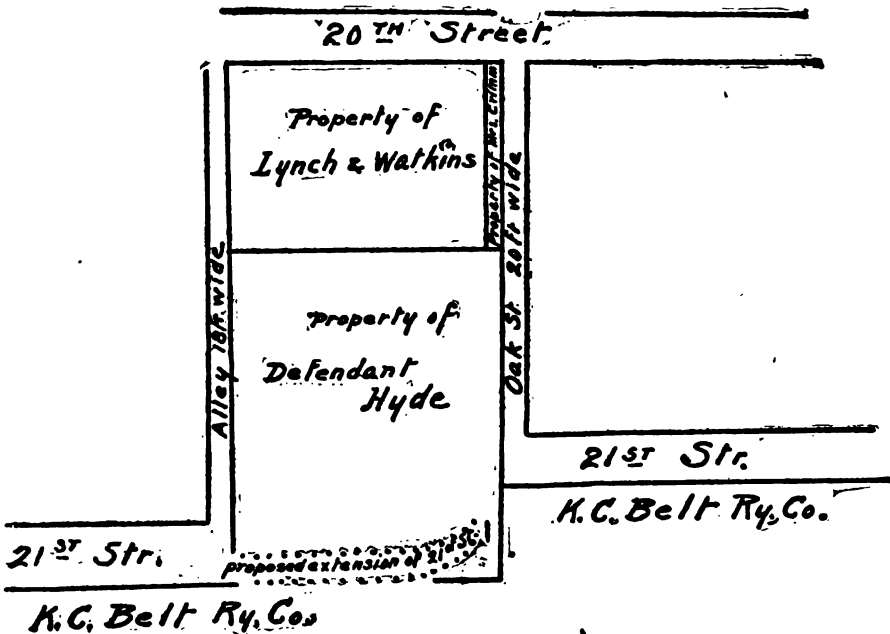
But in a somewhat similar case, in Morse v. Westport, 136 Mo. 276, 37 S. W. 932, the court did not consider the enactment, about the same time, of many ordinances for street improvement, in view of an impending change of the city charter, to be such proof of fraud in the municipal action as to warrant the court, in a suit by a property owner, in restraining the city from letting contracts for the improvements.

assess the benefits over a district prescribed by the ordinance, in which district is included remaining property of defendant. The jury assessed the defendant's damages at \$5,000 and his benefits at \$2,577.10, and from the judgment of condemnation that followed on those assessments the defendant has appealed.

Defendant Hyde owns a tract of land nearly square in shape, containing about 60,000 square feet, bounded on the east by Oak street 20 feet wide, west by an alley 18 feet wide, and on the south by the right of way of the Kansas City belt Railway. Twenty-first street, 60 feet wide, coming from the west, terminates on the west line of defendant's property; its south line being nearly coincident with the south line of defendant's property. The following diagram gives a general idea of the location:

the two disconnected ends of Twenty-first street, nor to carry the street entirely through defendant's property, but to terminate it in defendant's property at a point 10 feet west of his east line; nor does the ordinance aim to carry the street to its full width even as far as it purposes to go, but to the width only of 30 feet. Another feature of the route marked out by the ordinance is that, after going 68 feet along the south line of defendant's land, it changes course to the northeast to the terminus named, and that, too, at an angle which, even if the course were extended to defendant's east line, would not connect it with that end of Twenty-first street.

Appellant contends that it appears on the face of the ordinance, when applied to the physical facts above stated, that the public has no interest in this proceeding; that the extension of Twenty-first street as proposed



Twenty-first street, as will appear from the diagram, does not extend across defendant's property, but it ends on the west against defendant's west line, and begins again going east at defendant's east line, and not then on a line with its own west end but considerably north of it. The ordinance in question does not aim to unite

would simply create a cul-de-sac in defendant's property, which would be of use to no one; and that we think is correct. But to meet that objection the city undertook to prove that there was another fact to be considered which would show that this extension was for a public use and would serve the public, namely, that there was pending

at the same time and in the same court another proceeding the purpose of which was to widen Oak street and bring it down to connect with this extension of Twenty-first street and to the right of way of the Kansas City Belt Railway Company. But, on the objection of defendant, the testimony offered by the city on that point was excluded. The idea advanced was that this case would have to stand or fall by its own strength, and could not be helped out by another proceeding, the result of which was only problematical. We have now under consideration the appeal of this same defendant in the Oak Street Case (196 Mo. 515, 96 S. W. 206), both cases having been submitted for our judgment at the same time, and in that case, to meet the objection of the defendant that the widening and extending of Oak street would only carry it to an unprofitable end, the city offered to prove that it was, at the same time, moving to extend Twenty-first street so as to connect it with the widened and extended Oak street; but, on like objection by the defendant, that evidence was excluded. In spite of the ruling of the court, however, the evidence in its full force got to the jury, and must have had its effect, because the jury could not, with reason, have assessed any benefits in this case if there was no purpose shown to connect the two streets. The court erred in excluding that evidence. Assuming that it was to the public interest that these two streets should be connected in the manner that they would be if both of those ordinances were carried into effect, and that the common council so determined, yet, since proceedings to widen or extend both streets cannot be embraced in one suit, it would be impossible to carry the scheme into effect if each proceeding had to rest alone on its own facts without taking into account the purpose of the other. If each proceeding depends for its success on a condition that does not already exist, but that can be brought about only by a successful prosecution of the other; and if neither can proceed until the other is finished,—then the one defeats the other and both must fail. That cannot be the law. The danger suggested in the possible failure of the other proceeding can be avoided without any difficulty by the court in its control of its judgment; it, can withhold its final judgment, or its ruling on a motion for a new trial, or otherwise suspend final action, until judgments are reached in both cases. Nothing that it is necessary for the court to know in order to reach a correct conclusion in a given case can be said to be irrelevant or immaterial.

If the opening or extending of a particular proposed street is but a part of a general

scheme, the court should know what the scheme is in order to appreciate the value of the particular street in question. That scheme may be shown by contemporaneous ordinances if it has been put into that record form, or it may be shown by the best evidence of which the fact is susceptible, if it has not been made a matter of record. While the passing of an ordinance to establish, widen, or extend a street is the exercise by the city of a delegated governmental power, legislative in its character, and, therefore, not subject to judicial direction (Albright v. Fisher, 164 Mo. 56, 64 S. W. 106; State ex rel. Abel v. Gates, 190 Mo. 540, 89 S. W. 881), yet, after the ordinance has become an accomplished fact, if attempt is made to apply it to the injury of the property rights of a citizen, he may, if he can, show that its passage was obtained by fraud or other unlawful means, or for an unlawful purpose. In Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743, this court, per Black, J., said: "The rule of law is well established that the courts will not inquire into the motives of the legislature in enacting a law, even where fraud and corruption is alleged. Cooley, Const. Lim. 5th. ed. 225. But the rule is somewhat relaxed as to municipal bodies. Speaking of such bodies, it is said: 'We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby.' 1 Dill. Mun. Corp. 4th ed. § 311." That doctrine has been iterated by this court in other cases. Knapp S. & Co. v. St. Louis, 156 Mo. 343, 56 S. W. 1102; State ex rel. Abel v. Gates, supra.

At the trial of this case the defendant offered to prove that one of the men who owned the property adjoining his on the north was, at the time of the passage of these ordinances, the speaker of the lower house of the common council, to whose property a switch could not be run from the Kansas City Belt Railway unless the streets were extended and widened as in these ordinances was proposed; that he, through his partner, had approached defendant with a proposition that if he, defendant, would sell him a right of way to the belt railway, the ordinances would not be passed, but defendant declined and the ordinances were passed; that the purpose of the ordinances was not to widen or extend the streets for use as public highways, but solely for the purpose of affording the speaker of the lower house and his business partner access, by means of a switch track, to the belt railway, and that, when widened and extended, as proposed in these ordinances, and turned over to the railway to be covered with

switch tracks the public would be practically excluded from the use of those streets. The court, on objection of the plaintiff, rejected the evidence, and exception was saved. The rejection of that evidence raises the serious question in this case. If it is a fact that the purpose of the council in passing the ordinances was that these streets, when widened and extended as proposed, were to be given over to railway switch tracks, then the common council was proceeding to condemn private property for a purpose for which it had no right to condemn. When we say that the validity of a city ordinance may be attacked on the ground of fraud in its procurement, we do not necessarily mean that actual bribery or corruption must be shown, but it is sufficient if the fraud charged is of that character that has been defined to be the wilful doing of an unlawful act. The common council has authority to establish, extend, and widen streets for the purpose of public highways, and, when established, extended, or widened, it has authority, within certain bounds, to allow railway tracks to be laid in the streets and trains to pass over them. But those streets are established for public use, and the cost of establishing them is charged as a special tax on the benefit district affected. The common council has no authority to establish a street, or a system of streets, at the expense of the property owners in the district for the use of a private individual or number of individuals. And if the council should undertake to use the power that has been intrusted to it for the public benefit to serve private interests, it is an abuse of the power, a violation of the trust, a wilful doing of an unlawful act, a legal fraud. It has been decided by this court that an ordinance of the city of St. Louis, essaying to grant a railroad company the right to lay its tracks in a street that was so narrow that when the tracks were laid and trains operated on them, the street was practically unsafe for a public highway, was illegal and of no effect. *Lockwood v. Wabash R. Co.* 122 Mo. 86, 24 L.R.A. 516, 43 Am. St. Rep. 547, 26 S. W. 698. As was held in the case of *Glasgow v. St. Louis*, above mentioned, the city has the power to vacate a street when it deems it no longer of public use, and, in the absence of fraud, it is no ground for holding the vacating ordinance illegal because the effect is to give the use of the ground to an adjoining manufacturing concern, or even if it was done for that purpose. The controlling idea in that case is that if, without fraud, the city authorities are well satisfied that the street is of no use to the public, and could be advantageously used by the adjoining

manufacturing concern, the ordinance vacating it is not illegal.

But in the case at bar the common council come saying: "We need this ground for a public highway; we are going to condemn it for the use of the public, and we are going to make those who own property lying within a certain district pay for it. We are going to make this defendant, whose property to the value of \$5,000 we will take, pay, as for the benefit it will do him, more than half the sum we give him." Surely, if for nothing more than showing the questionable extent of his benefits, the defendant ought to be allowed to show the purpose to which the proposed streets are to be put, if that purpose is already a part of the general scheme. If, along with these two ordinances, the common council had passed an ordinance authorizing the belt railway company to so occupy the proposed streets, when completed, with switch tracks, as to give certain individuals switch connection for their property with the belt railway, that would be a fact that would necessarily influence the jury in the assessment of the benefits which the defendant would be required to pay, and it might be an important fact for the court to know, when the time should come to pass on the question of the validity of the ordinance; and if such was the purpose the common council would have been more candid to have so avowed it; but if such was in fact the purpose, though not so avowed, it is just as important for the court to know it, and the defendant has the right to prove it. What is called Oak street is now only 20 feet wide. It terminates in that part of Twenty-first street that lies east of the defendant's property, it stands at such an angle to the belt railway as seems to make it impracticable to run a switch track into it. The property of the firm, in whose interest alone, as the defendant contends, this proceeding is being prosecuted, lies adjoining, on the north, defendant's property, and is separated from Oak street by a strip 10 feet wide belonging to Mrs. Crimm. The scheme as shown by the ordinance in the Oak street property is to take Mrs. Crimm's 10-foot strip and a strip of like width off the east side of defendant's property, thus making Oak street 30 feet wide and giving the firm mentioned a front for the full length of its property on that street; then the sharp angle, that would otherwise hinder the laying of a track from the belt line into Oak street, is reduced by the turn of the course of the proposed extension of Twenty-first street to the northeast. If the purpose is, as defendant offered to prove that it was, to shape these streets for the convenient introduction of the switch track

mentioned, the plan proposed would facilitate that purpose. Then if we contemplate what Oak street would be, 30 feet in width and a railroad track through it, the question would arise as to whether that street was any longer susceptible of being used as a public highway. In the case of Lockwood v. Wabash R. Co. above mentioned, the street was 40 feet wide, from building line to building line, and 24 feet from curb to curb, and this court held that the railroad tracks amounted to a practical exclusion of the public from the street, and that the ordinance was therefore void.

If there was now no scheme to turn these streets over to the use of the belt railway company, if they were now already extended, widened, and established as proposed, and if the common council was now proposing to grant the belt railway company the right to lay its tracks through Oak street, if we should adhere to what we said in the Lockwood Case, we would have to hold that the city council could not so drive the public off that highway. And it does not alter the case that there are other lots along the line that might be rendered more available for business purposes if they were afforded connection by switch tracks with the belt road. The common council can no more create a street for the especial benefit of a given number of people than it can for that of one individual. If it is to be a street, it must be a highway for the public, and no use of it can be granted inconsistent with the use of the general public. And, while it is competent, as we have seen in the Glasgow Case, above mentioned, to vacate a street which is no longer of any use to the public, yet it is not competent to create a street in the name of the public for the purpose of vacating it in the interest of whom it may concern. In *Ligare v. Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934, the city council had passed two ordinances, one to widen Archer avenue, the other granting a railroad company the right to lay its tracks in the street when it should be so widened. The court said: "It is, to our minds, clear that both ordinances before us in this case are but parts of a single and entire scheme. They were adopted on the same day, and the latter expressly refers to, and is by its terms dependent upon, the adoption and enforcement of the former; and it requires that the entire cost and expense of enforcing both ordinances, and all damages which may be adjudged against the city by reason of their being adopted and enforced, shall be paid by the railroad companies." In that case the city council was entirely candid in the expression of its purpose, and was careful not to impose the burden of cost, expense,

and damage on the persons whose property was to be taken, or on those owning other property in the vicinity. The court went on to say: "Moreover, the attempt to widen Archer avenue for the limited distance and in the peculiar manner described in the first ordinance is manifestly to meet a local want in that respect, and the second ordinance conclusively shows that that local want is space for laying down additional railroad tracks, and nothing else." Then after showing how completely the street, when widened, would be occupied by railroad tracks, the court, continuing, said: "Hemmed in by the wall on one side and by the buildings or inclosures on private property on the other, no rational being would, at the risk of the inevitable dangers from passing engines and cars, use this part of the street as a common highway, unless under stress of most extraordinary circumstances. It is not material that the public are not, by the words of the ordinance, forbidden the use of this part of the street,—the effect of the grant is inevitably an exclusion of all but these railroads from its use, and the law deals with results, and not with mere forms, in such matters. . . . It is so familiar that we need not stop to demonstrate it, that cities, villages, and towns are only empowered to lay out, open, and improve streets for such public use as that persons and property within the municipality may be legitimately assessed or taxed for payment thereof, and that persons and property within a municipality cannot be legitimately assessed or taxed for the right of way or the making or improving of a road for a railroad company alone. . . . We do not deny that the city has power to widen streets, generally, and that, when it has undertaken to do so, the motives that may have actuated those in authority are not the subject of judicial investigation; but the purpose for which a thing is done is very different from the motives which may have actuated those by whom it is done, and is, in the present instance, a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is, in all cases, limited by the purpose for which it shall be exercised,—as thus, private property may be condemned for public use; but it may be shown that the use, in fact, is not public, but private. . . . A railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city, and . . . a city cannot, under authority to condemn property for streets, condemn property for a railroad track, for the principle must be the same."

The facts of the case at bar illustrate forcibly the necessity for the admission of

evidence of kind offered by the defendant. To the city council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use. "Public" in that connection means everybody. If the use is not for everybody, it is a private use. If to an individual, or to any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use, and a destruction of its public-service character. Now, suppose an influential individual, to whom a slice of his neighbor's property would be very convenient, should ask the city council to condemn that property for his use, and the council should pass an ordinance, as requested, declaring that it condemned the property for the use of the individual, of course the ordinance would be void on its face. But suppose the council, intending the condemnation to be really for the sole benefit of the individual, in order to give it validity, should say in the ordinance that the property was to be condemned for a public street, would such a false recital in the ordinance be conclusive? Would it put the man whose property was to be taken, and the people in the district who were to be taxed to pay for it, beyond the protection of the constitutional guaranty that their property should not be taken for private use? Could the city council, by a false recital in the ordinance, give it a validity which it would not have if it recited the truth? And when the city comes to ask the aid of the court to carry the ordinance into effect, is it possible that the court must be a mere tool to do the will of the council, with no power to inquire into the truth of the matter? What protection has a citizen for his constitutional rights, if the courts cannot look through a sham and see the truth, and how can the courts learn the truth if they must take the recitals in the ordinance as conclusive, and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence, and how humiliating would be the attitude of our courts, if they were so powerless. But our law is not so lame, and our courts are not so impotent. The courts in such case will hear the evidence and find the facts. If the truth lies only in an unwritten agreement or understanding, it can be proved only by oral testimony, and, that being the best evidence of which the fact is susceptible, the court must receive it and weigh it. Defendant, in such case, is not driven to a suit in equity to reform the ordinance or assail its integrity. This is a summary proceeding, no pleadings are prescribed by the charter or by statute, and the party has a right to

demand that the court hear the evidence and find whether or not the purpose of the proceeding is to condemn his property for a public use or for the use of an individual or individuals. If, as the defendant offered to prove, the real purpose for which these ordinances were passed was to make a way for a switch track or switch tracks to property of an individual or any number of individuals, then it was a purpose for which the city council had no authority to condemn property, and the passage of the ordinances was an abuse of its power, and the court should adjudge the ordinances void. But, even if switch tracks are not intended and will not be laid in the streets, still, on what possible theory can it be said that this defendant will be benefited by the opening of this street through his land? It gives him no connection that he has not already, and it cuts him off from his connection with the right of way of the belt railway. The only change in his situation, besides that of depriving him of a large slice of his property, will be to put him at the mercy of the city council if he should ever want a switch track into his premises connecting with the belt railway.

It is said, in behalf of respondent, that no pleadings were filed alleging that this was a proceeding to condemn private property for a private use, and that therefore there is no such question in the case. Under the provisions of the city charter prescribing the procedure in such case, formal pleadings are not required. Nevertheless the defendant in this case did file what is called a motion averring that the ordinance was invalid for several reasons, specified among which was that it was a proceeding to take his property not for a public, but for a private use, and prayed that the suit for those reasons be dismissed; which motion the court overruled without hearing evidence, and defendant excepted. It is true, as contended by respondent, that the jury was not impaneled to try any questions except those relating to the damages and benefits; and therefore, except as bearing on those questions, the jury had nothing to do with determining whether this was a proceeding in good faith to condemn property for a public street; but that was a question addressed to the court, on which the court ought to have heard the evidence offered, and, if satisfied that it was a proceeding to condemn the property of the defendant for the use of one individual or individuals, it ought to have rendered judgment for defendant, dismissing the proceeding. The court could have tried that issue before impaneling the jury, or during the jury trial, or afterwards as it might see fit to do, since there is no

particular procedure prescribed in the charter or elsewhere.

For the reasons above given, the judgment is reversed, and the cause remanded to the Circuit Court to be proceeded with according to the law as hereinabove expressed.

All concur.

NEW HAMPSHIRE SUPREME COURT.

FRANK SHACKETT

v.

M. F. BICKFORD.

(74 N. H. 57, 65 Atl. 252.)

Deceit—suspicion of falsity.

Suspicion that a statement of facts made to effect the sale of a chattel may be

false is sufficient, if it proves to be so, to sustain an action for deceit.

(November 7, 1906.)

RESERVATION on defendant's exceptions after verdict for plaintiff by the Superior Court for Sullivan County for the opinion of the Supreme Court, of an action brought to recover damages for deceit in the sale of a horse. Overruled.

The facts are stated in the opinion.

Mr. Henry F. Hollis, for defendant:

In an action on the case for deceit in the sale of a horse, it is essential to prove *scienter*.

Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Spead v. Tomlinson, 73 N. H. 46, 68 L.R.A. 432, 59 Atl. 376; Syracuse Knitting Co. v. Blanchard, 69 N. H. 447, 43 Atl. 637; Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496; Rowell v. Chase, 61 N. H.

Case Note.—Some American views of the case of Derry v. Peek: —The above case, in holding that a suspicion on the part of the maker of a statement, that such statement may be false, is equivalent to actual knowledge of its falsity, for the purpose of giving a right of action for deceit to a party injured thereby, is fully in accord with authority, since, under such circumstances, there is evidently a want of good faith. But the English case of Derry v. Peek, cited in the opinion in the case reported, and which restates the principles underlying actions for fraud, in imposing the restriction that such an action is not maintainable where the statements are made in good faith, irrespective of whether the person making them has reasonable grounds for believing them to be true, runs counter to a number of decisions; and for this reason a review of the American cases in which it has been cited as bearing upon this question is deemed of interest, as tending to indicate the attitude of our courts toward its doctrine.

It was cited in Watson v. Jones, 41 Fla. 241, 25 So. 678, in which, after alluding to the necessity of alleging and proving, in an action for deceit, the knowledge of defendant that his representations were false, the court proceeds to discuss the quantity and character of proof necessary to sustain the allegation of *scienter*, and holds that the ultimate fact of knowledge may be established by proof that defendant's situation or means of knowledge was such as made it his duty to know whether a statement was true or false. In reviewing a number of American decisions, the court said: "In Alabama, Colorado, Nebraska, and some other states the courts do not seem to require proof of *scienter* in cases where the party making a false representation professes to speak from his own knowledge. Mun-

roe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Jordan v. Pickett, 78 Ala. 331; Goodale v. Middaugh, 8 Colo. App. 223, 46 Pac. 11; Johnson v. Gulick, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883. In other states the charge of fraudulent intent in actions for deceit may be maintained by proof of a statement made as of a party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; in which case it is deemed that the fraud consists in stating that the party knows the thing to exist when he does not know it to exist, and in such cases a belief of its existence will not warrant or excuse a statement of actual knowledge. Fisher v. Mellen, 103 Mass. 503; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923; Bullitt v. Farrar, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 486, 43 N. W. 566. It is also held in these states that, if the representations were not made as of the party's own knowledge, then the evidence must show that the party knew them to be untrue; and evidence that he had reasonable cause to believe that they were untrue will not constitute sufficient proof of *scienter*. Pearson v. Howe, 1 Allen, 207; Stone v. Denny, 4 Met. 151; Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339; Marsh v. Falker, 40 N. Y. 562; Marshall v. Fowler, 7 Hun. 237; McKown v. Furgason, 47 Iowa, 636. The question was considered by this court in Wheeler v. Baars, 33 Fla. 696, 15 So. 584, and the defendant in error relies upon the decision in that case in support of the position assumed by him in this one. It is there said that the *scienter* may be proved by showing, first, actual knowledge of the falsity of the representation by defendant; second, that defendant made the

135; *Messer v. Smyth*, 59 N. H. 41; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76.

Suspicion is not enough.

Limerick Nat. Bank v. Adams, 70 Vt. 132, 40 Atl. 166; *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641.

Mr. Jesse M. Barton, for plaintiff:

Scienter is satisfied, not alone by absolute knowledge, but by certain equivalents, namely: (a) making material statements recklessly, without knowing whether they are true or false; (b) making material statements as of the defendant's knowledge; (c) making material statements under circumstances in which the defendant is bound to know the facts.

Rowell v. Chase, 61 N. H. 135.

Bingham, J., delivered the opinion of the court:

The important question in this case arises on the defendant's exception to the charge of the court to the jury. The action was

statement as of his own knowledge, or in such absolute, unqualified, and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or, third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. Under each phase, the proof must show that the statement was in fact false, and in addition, under the first, that defendant had actual knowledge that it was false; under the second, that defendant made the statement as of his own knowledge, when in fact he had no knowledge whether it was true or false, which seems to bear a close resemblance to the English rule, 'without belief in its truth, or recklessly careless whether it be true or false;' and, under the third, that defendant's special situation or means of knowledge were such as made it his duty to know as to the truth or falsity of the representation."

In *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 25 N. E. 100, it was said in passing that the law of Massachusetts, in actions for deceit, is, perhaps, not precisely that declared by the House of Lords in *Derry v. Peek*; but in *Nash v. Minnesota Title Ins. & T. Co.* 163 Mass. 574, 28 L.R.A. 753, 47 Am. St. Rep. 489, 40 N. E. 1039, the doctrine of the English case, that mere ignorance, or negligence, or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, was fully approved; the court saying: "In this particular the decisions in this commonwealth are of similar import. *Tryon v. Whitmarsh*, supra; *Page v. Bent*, 2 Met. 371; *Pearson v. Howe*, supra; *King v. Eagle Mills*, 10 Allen, 548; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; 7 L.R.A. (N.S.)

deceit in the sale of a horse, and the ground upon which the trial proceeded was that the defendant knew his representations were false. The court charged the jury "that it was enough, upon the question of the defendant's knowledge, if he knew, or if he suspected, that the representations were not true." In other words, that suspicion by the maker that his representations are false is the legal equivalent of knowledge of their falsity, and fraudulent.

What will constitute fraud in such an action has recently been considered by the English courts. The leading case upon the subject is *Derry v. Peek*, L. R. 14 App. Cas. 337, decided in the House of Lords in 1889. The complainant in that case charged the defendants with knowingly making false representations. It was found in the court of first instance that the representations had been honestly made, believing them to be true; and the court of appeal (L. R. 37 Ch. Div. 541) held that, notwithstanding

Chatham Furnace Co. v. Moffatt and Fisher v. Mellen, supra; *Holst v. Stewart*, 154 Mass. 445, 28 N. E. 574. See also *Page v. Parker*, 40 N. H. 47; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Marsh v. Falker*, supra; *Chester v. Comstock*, 40 N. Y. 575, note; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432. There is a good reason for this rule. The general test to determine whether there is a liability in an action of tort is the question whether the defendant has, by act or omission, disregarded his duty. In applying this test, it is always necessary, first, to inquire what the defendant's duty is. In an action of deceit, the defendant is ordinarily sued as one whose only relation to the transaction is that of a gratuitous informer, who had no interest in the subject to which the representations related. On the necessary allegations of the declaration, he may be assumed to have answered inquiries put by a stranger, or to have volunteered statements out of apparent friendship. Under such circumstances, although he thinks that his statements will be acted upon by the inquirer, he has no higher duty than to answer honestly and in good faith. If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and ignorance or mistake will not relieve him from the consequences of an error. In seeking a remedy from him for a mistake so made, the plaintiff, in his declaration, states his relation to the transaction, and sues in contract. But one who merely answers the inquiries of a stranger, or courteously volunteers information in a matter which does not concern him, is in a position analogous to that of a gratuitous bailee of property, from whom a less degree of care is required than from a bailee for hire. He must not intentionally mislead;

this fact, the representations must be taken to be fraudulent because the defendants had no reasonable ground for that belief. The question, therefore, which was presented for the consideration of the House of Lords, when the case came before that body in *L. R. 14 App. Cas. 337*, was whether a statement honestly made and believed to be true should be treated as fraudulent because those who made it had no reasonable ground for entertaining that belief. In the House of Lords the decision of the court of appeal was reversed, and it was there held, in conformity with the universally recognized rule, that an action of deceit is based upon fraud; that an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could not be maintained; that want of reasonable ground for believing a representation to be true

might be evidence of fraud, if the circumstances indicated such recklessness or negligent disregard for the truth as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud; that, notwithstanding a court or jury might find that the speaker had no reasonable ground for believing his representations were true, he may nevertheless have honestly entertained such belief, and consequently that fraud could not be predicated upon such a finding. Lord Herschell, who delivered the leading judgment in the case, said (p. 374): "I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false rep-

but, if he answers honestly, to the best of his ability, he does his whole duty. If he is an ignorant, stupid man, and on that account the inquirer is led astray, it is not his fault, but the fault or misfortune of the person who relies upon him. It would be unjust to visit upon him the consequences of his ignorance in a matter in which he had no interest."

It is also cited in *Spead v. Tomlinson*, 73 N. H. 46, 68 L.R.A. 432, 59 Atl. 376, in support of the proposition that, in an action for deceit, the plaintiff must allege and prove not only that the representation was false, but also that it was made with a fraudulent intent; and it was there held that, when the representation relates to a matter which is susceptible of personal knowledge, and is made as of the maker's own knowledge, the jury may find, from the fact that it is false, that it was made with a fraudulent intent.

In *Kountze v. Kennedy*, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414, *Derry v. Peek* was expressly approved, the court saying that, where an act is attributable to an honest belief, a fraudulent intent is lacking and a charge of deceit fails; although the court further states that it was not necessary to go to this extent to uphold the judgment in question, it having been found that there were reasonable grounds for the belief.

In *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653, the court, though holding it unnecessary to determine the question in the case before it, said: "Whether actual bad faith must be shown in common-law actions for deceit, to justify a recovery, has been the subject of much controversy, and it has been finally settled in England, by the decision of the House of Lords in *Derry v. Peek*, *L. R. 14 App. Cas. 337*, that there can be no recovery in such an action whenever the defendant made the statement complained of in the honest belief of its truth, however un-

reasonable such belief. Such, too, would seem to be the holding of the Supreme Court of the United States in *Lord v. Goddard*, 13 How. 198, 14 L. ed. 111 (see also *Biggs v. Barry*, 2 Curt. C. C. 259, Fed. Cas. No. 1,402), though, in view of some of its later cases, the question may still be an open one in the latter court. *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215, 14 Sup. Ct. Rep. 219. There is much authority in this country supporting the view that an action for deceit may be maintained against one making an untrue statement, though in the honest belief of its truth, if there was no reasonable ground for such belief; or, to put it in another way, if he ought to have known the truth. *Cooley, Torts*, 2d ed. p. 585. . . . The conflict of authority in regard to actions for deceit is whether actual bad faith is necessary to sustain the action, and not whether an untrue statement, founded on an honest belief in its truth, though inadvertently or forgetfully or negligently made, is a statement in bad faith. Here the statute expressly declares the material issue to be whether the misrepresentation was made in bad faith. This relieves us of all difficulty. The statute means what it says. It does not mean constructive bad faith. It does not mean gross negligence, which some courts have held sufficient to sustain an action for deceit. It means the same actual intent to mislead that must be found in convicting one of the crime of false pretenses; and surely honest belief in the misstatement, through forgetfulness and inadvertence, is a defense to such a charge. The reference to the essential basis of recovery in common-law actions for deceit only tends to confusion because of the conflict of authority, and is in no way helpful in constraining the statute."

In *Hindman v. First Nat. Bank*, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931, it was cited in support of the proposition that, before the plaintiff can recover in an action of deceit, he must prove two things,—that the

resentation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." In *Angus v. Clifford* [1891] 2 Ch. 449, 465, 466, Lindley, L. J., in com-

menting upon this statement of Lord Herschell, said: "You may have . . . a false statement made, but made without the matter being present to your mind, and made carelessly; and, if that is the fact, that is not fraud, but carelessness, for which an action will not lie. . . . The passages about knowledge—knowingly making it, and making a statement without believing its truth—are based upon the supposition that the matter was really before the mind of the person making the statement; and, if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that, I should say, is proof of carelessness rather than of fraud. I base my judgment . . . on the

representation was false, and that the person making it knew it was false; though in such an action it is not enough to show that the representation is untrue, for, if it was honestly believed to be true, that is a good defense; but that the grounds of belief, and the means of knowledge, in possession of the person making a statement, are to be considered in determining the honesty of the belief.

In *Kimber v. Young*, 70 C. C. A. 178, 137 Fed. 744, the court said: "The basis of the action of deceit is the actual fraud of defendant,—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the erroneous assumption that that which is merely evidence of fraud is equivalent to the ultimate fact which it tends to prove, and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for a rescission of a contract is equally as available in an action of deceit;" proceeding then to quote from *Derry v. Peek*, which is termed "a well-reasoned case."

Derry v. Peek, however, recognizes the fact that a false representation, though made without actual fraudulent intent, may warrant the rescission of the contract based thereon; and in *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720, it was cited in support of the proposition that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertence, when relied on, and which have become the foundation of the active relations between the parties, constitute such fraud as will move a court of equity to decree the rescission of an executory contract.

And in *Robinson v. Welty*, 40 W. Va. 402, 22 S. E. 73, it was held, upon the 7 L.R.A. (N.S.),

same authority, that a contract resting upon a misrepresentation cannot stand, however honestly the misrepresentation may have been made, *scienter* being immaterial in an action for rescission.

The decisions which run apparently counter to the doctrine under discussion cannot here be taken up in detail for the purpose of indicating their exact relation thereto. It is suggested, however, that many of the cases which seem to hold that a statement honestly made may form a basis for an action for fraud are susceptible of justification, although incorrect in theory, on some one of the following grounds, none of which conflicts with the rule laid down in *Derry v. Peek*:

That the statement was contractual in its nature, so as to permit the recovery of damages where it proves to be false, as for breach of implied warranty.

That the statement was such as to warrant a recovery of the consideration on the theory that the contract was entered into under mutual mistake.

Whether or not a person may escape liability on one or the other of the foregoing grounds depends upon the relation of the parties to the transaction, want of actual bad faith operating to relieve one who sustains no contractual relation; but there is another ground on which one may be held liable irrespective of contractual relation, which is:

That the person not only made the statement as true, but further represented himself as knowing its truth; in which case the element of bad faith lies in an affirmation of actual knowledge which he knows he does not possess.

Liability for damages accruing because of reliance on statements made in good faith, but which prove untrue, may also sometimes be predicated upon a breach of duty arising from circumstances or the relation of the parties, to ascertain the actual facts.

... ground that . . . an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is, of course, fraud." In *Le Lievre v. Gould* [1893] 1 Q. B. 491, 498, Lord Esher, M. R., states: "A charge of fraud . . . against a man . . . cannot be maintained in any court unless it is shown that he had a wicked mind. . . . If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind." And Bowen, L. J., in the same case, says (pp. 500, 501): "But his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case it is the knowledge of the falsehood, in the second it is the wicked indifference, which constitutes the fraud. There seems to have been some sort of an idea that . . . whether the man had made the representation, not knowing and not caring whether his statement was true or false, the expression 'not caring' had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false. It meant not caring in the man's own heart and conscience whether it was true or false; and that would be wicked indifference and recklessness."

It is apparent from the views expressed by the judges in these cases that to establish fraud you must prove a dishonest mental state or condition of mind on the part of the speaker with reference to the truthfulness of his statement; that, when he makes a statement of fact, intending it to be relied upon, he of necessity affirms his belief in its truth (*Smith v. Chadwick*, L. R. 9 App. Cas. 187, 203; *Angus v. Clifford*, supra, 470); that, if his statement was untrue and he knew it, or he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest and the fraudulent character of his act established. Applying these principles to this case, it would seem to follow that when the defendant, with a view to effecting the sale, stated to the plaintiff that the horse was safe and just what he wanted,

he thereby affirmed his belief in the truthfulness of his statement, and, it being found that the horse was vicious, and that the defendant suspected that his statement was false, that his want of belief or conscious disregard for the truth or falsity of his statement was established; for a person who suspects that his statement is false does not entertain an honest belief that it is true, or is consciously and wickedly indifferent to its truth or falsity.

The conclusion here reached is in harmony with the decisions in this state and with the great weight of authority elsewhere. *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Hansom v. Edgerly*, 29 N. H. 343; *Pettigrew v. Chellis*, 41 N. H. 95; *Springfield v. Drake*, 58 N. H. 19; *Rowell v. Chase*, 61 N. H. 135; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Speed v. Tomlinson*, 73 N. H. 46, 61, 68 L.R.A. 432, 59 Atl. 376; *Pearson v. Howe*, 1 Allen, 207; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284; *Andrews v. Jackson*, 168 Mass. 266, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; *Salisbury v. Howe*, 87 N. Y. 128; *Haddock v. Osmer*, 153 N. Y. 604, 609, 47 N. E. 923; *State, Cummings, Prosecutor, v. Cass*, 52 N. J. L. 77, 18 Atl. 972; *Lamberton v. Dunham*, 165 Pa. 129, 30 Atl. 716; *McKown v. Furgason*, 47 Iowa, 637; 1 Bigelow, Fr. 609, 511, 513. In *Mahurin v. Harding*, supra, the court approved a charge to the jury that "if the affirmation [of the defendants] was known, or believed, or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent;" and stated that the terms used to describe the *scienter* were "expressions of equivalent import." With this view we are content. The defendant's motions for a nonsuit and verdict were properly denied. The evidence was sufficient to warrant the jury in finding that the representations were fraudulent.

Exceptions overruled.

All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN H. RICKER

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plff. in Err.

(— N. J. —, 64 Atl. 1068.)

Fellow servants—train despatcher and fireman.

A train despatcher of a railroad company, whose duty is to issue telegraphic orders for the movement of trains upon a

single-track road, in the name of the superintendent, and to see that they are transmitted, is not a fellow servant of a fireman upon one of the locomotives of the company.

(Gummere, Ch. J., and Garrison, Hendrickson, Pitney, Reed, Gray, and Dill, JJ., dissent.)

(November 19, 1906.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Headnotes by SWAYZE, J.

Case Note.—Train despatcher as fellow servant, at common law, of train employees:

While the decision in *RICKER v. CENTRAL R. Co.* was rendered by a divided court, it is in harmony with the decisions of the Federal courts, and of the courts of the various states which have passed upon the question, with the exception of Maryland and Mississippi.

Jurisdiction holding train despatcher not a fellow servant.

Arkansas recognizes the train despatcher to be a vice principal where he has direction and control of the movement of trains, as, in so doing, he performs the master's duty, and represents the company, which is liable for his negligence, if any, in so doing. *Little Rock & M. R. Co. v. Barry*, 58 Ark. 198, 25 L.R.A. 386, 23 S. W. 1097.

A train despatcher is not a fellow servant of an engineer. *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590. Upon the division where the accident involved in this case occurred three train despatchers were employed, one of whom was known as the chief train despatcher, but his duties and powers were not different from those of the train despatcher whose negligence caused the accident. The train despatcher, to use the language of the court, "in respect to the matter of moving these trains, was supreme. The whole power of the corporation whose duty it was to move them safely was delegated to him. He was the agent through whom the corporation attempted to perform its duty."

In *Palmer v. Utah & N. R. Co.* 2 Idaho, 315, 13 Pac. 425, the court held that a station agent whose duties were admitted to be the same as those of a train despatcher, so far as they related to the case, was not a fellow servant of a railroad carpenter who was injured through the failure of the station agent to notify the conductor of the train on which the carpenter was riding of a broken rail, notice of which he had received 7 L.R.A. (N.S.)

Mr. William D. Edwards, with Mr. George Holmes, for plaintiff in error:

In those states where the doctrine of the responsibility of the company for the negligence of the train despatcher is upheld the doctrine of "superior-servant rule" as a limitation upon the master's exemption from liability to a servant for the negligence of a fellow servant also obtains.

Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 25 L.R.A. 710, 47 Am. St. Rep. 392, 29 Atl. 994.

This rule does not obtain in New Jersey.

Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 647, 58 L.R.A. 808, 52 Atl. 565; *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634.

Mr. Louis H. Schenck, for defendant in error:

It is the recognized duty of the master

several hours before the accident. This decision was based upon the ground that the station agent, or train despatcher, was invested with the controlling or superior duty in the management of the business of the railroad. It will be noted that it does not appear that the station agent had general control over the movement of trains, and that it does appear that the accident was not the result of a collision.

A train despatcher or division superintendent of a railroad company under whose orders trains are run is not in the same line of employment as an engineer who runs a locomotive over such road with a train attached, under the order of such train despatcher or division superintendent; and such train despatcher represents the company. *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.

Neither is he a fellow servant of a conductor injured in a collision caused by the negligence of such assistant superintendent or train despatcher. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109.

The supreme court of Indiana determined the question by holding the train despatcher to be a vice principal, in *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988, and in so doing it overruled *Robertson v. Terre Haute & I. R. Co.* 78 Ind. 77, 41 Am. Rep. 552, in which a contrary doctrine had been enunciated, and said that the remarks of the commissioner in that case were wholly *obiter dicta* and had no authority whatever. Findings in the *Heck Case* showed that all train orders were issued by the train despatcher, and that he absolutely controlled all their movements, and that he was charged with the duty of so ordering such movements as to avoid collisions. The court further stated that "a railroad company is legally bound to know, and, therefore, in law it does know, the whereabouts of all its trains. . . . This knowledge it can only have through its train despatcher."

The rule that a train despatcher is not a

not only to furnish a safe place for its employees to work, but to keep that place safe.

Van Steenburgh v. Thornton, 58 N. J. L. 160, 33 Atl. 380; *Comben v. Belleville Stone Co.* 59 N. J. L. 226, 36 Atl. 473; *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634; *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764.

The train despatcher is not a fellow servant with the members of the train crews to whom he issues orders for the movement of trains.

Little Rock & M. R. Co. v. Barry, 58 Ark. 198, 25 L.R.A. 386, 23 S. W. 1097; *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 1 Am. St. Rep. 729, 4 S. W. 129; *McKune v. California Southern R. Co.* 66 Cal.

302, 5 Pac. 482; *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 N. E. 590; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Sheehan v. New York C. & H. R. Co.* 91 N. Y. 332; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; 3 *Elliott, Railroads*, § 1322; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 188, 102 Fed. 96; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 293, 50 N. E. 988; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11

fellow servant with the trainmen was adhered to in *Missouri, K. & T. R. Co. v. Elliott*, 2 Ind. Terr. 407, 51 S. W. 1067, in which the court discusses at some length the authorities dealing with the fellow-servant doctrine.

And in Kentucky it has been held that a railroad company is liable for injuries resulting to an employee from the collision of trains due to the negligence of a train despatcher who had control of all the officers on both trains. *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush, 559.

In *McLeod v. Ginther*, 80 Ky. 399, the liability of the defendant for the negligence of the train despatcher in causing a collision resulting in injury to the engineer on one of the trains was apparently assumed by the court in passing upon the case, as it limited its discussion to the question of whether or not the train despatcher had been negligent, which question it decided adversely to the railroad company.

In Maine the liability of a railroad company for the negligence of its train despatcher was sustained in *Lasky v. Canadian Pacific R. Co.* 83 Me. 461, 22 Atl. 367, where it was held that a train despatcher who habitually issues orders for trains in the name of the superintendent, in his absence, is a vice principal, and not a fellow servant of an engineer injured through a collision caused by his negligence.

The Missouri supreme court, after holding, in *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410, that, under their rule placing upon the plaintiff the burden of showing the nonexistence of the relation of fellow servants, plaintiff was properly nonsuited for not introducing testimony to show that the decedent and the train despatcher were not fellow servants, passed upon the question under discussion, in *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 1 Am. St. Rep. 729, 4 S. W. 129, by holding the train despatcher who had control of the movement of the trains not a fellow servant with those engaged in operating and moving the train. An unsuccessful attempt was made to apply this decision in the subsequent case of *Jackson v. Missouri P. R.* 7 L.R.A. (N.S.)

Co. 104 Mo. 448, 16 S. W. 413. The ground on which the court based its refusal was, first, that "it did not appear what the duties of this so-called train despatcher were," and, second, it was held that the negligence of the deceased caused the accident.

In *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 57 Atl. 913, the court held a train despatcher to be a vice principal, and said: "They [railroad companies] . . . ought to know to what use each portion of the road is devoted at a given time. Their employees do not have this knowledge, except as informed by them. The running of a train over the road is their act, whether it is run by the direct order of their stockholders, or by the order of their directors, superintendent, or train despatcher. The arranging for the running of trains generally is essentially a master's function. It requires the exercise of the master's authority and discretion. It differs from the act of a conductor in taking his particular train over the road, as the act of the author of a business in instituting and directing it differs from the act of a servant in executing its details."

The question was settled in New York by determining that a train despatcher is not a fellow servant, in *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466. There the railroad company had established and promulgated what the court of appeals considered an appropriate and sufficient rule and regulation for the government and operation of the various trains upon its road; but it was held that the defendant's duty did not stop there; that it owed the duty of taking due and reasonable care to give correct orders to its trains; and that the failure of the train despatcher to perform this duty is the failure of the master; and that, when the train despatcher originates and promulgates train orders, he is acting as the master.

In *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 35 N. Y. S. R. 853, 26 N. E. 609, the court of appeals held that the defendant was negligent if the collision was

Atl. 514; Galveston, H. & S. A. R. Co. v. Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; Lasky v. Canadian P. R. Co. 83 Me. 461, 22 Atl. 367; McLeod v. Ginther, 80 Ky. 399; Sutherland v. Troy & B. R. Co. 125 N. Y. 737, 26 N. E. 609; Dana v. New York C. & H. R. R. Co. 92 N. Y. 639; Washburn v. Nashville & C. R. Co. 3 Head, 638, 75 Am. Dec. 784; Flannegan v. Chesapeake & O. R. Co. 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028; 4 Thomp. Neg. last ed. § 5020; Thomas, Neg. 2d ed. p. 1656.

Swayze, J., delivered the opinion of the court:

The plaintiff, a fireman on train 30, south bound, on a branch of the defendant railroad, was injured in a collision with train

due to the omission of the train despatcher to exercise proper care to avoid the collision; but the decision did not turn entirely upon this point, as the court reversed the judgment on the ground that the plaintiff had been guilty of contributory negligence.

And in *McChesney v. Panama R. Co.* 74 Hun, 150, 26 N. Y. Supp. 245, it was held that a train despatcher was not a fellow servant of an engineer, and that the question was no longer an open one. This decision was affirmed in the court of appeals without opinion. 148 N. Y. 729, 42 N. E. 724.

The Pennsylvania courts hold that a train despatcher is not a fellow servant with an engineer injured in a collision caused by the negligence of the train despatcher. *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514. The train despatcher in this case had complete control of the movement of the trains.

This case was subsequently cited in *Reiser v. Pennsylvania Co.* 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175, in support of the doctrine that, the train despatcher being a vice principal, the railroad company was bound by his knowledge of the incompetency of the telegraph operator. But, while the court ruled against this contention on the ground that, the train despatcher having no power to discharge the operator, notice to him was not notice to the company, there is nothing in the decision militating against the earlier decision in the *Seifert Case*, as the court said: "To the extent that he was the representative of the company in the performance of a positive duty it owed to its servants, it is responsible to them for his negligence; but beyond that it is not. The contention of the appellant that the knowledge of *Perdue* respecting the qualifications of *Crossman* was the knowledge of the company finds no support in *Lewis v. Seifert*."

The doctrine of the *Seifert Case* was reaffirmed in *Goodman v. Delaware & H. Canal Co.* 167 Pa. 332, 31 Atl. 670, and in *Brommer v. Philadelphia & R. R. Co.* 205 Pa. 432, 54 Atl. 1092. In the latter case the court passed upon the question with the mere 7 L.R.A. (N.S.)

No. 31, north bound, 1 mile south of Hoffman's station. The trial judge allowed the case to go to the jury only upon the question of negligence on the part of the train despatcher at High Bridge, the junction point of the branch road with the main line. Two questions are therefore presented on this writ of error: (1) Was the negligence of the train despatcher the negligence of the company, so as to preclude the application of the rule that denies recovery for injuries caused by the negligence of a fellow servant? (2) If so, was there evidence of negligence sufficient to justify the submission of the case to the jury?

The general principle, well established in the cases, is that the master is bound to take reasonable care that the place where

statement that "it is conceded that, under the decisions the train despatcher, within the limits of his employment, was a vice principal."

In Tennessee, where the fellow-servant doctrine has met with much disfavor on the part of the courts, and has been given a very narrow scope, it has accordingly been held that the superintendent of a road, whose negligence in starting a train caused the collision involved, represented the road and was a vice principal. *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784. See also *Haynes v. East Tennessee & G. R. Co.* 3 Coldw. 222, where the court refused to recognize the superintendent of the road as a fellow servant of a track repairer, who was run over and injured through the negligence of the former in sending out a train out of schedule time.

In *Missouri, K. & T. R. Co. v. Hogan*, 88 Tex. 679, 32 S. W. 1035, it was held that a train despatcher is not a fellow servant of an employee injured in a collision caused by the train despatcher's negligence.

A railroad company is liable for the negligence of its division superintendent, who, having charge of all trains, issued an order which resulted in a collision and the death of the plaintiff's intestate. *Galveston, H. & S. A. R. Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

And in *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475, 25 N. W. 544, the train despatcher was held not to be a fellow servant with the brakeman on a freight train, who was killed in a collision.

The rule in the Federal courts.

In determining who are fellow servants, the Federal courts are not, in the absence of a state statute determining such question, concluded by the decisions of the state court of the state in which the action arose, as the question is one of general law to be determined by reference to all the authorities, and a consideration of the principles underlying the relations of master and servant. The independence of the Federal courts in dealing with this question was settled in

the workmen are engaged shall be kept safe (Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764), and, if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault. Nord Deutscher Lloyd S. S. Co. v. Ingebrechtsen, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619. The master is held liable in a proper case because the negligence is regarded by the law as his negligence. Where the negligence consists merely in the failure of the agent to perform a duty properly intrusted to him by the master, the master cannot be held liable by virtue of the rule *respondeat superior*, where the application of that rule is prevented

by the well-established exception which exempts the master from liability to a servant for injuries resulting from the negligence of a fellow servant. In applying the general principles to the fact of a particular case, it often becomes difficult to determine whether the negligence in question is to be regarded as the negligence of the master or of the servant alone; and various tests to determine this question have been suggested. In this state we have rejected the theory which holds the master liable merely because the negligent servant is in charge of a separate department, or is superior in rank to the one injured. Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 58 L.R.A. 808, 52 Atl. 565. In Baltimore & O. R. Co. v.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

The Federal Supreme Court passed upon the question in Santa Fé Pacific R. Co. v. Holmes, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676, Affirming 68 C. C. A. 634, 136 Fed. 66, and held that a train despatcher is not a fellow servant of the train employees. Prior to this decision the question had been disposed of by several decisions in the Federal courts, all of which reached the same result.

In Baltimore & O. R. Co. v. Camp, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952, the question was passed upon by the circuit court of appeals in the sixth circuit and the train despatcher held not to be a fellow servant. Judge Taft, writing the opinion, said the evidence showed that the train despatcher whose negligence caused the collision had complete control for eight hours of the movement of all trains. He sent his despatches in the name of, and in the stead of, the superintendent, who was absent from the office, and he was "therefore at the head of the division for the operation of trains." While this case involved the Ohio statute declaring that every person in the employ of a railroad company "actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior, of such other employee; also that every person in the employ of such company, having charge or control of employees in any separate branch or department, shall be held to be the superior, and not fellow servant, of employees in any other branch or department,"—the court stated: "We do not doubt that a train despatcher is a representative of the company, within the rule of the common law, as expounded by the Supreme Court of the United States. . . . He represents the company for two reasons: First, because he is *pro tempore* in supreme control of a distinct department of the railroad, namely, the running department of the company for his division; and, second, (because the work which he is called upon to do is in the discharge of a positive duty owed by the company to its employees." L.R.A. (N.S.)

After its decision in the Camp Case, the circuit court of appeals for the sixth circuit again passed upon the question in Felton v. Harbeson, 44 C. C. A. 188, 104 Fed. 737, and reached the same conclusion. In this case no statutory question was involved, and the decision was squarely on the common law, and the court contented itself with the mere statement of its holding, and cited its prior decision as an authority.

The question was next passed upon by District Judge Newman, in the northern district of Georgia, in Clyde v. Richmond & D. R. Co. 69 Fed. 673, who reached the same conclusion as that arrived at in the Camp Case, which he cited. Here the train despatcher was in complete control of the trains, and knew their location.

In the eighth circuit the court of appeals held, in Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 188, 102 Fed. 96, that the train despatcher is not a fellow servant of the trainmen, saying that this rule is now as firmly settled as any rule of law can be by judicial decisions. A railroad track is of no use to its owner or the public unless cars are run upon it. The railroad is built for that purpose. It is the movement of the trains upon the track that constitutes it a railroad. That is the consummation of the whole business. Trains will not move of their own volition. They have to be set in motion and kept moving by orders from some source. The conductors and engineers on the different trains have no authority over each other. They are required to obey orders for the movement of their trains, but can give none. The company itself can alone tell when and how its trains shall be run. That is its business, and, in the last analysis, its only business. . . . The *alter ego* of the company in directing the movement of its trains by telegraph is the train despatcher, and his orders are the orders of the company, and must be obeyed by all to whom they are addressed." In this case, Sanborn, Ch. J., dissented on the ground that "the train despatcher in this case, whose duty it was to direct the movement of trains on one of several divisions of this railroad, was, in my opinion, a fellow

Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, it was said that the question turns rather on the character of the act than on the relation of the employees to each other. This test had already been adopted in our supreme court (*Smith v. Oxford Iron Co.* 42 N. J. L. 467, 474, 36 Am. Rep. 535), where Justice Van Syckel said that the neglect to perform those duties which devolve upon the company should be regarded as the neglect of the company itself; and was adopted by this court in *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634. In *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, Justice Dixon said, with reference to the inspection and repair of apparatus, that a rational distinction would seem to be that when the

employee's duty to inspect and repair is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault; but that, if the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default. Both of these tests—the character of the act, and its incidental feature—are useful tests; but there is nothing in the cases cited to indicate that there may not be other tests also. The question to be determined is whether, under

servant of all his coworkers in the operating department of the plaintiff in error below its superintendent or general manager; and for that reason the railroad company was not liable for his negligence."

And in the ninth circuit it has been held by the circuit court of appeals that a train despatcher issuing orders for the movement of trains in the name of the superintendent is not a fellow servant. *Northern P. R. Co. v. Mix*, 57 C. C. A. 592, 121 Fed. 476.

Jurisdictions, holding train despatcher to be a fellow servant.

In *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L.R.A. 710, 47 Am. St. Rep. 392, 29 Atl. 994, a train despatcher was held to be a fellow servant of an engine man injured in a collision. That this decision is due to the peculiar condition of the Maryland decisions in extending the fellow-servant rule is shown by the fact that the court, after reviewing the Maryland decisions, in one of which it was held that the chief manager of the works, who hired and discharged the hands, kept their time, etc., was a fellow servant of a laborer (*Yates v. McCullough Iron Co.* 69 Md. 370, 16 Atl. 280), stated: "In the face of these decisions, it is impossible to treat Shull as anything more than a fellow servant. The management of the division upon which he was train despatcher was not committed to him. He was a subordinate appointed by the superintendent, and, though he had charge of the trainmen and of the movement of trains on his division, and could employ and discharge flagmen and brakemen, it is far from being shown that the master had relinquished all supervision of the work on that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. . . . They were both engaged in the same common work, employed by the same agent of the common master, and were performing duties pertaining to the same general business; and unless the whole current of the Maryland decisions is to be reversed, they

were fellow servants of the railroad company, upon the evidence now before us."

In *Millsaps v. Louisville, N. O. & T. R. Co.* 69 Miss. 423, 13 So. 696, the court held, without discussing the question, that the train despatcher is the fellow servant of the fireman killed by a collision through the train despatcher's negligence. The train despatcher was charged with the duty of directing the movement of trains. The court passed upon the point with the mere statement that "the train despatcher was the fellow servant of the intestate," and cited *Louisville, N. O. & T. R. Co. v. Petty*, 67 Miss. 255, 19 Am. St. Rep. 304, 7 So. 351, *Lagrone v. Mobile & O. R. Co.* 67 Miss. 592, 7 So. 432, and *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258. None of the cases involved the negligence of the train despatcher. In the *Hughes Case* the plaintiff was injured by the rotten condition of the cross-ties which threw his locomotive from the track, and it was the duty of the section boss and road master to keep the track in reasonable repair. In the *Petty Case*, a brakeman was injured by the sudden jerking of the engine while going down grade, due to the fact that the sand box had not been supplied with sand by the hostler. Here the court showed its intention to give a broad scope to the fellow-servant doctrine by the use of the following language: "The rule on this subject . . . has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this state; and we must not be expected to follow the devious ways of those courts which, in bending the rule which all acknowledge, to effect their ideas of justice, in particular cases, have well-nigh destroyed the rule itself. This rule, as held in this state, and in several other states of the United States, and in England, is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties." In the *Lagrone Case* a section master was held to be a fellow servant of

all the circumstances of the particular case, the servant is to be regarded as the *alter ego* of the master. It may be that the master has intrusted him with such control over the general conduct of the business that he must be regarded as standing in the master's shoes. This is especially likely to be the case with a corporation, which can act only through agents, as was suggested in *Smith v. Oxford Iron Co.* supra, and in *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 Atl. 324. In such cases the liability of the master depends upon whether he has intrusted the servant with such control as is properly the business of the master.

We think the facts in the present case necessitate an inference that the train de-

spatcher was the *alter ego* of the defendant. It will hardly be denied that the duty of a railroad company to take care that the place in which its employees are to work shall be reasonably safe required the company to prepare a schedule or time-table for the running of its trains. Such a schedule is absolutely essential in order that the system adopted by the company for the conduct of its business may be reasonably safe. When that schedule breaks down, it may be under such circumstances that a new schedule to meet the emergency can be made by the train hands themselves; as, for instance, when a train is delayed and the engineer makes up time by running faster than his ordinary schedule. But when the railroad is a single track, and it becomes

a track repairer, and the court used language which plainly showed its intention not to qualify or limit the fellow-servant rule, as has been done in most states. In speaking along this line, the court said: That the question under discussion is "in apparent incertitude, owing to conflicting opinions entertained by many courts of last resort in the United States, is certainly and lamentably true. But we think it may be confidently affirmed that this incertitude arises not from any disagreement as to the reason and right of the general rule, . . . but from a vacillating spirit which has striven to bend the rule to its application to the exigencies of particular cases."

Application of superior-servant doctrine.

The value of the decision in the *RICKER CASE* is increased by the fact that, in addition to determining the concrete question involved, the court discusses and passes upon its underlying principles. Counsel for the defense contended that in those states where the doctrine of responsibility of railroad companies for the negligence of their train dispatchers is upheld, the "superior-servant rule" obtains, and that, inasmuch as such rule does not obtain in New Jersey, railroad companies there could not be held liable for the negligence of their train dispatchers. This compelled the court to determine whether the recognition of the superior servant rule" is essential to the establishment of the liability of the railroad company; and, upon this subject, the court held that it is the nature of the peculiar duties of the train dispatcher that fixes his status, and not the superiority of his rank, and that, consequently, he represents the company, and is a vice principal, without regard to the existence or nonexistence of the "superior-servant rule."

This position of the court is strengthened by an examination of the above presentation of the authorities, which shows that not only has a train dispatcher been held to be a vice principal in many jurisdictions where the superior-servant doctrine does not prevail, but that, where the courts have discussed the grounds of their

decisions, they have, as in the *RICKER CASE*, quite uniformly based their holding upon the nature of the train dispatcher's duties, and ignored the superior-servant doctrine. Aside from the cases which have ignored the superior-servant doctrine, in holding the train dispatcher to be a vice principal, the *RICKER CASE* finds direct support in *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 57 Atl. 913, where the court said: "These decisions [upholding the vice-principalship doctrine] are generally put on the ground that the duty which the train dispatcher performs is the master's duty, not on the ground of the superiority of the dispatcher's rank or grade of service, or other doctrine peculiar to the jurisdiction and not recognized in this state."

However, it must be noted that some of the decisions are either silent as to the basis on which they rest, or are based upon the narrow ground of the superior-servant doctrine. See *Palmer v. Utah & N. R. Co.* 2 Idaho, 315, 13 Pac. 425, where the decision was based upon the ground that the train dispatcher, or station agent as he was called, was invested with a controlling or superior duty in the management of the railroad; and it is questionable whether the duties which he performed were such as would bring him within the rule as recognized in those jurisdictions where the nature of the train dispatcher's duties is the controlling element. This suggests the importance of determining the ground on which the decisions of a particular jurisdiction rest, as it affects the limits of the rule. As appears in the next subhead, the jurisdictions in which the superior-servant doctrine does not obtain hold the train dispatcher to be a vice principal only when he is performing acts relating to the peculiar duties of his position.

Liability dependent upon nature of negligent act of so-called train dispatcher.

The case of *McHugh v. Manhattan R. Co.* 179 N. Y. 378, 72 N. E. 312, was tried on the theory that the duties of the train dispatcher, involved in that case, were not

necessary for the company to require information to be given to a central authority, who is empowered to direct the movements of all trains, his orders for that purpose amount to a new emergency schedule. We agree with the court of appeals in New York that the preparation of that schedule is a positive duty of the master. *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466. The work is not merely incidental, as was the duty of the brakeman to signal the oncoming train in *Miller v. Central R. Co.* 69 N. J. L. 413, 55 Atl. 245. What chiefly distinguishes the train despatcher's work in the present case is that by the company's rule it was made his duty to issue telegraphic orders for the move-

ments of trains in the name of the superintendent, and to see that they were transmitted and recorded in the manner prescribed. This duty in the present case required him to issue orders to three different trains miles apart, and might sometimes require orders to many trains scattered along the company's whole line. Such work as that pertains to the master, the natural directing head. The train despatcher is not merely a superior servant, like the foreman of a gang of workmen. It is to be conceded, as we think it must be, that the duty to prepare a time-table is the company's duty. The duty is not discharged by preparing a time-table once for all, accompanied by rules regulating variations therefrom. The duty to exercise reasonable care is continu-

such as would bring the case within the New York rule making a train despatcher a vice principal; and the opinion of the court of appeals contains language to the same effect. The action was brought under the employer's liability act on the theory that the train despatcher was "acting as superintendent," within the meaning of that act; and it was nowhere contended that he was a vice principal. In fact, the court, in its opinion, said: "It may be conceded that, apart from the provisions of the employer's liability act the defendant would not have been liable to its employees for the negligence" of Coleman, the train despatcher. The facts of this case show that the defendant was a New York city elevated railroad company, and that the train despatcher had charge of the Rector-street yard, and that the injury complained of was due to his negligence in starting the train before the decedent, who was engaged in coupling a car to the train, had reached a place of safety. It does not appear that he had anything to do with making up the train schedules, or had any control over the trains other than to signal them when it was time for them to leave the Rector-street station. While there is nothing in this case to militate against the general rule adhered to in New York, it is of value as showing the limits of the rule, and that it is dependent upon the nature of the acts of the employee, rather than upon his title of train despatcher.

That the rule will not be applied where the negligent servant, while called a train despatcher, was not at the time performing the essential duties of that office, is suggested by the decision in *Jackson v. Missouri P. R. Co.* 104 Mo. 448, 16 S. W. 413, where one of the grounds upon which the court defeated the plaintiff was, to use its own language: "It does not appear what the duties of this so-called train despatcher were. So far as we can see, he was nothing more than a station agent." In this case the injuries complained of were not due to a collision, but were suffered by the decedent while attempting to couple cars

loaded with timber and iron rails which projected over the ends of the cars.

In *Goodman v. Delaware & H. Canal Co.* 167 Pa. 332, 31 Atl. 670, the court affirmed a judgment for the plaintiff, and held, against the defendant's objection, to the following instruction relating to the defendant's liability for the acts of the train master: "The evidence, as I remember it in this case, leaves it as a question of fact for you whether he was. If he was merely directing the movements of a train which was upon schedule time, he might be acting in the capacity of a conductor; and therefore, in that case, would be a coemployee, and the company would not be responsible for his act in that position, or his acts done in that capacity. But if, in putting the train upon the track in that place, he was assuming the duties of his office of train master of putting a train, an irregular train, upon the track, not upon schedule time, . . . then he was exercising the duties of his office as train master, and his acts were the acts of the company."

In *Palmer v. Utah & N. R. Co.* supra, where the decision was based upon the superior-servant doctrine, the court allowed a recovery where the negligent employee was a station agent exercising duties which were admitted to be the same as those of a train despatcher; but the negligence complained of consisted of failure to notify the conductor of the train on which the decedent was riding of the existence of a broken rail.

While the Missouri rule makes the train despatcher a vice principal (*Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 1 Am. St. Rep. 729, 4 S. W. 129), the court refused to apply the rule in *Jackson v. Missouri P. R. Co.* supra, on the ground that "it does not appear what the duties of this so-called train despatcher were."

Train despatcher acting in name of superintendent.

The fact that the train despatcher acted for and issued his orders in the name of

ous, and the need of a time-table to direct the movement of trains is constant. Upon the question whether this duty is a positive one resting on the master, we can see no distinction between this case and the case of *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L.R.A. 302, 52 Atl. 634. It is quite as much the master's duty to keep the time-table up to date as to keep the roadbed in repair. Both are equally essential to the servant's safety. The courts of fourteen of our sister states, and the Federal courts, including courts which rest the liability of the master upon the same ground as our own cases, have reached the same result. The cases have been recently diligently collected by Mr. Justice Chase, of New Hampshire, in *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 57 Atl. 913. It would serve no useful purpose to repeat the citations. To them may be added the recent case of *Santa Fé Pacific R. Co. v. Holmes*, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676. The courts of Maryland and Mississippi seem to stand alone in the other view, and their reasoning does not command itself to us. We do not rest our view upon the fact that the train despatcher is superior in rank to the fireman of a locomotive. We can conceive of cases where the company would not be responsible for his negligence. Perhaps *Reiser v. Pennsylvania Co.* 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175, may be regarded as such a case. There it was held that the knowledge of the train despatcher that a station agent and telegraph operator, whose negligence caused the accident, was incompetent, did not make the company liable. We rest the defendant's liability in this case upon the character of the work of the train despatcher in regulating the movement of trains.

In order to determine whether there was sufficient evidence to justify a submission of the case to the jury, a rather full statement of the facts proved is necessary. Three trains are involved. No. 30 and No. 52 were south-bound trains, and by the rules

of the company had the right of way. No. 31 was a north-bound train. According to the time-table, No. 52 should have reached the terminus at High Bridge at 9:40 A. M., ten minutes before the departure of No. 31, and No. 30 and No. 31 should have met at Hoffman's, 3.9 miles north of High Bridge. On the morning of the collision No. 52 was detained and considerably behind time. At 9:43 A. M., three minutes after No. 52 was due at High Bridge, the train despatcher issued an order directing 52 and 31 to meet at Hoffman's. This order reached the telegraph operator at Califon, 1½ miles north of Hoffman's, and he put out a signal to stop the south-bound train. In the meantime, No. 30 had passed No. 52, which was on a switch at Vernoy a little more than a mile north of Califon. By the rules of the company a train overtaking another train of the same or superior class, disabled so that it cannot move, will run around it, assuming the rights and taking the orders of the disabled train to the next telegraph office which is open, where it will report to the superintendent. The next telegraph office after No. 30 had passed No. 52 was Califon. At that point train No. 30 offered to stop, but the station agent and telegraph operator signaled to go ahead, and gave the train conductor a clearance card, which reads as follows: "I have no orders for your train. Signal is out for 52." It was then about 10:20 A. M. No. 30 was due at Califon at 10:01, and, being a south-bound train, had the right of way. At 9:43 the conductor of No. 31, then waiting at High Bridge, received the order directing him to meet No. 52 at Hoffman's. At that time, according to the time-table No. 30 should have been fifteen minutes north of Vernoy. The conductor of No. 31 asked the train despatcher if No. 30 was ahead of No. 52 and was assured that it was not. When No. 31 was ready to leave High Bridge, the conductor saw the order board red, which meant there were orders for him, and he started to the office to see what the trouble

the superintendent does not affect his relation as a vice principal.

Thus, in *Lasky v. Canadian Pacific R. Co.* 83 Me. 461, 22 Atl. 367, the train despatcher used the name of the superintendent in issuing orders during the latter's absence, and the court, in holding the train despatcher to be a vice principal in so doing, said: "It appears that it was customary for the train despatcher thus to use the superintendent's name, and that the practice was acquiesced in by the superintendent and other officials connected with the road. An act done for the superintendent by his authority, either general or special, is his act."

And in *Wallace v. Boston & M. R. Co.* 72 L.R.A. (N.S.)

N. H. 504, 57 Atl. 913, the train despatcher, in giving the orders involved, acted by the authority and in the name of the superintendent.

And in *Northern P. R. Co. v. Mix*, 57 C. C. A. 592, 121 Fed. 476; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; and *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988,—the train despatcher issued his orders in the name of the superintendent.

The assistant superintendent, to whose orders the trains are all subject, is a representative of the corporation; and this rule applies to all orders issued by his assistants in his name. *Chicago, B. & Q. R. Co. v. McAllen*, 84 Ill. 109.

was, but as he got in sight of the office the yard master and the train despatcher both gave him the regular hand signal, the regular day signal, to go ahead, and he started with his train at 10:15 or 10:16. The road was a single track, and the result was a head-on collision 1 mile south of Califon at 10:28. The train despatcher had been inquiring about No. 52 of the telegraph operator at Califon for half or three quarters of an hour prior to the arrival of No. 30 at Califon, but is not shown to have made any inquiry as to No. 30. Under these circumstances, we think it was a question for the jury whether the train despatcher was negligent in allowing the time from 9:43 to 10:15 to elapse without any further orders, although he must be presumed to know from the time-table that No. 30 was due at Hoffman's at 10:10, five minutes before he ordered No. 31 out of High Bridge, and might have passed No. 52, which was then at least fifty minutes behind time, for it was due at Califon at 9:25. It is true the witnesses testified that No. 30 had no right to pass No. 52 at Vernoy, but they also said it frequently did pass. No. 30 was due at Califon at 10:01. We think it was a question for the jury whether the care necessary in directing the movements of trains upon a single-track road did not require new orders. The order of 9:43 A. M. was adapted to the conditions existing at the time, but not to the condition thirty-two minutes later. At the time No. 31 was ordered out of High Bridge it did not have full schedule time to make the meeting point at Hoffman's, and could not leave without special orders. The fact that a special order was necessary would naturally suggest to the train despatcher that the operator at Califon be notified that such order had been given to No. 31. To make a special order accomplish its purpose, it seems reasonable that it should be communicated to all trains likely to be affected, and not to one alone. Such was the course adopted with the order of 9:43 A. M. If the same course had been adopted with the order given No. 31 at 10:15 the accident might have been averted, for four or five minutes elapsed before No. 30 left Califon, a time long enough to enable notice to be sent to the operator at Califon. We think it was also a fair question whether the train despatcher was not negligent in ordering No. 31 to leave High Bridge at a time when No. 30, by the time-table, ought to have passed Hoffman's without making inquiry as to the whereabouts of No. 30,—especially as No. 30 had the right of way. It may be said that the operator at Califon ought to have known that the order as to No. 52 was applicable to No. 30, since the 7 L.R.A. (N.S.)

latter had passed No. 52, and ought to have reported No. 30's arrival before giving the clearance card. We incline to think he ought to have done so. It may also be said that the conductor of No. 30, before acting upon the clearance card, should have waited for the operator at Califon to report his arrival and receive further orders, although it is to be said in his defense that he may well have thought that such a report had been made, for his train could be seen for 300 or 400 yards before it reached Califon, and was running so slowly that the operator had time to make the clearance card after he saw the train coming. But, even if the operator at Califon and the conductor of No. 30 were negligent, the question would still remain whether, under all the circumstances of the case, the train despatcher exercised reasonable care in depending upon their accepting an order issued for No. 52, thirty-two minutes before, as an order still obligatory on No. 30. Ought it not to have occurred to him that they might possibly think, as they probably did think, that the order to No. 52 did not apply to No. 30, and that No. 31 would be held at High Bridge until No. 30 reached that point, especially as the train despatcher up to 10:15 is not shown to have made any inquiry as to No. 30, although her regular time for leaving Califon had passed? If the accident was caused by the negligence of the operator at Califon and of the conductor of train No. 30 co-operating with the negligence of the train despatcher, the defendant is nevertheless liable. *Cole v. Warren Mfg. Co.* 63 N. J. L. 626, 44 Atl. 647; *Flanigan v. Guggenheim Smelting Co.* 63 N. J. L. 647, 44 Atl. 762; *Campbell v. T. A. Gillespie Co.* 69 N. J. L. 279, 55 Atl. 276.

We find no error, and the judgment must be affirmed.

Gummere, Ch. J., and Garrison, Hendrickson, Pitney, Reed, Gray, and Dill, JJ., dissent.

PENNSYLVANIA SUPREME COURT.

JOSEPH C. COOKE

v.

WILLIAM E. DORON, Plff. in Err.

(215 Pa. 393, 64 Atl. 595.)

Curtesy—alien.

1. An alien husband may take an estate by the curtesy in land of which his wife died seised, under a statute providing

Case Note.—Right of alien to take estate by curtesy under enabling statutes:—The authorities are in complete harmony in holding that, in the absence of any enabling statute, an alien cannot take prop-

that aliens shall be capable of taking by descent lands within the state, in the same manner as citizens may do.

Same—title by purchase.

2. If an estate by the curtesy is an estate by purchase, it is covered by a provision of a statute permitting aliens to purchase and hold real estate.

(May 24, 1906.)

ERROR to the Court of Common Pleas for Bucks County to review a judgment in favor of plaintiff in a proceeding to establish an interest in certain real estate as tenant by the curtesy. **Affirmed.**

Elwood Doron died seised of certain real estate, leaving two children, William E. Doron and Catherine H. Doron, as tenants in common in fee. Catherine H. married Joseph C. Cooke, a nonresident alien. Upon the death of his wife he asserted an interest by the curtesy in her share of the estate of Elwood Doron, which was denied by her brother, and he brought this action to enforce his claim.

Further facts appear in the opinion.

Messrs. Howard I. James and Alexander Simpson, Jr., for appellant:

At common law an alien could not become tenant by the curtesy.

Rubeck v. Gardner, 7 Watts, 455; Reese v. Waters, 4 Watts & S. 145; Jackson v. Burns, 3 Binn. 75; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603; 2 Am. & Eng. Enc. Law, 2d ed. p. 70; 1 Washb. Real Prop. 189; 1 Kerr, Real Prop. ¶¶ 813, 834.

A tenancy by the curtesy is neither by descent, devise, nor purchase, but by operation of law.

Whichcote v. Lyle, 28 Pa. 74; Reese v. Waters, *supra*; Shippen v. Izard, 1 Serg. & R. 222; Ro Bards v. Murphy, 64 Mo. App. 90; Crow v. Kightlinger, 25 Pa. 343; Lan-

erty by act or operation of law, as by descent, by curtesy, etc.; for the law, since it will be deemed to do nothing in vain, will not cast the descent upon one who cannot by law hold an estate. But the common-law doctrine as to the property rights of aliens has been greatly modified by statute, and in many of the states and territories resident aliens are placed practically upon the same footing as natural-born citizens, with reference to their rights to acquire, hold, and transmit real and personal property.

The only case, except COOKE v. DORON and the case of Reese v. Waters, 4 Watts & S. 145, referred to therein, which a search has discovered, dealing with the right of an alien to take an estate by curtesy under statutes removing his common-law disabilities, is Lumb v. Jenkins, 100 Mass. 527, in which the court held that a Massachusetts 7 L.R.A. (N.S.)

caster County Bank v. Stauffer, 10 Pa. 398; Harris v. York Mut. Ins. Co. 50 Pa. 341; Clarke's Appeal, 79 Pa. 376; Rouse v. McKean County Poor District, 169 Pa. 116, 32 Atl. 541; Shortall v. Hinckley, 31 Ill. 219; Rose v. Sanderson, 38 Ill. 247; Jacobs v. Rice, 33 Ill. 369; Fitzgerald v. Brennan, 57 Conn. 511, 18 Atl. 743; Sill v. White, 62 Conn. 430, 20 L.R.A. 321, 26 Atl. 396; Melvin v. Locks & Canals, 16 Pick. 140; Foster v. Marshall, 22 N. H. 491.

Messrs. Ruby R. Vale, Hugh B. Eastburn, and Alexander & Magill, for appellee:

Pennsylvania, both under the proprietary government and since her independence, has held out encouragement to aliens unknown to the principles of the common law.

Stewart v. Foster, 2 Binn. 110; Rubeck v. Gardner, 7 Watts, 455; Com. ex rel. Dickinson v. Detwiller, 131 Pa. 614, 7 L.R.A. 357, 18 Atl. 990, 992; Ondis v. Banta, 7 Kulp, 390.

Upon the question of the right to curtesy reference is made to Whichcote v. Lyle, 28 Pa. 73; Emmett v. Emmett, 14 Lea, 369.

There are two modes only of acquiring title to land, *viz.*, descent and purchase.

3 Washb. Real Prop. pp. 4, 290.

Title to an estate as tenant by the curtesy must then fall under either one of these classes.

Co. Litt. § 12; 18b, note 106, 191a, note 77, § 5; 2 Bl. Com. 201; Wms. Real Prop. 97; Tiedeman, Real Prop. 619.

The estate of tenant by the curtesy cannot be classed under the head of purchase, even in its largest common-law acceptation.

Co. Litt. § 12; Reniger v. Fogossa, 1 Plowd. 11; 1 Bl. Com. bk. 2, 201; 4 Kent, Com. p. 440; 2 Pingrey, Real Prop. § 1127, p. 1168.

Title by descent or hereditary succession is a title acquired by act or operation of law, as contradistinguished from title by

statute providing that aliens may take, hold, transmit, and convey real estate was enacted to change the law as stated in Foss v. Crisp, 20 Pick. 121, in which it was held that an alien husband could not take an estate by curtesy, although, previous to the death of the wife, he had declared his intention to become a citizen, and was subsequently naturalized.

As to an alien's right to inherit, generally, see note in 31 L.R.A. 177.

As to the effect of treaties upon an alien's right to inherit, see note in 32 L.R.A. 177.

As to the effect of state constitutions and statutes upon the question of inheritance by or from an alien, see note in 31 L.R.A. 85.

As to the effect of state statutes and constitutions upon inheritance through an alien, see exhaustive note in 31 L.R.A. 146.

purchase, or by the act or agreement of the parties.

1 Boone, Real Prop. § 262.

An estate by the curtesy is by descent.

Watkins, Descents (1793) p. 81; Chitty, Descents (1825) p. 306; 1 Bl. Com. bk. 2, p. 127; 1 Tiffany, Real Prop. § 211, p. 501; 2 Boone, Real Prop. § 44; Tiedeman, Real Prop. § 101, p. 72; 8 Am. & Eng. Enc. Law, 2d ed. p. 517; Watson v. Watson, 13 Conn. 83; Witham v. Perkins, 2 Me. 400; Reed ex dem. Burchell v. Brown, 7 N. B. 168; 4 Kent, Com. p. 374; 1 Kerr, Real Prop. § 765, p. 627; Pemberton v. Hicks, 1 Binn. 1; Fallon, Conveyancing in Pennsylvania, p. 555; Summer v. Partridge, 2 Atk. 47.

Elkin, J., delivered the opinion of the court:

The question raised by this appeal is whether an alien husband is entitled as tenant by the curtesy to the real estate, or the interest therein, of which his wife died seised. At common law an alien cannot be tenant by the curtesy in this state. This rule is not questioned, and cannot be under the authority of our cases. Jackson v. Burns, 3 Binn. 75; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Rubeck v. Gardner, 7 Watts, 455; Reese v. Waters, 4 Watts & S. 145. The burden is therefore on an alien husband to point to the act or acts of assembly giving him the right to take such an estate in order to support his claim thereto. There are a number of statutes relating to the rights of aliens, but the act of February 23, 1791 (3 Smith's Laws, p. 4), is mainly relied on by the court below, and by the appellee here. It provides "that alien citizens shall be capable of acquiring or taking by devise or descent lands and other real property within this commonwealth in the same manner as citizens of this state may or can do."

The language of this act would seem to be broad enough to include a tenancy by the curtesy, but it is contended with much force that it has not been so construed, and that a different construction must have been placed upon it in Reese v. Waters, supra. It is true it was decided in that case that an alien husband acquired no title in his wife's real estate of inheritance as tenant by the curtesy initiate. It was there contended that the act of 1818, which allowed aliens to purchase real property subject to a limitation as to quantity, gave an alien husband the right to take as tenant by the curtesy. In the decision of that case it was held that the act of 1818 did not include such an estate because it was doubted whether the verb "to purchase" as used in the act could be considered equivalent to or synonymous with

the words "to take by purchase." That case seems to have been ruled on this ground alone. The act of 1791 was not mentioned, and, so far as the record shows, was not considered. Whether it was deemed obsolete, not applicable, or immaterial, under the facts of that case, we have no means of ascertaining. It could scarcely have been regarded as obsolete because in Rubeck v. Gardner, 7 Watts, 455, decided in 1838, four years before Reese v. Waters, it was recognized as in force, but held inapplicable to the facts of that case on the ground that the heir or devisee of an alien could not take and enjoy a greater and more entire estate than the alien ancestor himself had. It is therefore a fair inference that the act of 1791 was either overlooked or considered inapplicable under the particular facts upon which the case of Reese v. Waters was decided. The fact is, however, that in no reported case has the word "descent," found in the act of 1791, been construed by this court as applied to a tenant by the curtesy. This act has not been repealed in express terms, nor by necessary implication, and does not contain any limitation as to time. It must therefore be considered in force and effect.

Counsel for appellant concedes this position, but contends that the word "descent" as used therein does not technically include a tenancy by the curtesy. In answer to this position, it may be said that all modes of acquiring title to real property may be reducible to title by descent and title by purchase. The first includes title by act or operation of law, the second title by act or agreement of the parties. 4 Kent, Com. p. 446; Pingrey, Real Prop. pp. 116, 118; 1 Boone, Real Prop. § 262. It is no doubt true that some estates are difficult to classify under these general divisions of title. It may also be conceded that an estate by the curtesy is one of these. However, it is clear, on principle, that a tenancy by the curtesy is more in the nature of an estate by descent than by purchase. The great weight of authority is to this effect. Titles by curtesy and in dower, arising by operation of law upon the death of the wife or husband as the case may be, seem to fall properly under the head of title by descent. 4 Kent, Com. p. 374. It devolves upon him (the husband) as the estate of an ancestor does upon an heir. 1 Washb. Real Prop. p. 343. An estate by curtesy occurs by mere operation of law upon the death of the wife, and for that reason partakes more of the character of an estate acquired by descent than purchase. 1 Kerr, Real Prop. 627. He (the husband) takes it by operation of law as by descent. 1 Tiffany, Real Prop. p. 501. It is an estate by descent, and has therefore been held to

be subject to all the equities in respect to it as against his wife. Fallon, Conveyancing in Pennsylvania, p. 555. An estate by the curtesy consummate partakes more of the character of an estate acquired by descent than of one acquired by purchase. 8 Am. & Eng. Enc. Law, 2d ed, p. 517. These text writers are supported by some of our adjudicated cases. Mr. Justice Yeates, in *Pemberton v. Hicks*, 1 Binn. 1, said: "It is, however, settled that tenants by the curtesy and in dower come in by descent merely by act of law." To the same effect are the cases of other jurisdictions. *Watson v. Watson*, 13 Conn. 83; *Witham v. Perkins*, 2 Me. 400.

We have examined with care the able argument of counsel for appellant relating to this question, but have not been convinced that the word "descent" in the act of 1791 does not include an estate by the curtesy. We can see no reason why an estate which devolves upon the husband by operation of law at the death of his wife should not be regarded as taken by descent. The trend of our legislation has been to treat alien friends in these respects as citizens. The decision in *Reese v. Waters* was followed by the act of April 16, 1844 (P. L. 274); and, while we are not prepared to accept as final and conclusive the view of the court below, not without merit, that this act should be construed to be retrospective as to lands acquired by purchase and prospective as to lands taken by descent, it, however, does show that our legislature was blazing the way to the open-door policy in dealing with the right of aliens to acquire and hold real property. Our attention has not been called to any case decided by this court, nor have we been able to find any that expressly holds an estate by the curtesy is not one taken by descent. In *Com. ex rel. Dickinson v. Detwiller*, 131 Pa. 614, 7 L.R.A. 357, 360, 18 Atl. 990, 992, Mr. Justice Williams, in discussing the enabling statutes so far as they relate to aliens, said: "Even as to real estate, the distinction between a resident alien friend and a citizen has disappeared in Pennsylvania, and nearly every other state in the Union." The learned justice referred to the act of 1807, wherein it is provided generally that alien friends resident within our state may purchase lands, tenements, and hereditaments, and have and hold the same in fee simple or any lesser estate, as fully to all intents and purposes as the natural-born citizen may do. Counsel for appellant recognizes the force of the doctrine announced in that case, but insists that the general discussion relating to the right of aliens is *obiter dicta*. This may be conceded, but it is a judicial suggestion at least that courts

will not be astute in the application of refined distinctions in support of a public policy, once considered wise, but now disavowed and almost forgotten in the broader humanity manifested in the reciprocal relations of states and nations governed by the Anglo-Saxon race. *Cessante ratione, cessat ipsa lex*. The tendency of our legislation has been to enable aliens to take, hold, and purchase real estate and other property in the same manner as other citizens. This is clearly indicated by the act of May 1, 1861 (P. L. 433), which provides that "aliens may hereafter purchase and hold real estate in this state, not exceeding in quantity 5,000 acres, nor in net annual income \$20,000." The evident intention of this act was to enable aliens to purchase property within the limitations as to quantity and value named, and to hold property within the same limitations. The legislative meaning may be in doubt. It may be that the word "hold," as used in this act, only applies to property actually purchased. It is not necessary, however, to give it this restricted meaning, and we see no reason why it may not apply to any estate which an alien takes or holds from any source; that is to say, an estate by descent, by purchase, or in any other way, if, as contended, there is some other way to acquire title. The primary significance of the word "hold," as it relates to real property, is to enjoy and possess; and certainly an estate by the curtesy can be enjoyed and possessed by the tenant. If the word "descent," in the act of 1791, or the words "purchase" or "hold," in the act of 1861, include in either act an estate by the curtesy, the judgment of the court below must be affirmed. If it is an estate by descent, it is included in the act of 1791. If it is an estate by purchase, it is covered by the act of 1861. Then, again, if the word "hold," as used in the latter act, relates to any kind of title, as by descent, or purchase, or otherwise, the contention of appellant cannot prevail. In either view, the appellee is entitled as tenant by the curtesy to the enjoyment of the real estate of which his wife died seised. It requires a nicety of refinement, not convincing to the court, to hold that an estate by the curtesy does not come within the meaning of any of these provisions of our statutes. The common-law rule is harsh and unjust, without justification under existing governmental conditions, and manifestly at variance with the spirit of our institutions and the conscience of our people. Fortunately our statutes do not require its enforcement.

Judgment affirmed.

TENNESSEE SUPREME COURT.

STATE NATIONAL BANK, Appt.,
v.
CITY OF MEMPHIS.

(116 Tenn. 641, 94 S. W. 606.)

Tax—protest—agreement.

1. A city, when about to distrain for taxes, may make an agreement with the taxpayer that the payment is under protest, which may be carried out in any subsequent litigation to recover back the money paid.

Same—action to recover back—plaintiff.

2. A bank having a right, under the statute, to pay the taxes assessed on its stock, may maintain an action in its own

name to recover back money illegally exacted as taxes.

Same—state bonds—exemption.

3. There is no implied exemption of state bonds from taxation.

Same—unconstitutional exemption.

4. An act exempting from taxation of state bonds violates a constitutional provision that all property shall be taxed.

Statute—amendment—reference.

5. An act may be amended without specific reference to it, where it is itself an amendment of a former act into which, by its terms, it is incorporated, and to which reference is made.

Tax—board of equalization—ineligibility.

6. The objection that a member of a board of equalization was incompetent to

Case Note.—Implied exemption of state or municipal bonds: —There are few authorities upon the question whether or not state and municipal bonds are impliedly exempt from taxation. No decision can be found that, *in hæc verba*, holds with *STATE NATIONAL BANK v. MEMPHIS*, that there is no implied exemption of such bonds, though the court, in *Champaign County Bank v. Smith*, 7 Ohio St. 42, fully set forth in the opinion above, makes use of language that would seem to preclude any other inference. In that case the court expressly held "that the power of the state to tax them equally with other property, having never been expressly surrendered, exists in full force," under a constitutional provision that laws shall be passed taxing "all moneys, credits, investments in bonds, stock," etc.

There is, however, considerable negative authority for this principle. Thus, in *People v. Home Ins. Co.* 29 Cal. 533, it was held that state bonds were not exempt from taxation under an act providing that "all property of every kind and nature whatever within the state shall be subject to taxation," with certain exceptions, in which such bonds were not included. This act classified personal property, for the purposes of taxation, in part as follows: " Chattels of every description;" "all money, at interest or loaned, whether secured by pledges, mortgage, or otherwise; all solvent debts exceeding what may be due from" the party taxed; "all capital stock of all corporations, companies, associations, firms, or individuals doing business or having an office in this state;" and "all other property, not real estate, which is not otherwise taxed." The court felt no doubt that the bonds in question were property which could be referred to some one or more of these classes.

Some further authority for this proposition may also be found in *People ex rel. Manhattan F. Ins. Co. v. Tax & A. Comrs.* 76 N. Y. 64, where certain bonds issued by the state of New York were held to be subject to taxation under a general description of property according to value, as provided by a law applicable to the whole state; but 7 L.R.A. (N.S.)

it is to be noted that there was no contention in this case that the bonds were impliedly exempt. It is fair to infer, however, from the opinion of the court, that it would have considered such a contention of no moment.

So, too, in *Com. v. Maury*, 82 Va. 883, 1 S. E. 185, which upheld the constitutionality of a statute imposing a tax upon persons engaged in the business of selling coupons cut from state bonds, the court said, in reply to the contention that the state had no power to tax such coupons, that it made no difference that this power of taxation was not expressly reserved; "it need not be reserved; it exists always unless yielded up." This would seem to preclude the idea of implied exemptions.

And in *State, Freese, Prosecutor, v. Woodruff*, 37 N. J. L. 139, where it was held that bonds issued by a city under a special act to meet an unexpected contingency not provided for in the charter, without being exempted by the act, were not exempted by a clause in the charter providing that bonds authorized to be issued by the mayor and aldermen should be exempt from all taxes, the court said that clauses exempting from taxation were not favored in the law, and should always be strictly construed; and that the one in question was "entitled to no more force than the words plainly required."

On the other hand, the proposition enunciated by the Tennessee court in *STATE NATIONAL BANK v. MEMPHIS* does not seem to meet with the approval of the supreme court of Georgia, for in *Augusta v. Dunbar*, 50 Ga. 387, where the power of a city to tax state bonds was denied, the court thought the presumption very strong that the state had not, in the absence of express words so declaring, conferred on another taxing power the right to tax state securities, when to do so would be to confer a power upon a city, which the state should not be presumed to have reserved for itself, in the absence of a clear declaration of its intention.

So, in *Miller v. Wilson*, 60 Ga. 505, it was held that an act empowering and authorizing the governor and comptroller gen-

serve cannot be raised upon a collateral attack upon the assessment.

Same—revision—appeal.

7. An appeal is not necessary to enable a board of equalization to revise a tax assessment under a statute providing that the board was created for the purpose of revising the assessment when returned by the tax assessor.

(June 23, 1906.)

A PPEAL by complainant from a decree of the Chancery Court for Shelby County sustaining a demurrer to a bill filed to recover back money paid for taxes alleged to be illegal. Affirmed.

The facts are stated in the opinion.

Messrs. Carroll, McKellar, Bullington, & Biggs for appellant.

Messrs. Henry F. Walsh and Flippin & Neuhardt for appellee.

Mr. Charles T. Cates, Jr., Attorney General, for the State:

State bonds are not exempt from taxation.

eral to "assess and levy a tax upon the taxable property of the state" could not be construed to authorize a tax upon state bonds, in the absence of explicit language clearly expressing the will of the legislature to tax such bonds. The court was confirmed in this opinion by the fact that like words had been employed in former acts, and the executive department of the state had never construed them to embrace state bonds; nor was there any mention anywhere in the act of such bonds. The court said: "It is a grave question of public policy whether it should be done, conceding the power to do the thing to reside in the general assembly; and, when done, it should be done with much deliberation and in unmistakable language; and when the legislative mind, whose peculiar province it is to determine such a question of public interest, affecting, it may be, the public credit, shall have indicated it to be the policy of the state to tax her own securities, her pledges to pay so much principal at the expiration of a certain time to the holders of those securities with . . . interest."

And in *Macon v. Jones*, 67 Ga. 489, in which the last two cases were cited with approval, it was held that the grant of power in a city charter "to tax all property, real and personal, in the corporate limits of the city," would not be construed to include the taxing of its own bonds, in the absence of express authority for that purpose.

So, too, the Louisiana supreme court has explicitly affirmed that there is, of necessity, an implied exemption of state and municipal bonds from taxation, and has undoubtedly furnished the leading opinion upon that side of the question under consideration, in *State ex rel. Da Ponte v. Board of Assessors*, 35 La. Ann. 651, where the specific question decided was that the bonds

Exemptions from taxation are never allowed unless they are granted in clear and unmistakable words.

Re Turnpike Cases, 92 Tenn. 369, 22 S. W. 75; *Memphis v. Union & Planters' Bank*, 91 Tenn. 546, 19 S. W. 758; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 693, 53 L.R.A. 921, 43 S. W. 115; *Wilson v. Gaines*, 9 Baxt. 551; *Memphis & Q. R. Co. v. Gaines*, 3 Tenn. Ch. 611; *People ex rel. Bank of the Commonwealth v. Tax & A. Comrs.* 23 N. Y. 205; *Com. v. Maury*, 82 Va. 887, 1 S. E. 185.

Neill, J., delivered the opinion of the court:

In the general revenue act of 1903, chap. 258, p. 632, of the acts of that year, the following section appears, viz.:

"Sec. 25. That the shares of stock of stockholders of any bank or banking association, savings bank, or loan company, or insurance company, or investment company, or cemetery company, or company or incorporation (other than such as are defined and assess-

of the city of New Orleans were not subject to taxation by the state or by the city. The Constitutions of Louisiana for many years had provided that all property should be taxed, but gave the general assembly power to exempt certain specified kinds of property; and it had been repeatedly held by the supreme court of the state that this power of exemption was limited to the cases enumerated. Yet the court holds that such bonds were exempt from taxation. In this case great weight is placed upon the fact that this was the first time in the history of the state that an attempt had ever been made to subject municipal bonds to taxation; and that neither the legislative nor the executive department of the state had ever considered such bonds subjects of taxation, or had ever made any attempt to assess them for that purpose. The court thought that, if the assessors were permitted to list such bonds for taxation, it would be essentially a tax levied by the assessors, and not one levied by the legislative will or in pursuance of constitutional direction. To quote from the opinion: "Is it reasonable or possible to suppose that the framers of the Constitution of 1879, in directing 'all property' to be taxed, in terms exactly equivalent to those which had been used in two prior Constitutions, intended or expected that the language should have a broader meaning, or receive a different interpretation, from that which had been uniformly attached to like words in the latter? We think not. We are bound to assume that they knew that the legislative and executive departments of the state, under those precedent Constitutions, acting under their solemn oaths to obey them, had uniformly construed the mandate that 'all property shall be taxed' as not covering the public securities of the city and state; and

able under §§ 22 and 23 of this act), doing business in this state, whether domestic or foreign, shall be assessed and taxed for state, county, and municipal purposes as the personal property of the stockholders, whether they reside within or without the state of Tennessee: Provided, however, the assessment of such shares of stock as the property of the stockholders shall be in lieu of any assessment or taxation of the capital stock or corporate property of such corporation, company, or association. Shares of stock assessable under this section shall be assessed at not less than the actual cash value of the same, less the assessed value of realty and tangible property, which said actual cash value of shares of stock shall be computed by looking to and considering the market value, the actual value of shares of stock, and from any other evidence of the value of the same. Real estate and tangible personalty of any corporation, company, or association, defined in this section, shall be assessed to the same, in the same

mode and manner, and where situate, as other real estate and tangible personalty; but, in computing the assessable value of such shares of stock, the assessed value of the realty and tangible personalty and registered Tennessee state bonds owned for a period of not less than six months prior to the 10th day of January preceding, shall be deducted from the value of the shares of stock, and the remaining value constitute the value upon which the assessment shall be made. Assessments of shares of stock under this section shall be made at the place, ward, or district of the town or county in which the corporation, association, or company is located. . . ."

In obedience to the direction contained in the following language of the foregoing section, viz., "but, in computing the assessable value of such shares of stock, the assessed value of . . . registered Tennessee state bonds owned for a period of not less than six months prior to the 10th day of January preceding, shall be deducted from the value

had always exempted them from taxation. Nor can we avoid the conclusion that, had they intended their own like command to subject such securities to taxation, they would have expressed such intention in special and unequivocal terms. It is obvious that no proposition could have been submitted to the convention which would have excited deeper agitation, or would have been more novel, momentous, and startling, than an open proposal to tax such securities. Yet we are asked to believe that, without in the slightest degree awakening public attention, and without a word of discussion, the convention has adopted such a measure under the equivocal guise of general provisions touching taxation, repeated substantially in the language of prior Constitutions under which they had never borne any such import. The demand is equally repugnant to common sense and to sound principles of interpretation." And Cooley on Taxation was quoted to the effect that "some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the legislature in adopting them. . . . It is always to be assumed that the general language of statutes is made use of with reference to taxable subjects. . . . The property of municipalities is not in any proper sense taxable. It is therefore, by clear implication, excluded. It is not, like government agencies, excluded from the power of tax laws, but it is beyond the grasp of their intent." The court further went on to say: "At all events, we do not hesitate to declare that our conviction that state and municipal bonds were not within the grasp of the legislative intent, in the general provisions of the laws relative to the taxation of prop-

erty, is quite as fixed and certain as if they had been expressly excepted. . . . A bond of the city of New Orleans is negotiable, and imports consideration. It represents no intrinsic value except the consideration which passed to the city upon her promise to return a stipulated equivalent. When the value of that consideration passed from private ownership into that of the city, it ceased to be private and became public property; and, therefore, nontaxable. When the city shall return this value or its stipulated equivalent to private ownership, by payment of her bond, it will become again private and taxable property; but for the city to retain the value and at the same time to tax it through the holder of her bond is certainly shocking to justice and common sense. The same remark is equally applicable to the state, whose creature and agent the city is, and under whose authority and direction the bond was created and issued. . . . Taxation, thus doubtful in power, indefensible in morals, wanting in explicit legislative sanction, irrational in policy, and barren of results, because incapable of practical enforcement, needs a stronger title to judicial recognition than mere quibbling on the literal meaning of words which, by long use and interpretation, have acquired in their present connection a restricted import exclusive of that now sought to be attached to them by mere executive officers of the state."

And the principles of the foregoing case were approved and applied in *State ex rel. Louisiana Improv. Co. v. Board of Assessors*, 111 La. 982, 36 So. 91, where certificates issued to the relator by a city for contract work done for the city were held not to be subject to taxation by the city.

of the shares of stock, and the remaining value constitute the value upon which the assessment shall be made," the tax assessor for the city of Memphis deducted \$250,000 as representing the value of such bonds, from the assessment of the shares of stock in the complainant bank; but the board of equalization corrected this action of the assessor by disregarding this deduction, and raising the assessment accordingly.

Thereupon, an agreement was entered into between the city and the bank whereby the latter was permitted to pay the taxes (\$6,840.84) on the shares under protest. This agreement recites that a distress warrant was about to issue, and the taxes were paid in view of that fact; and the city agreed that it would not insist that such payment was voluntary.

The tax rate was fixed at \$2.15 for the year covered by assessment in the ward in which complainant bank resides, and the present bill was filed to recover so much of the tax as was paid upon the state bonds.

Upon the allegations of the bill, the two principal questions raised by demurrer in the court below and debated here are the following:

On behalf of the complainant, it is insisted that state bonds are inherently exempt or nontaxable, on the theory that the state would not have the right to tax its own obligations in the hands of its creditors. But, aside from this contention, it is insisted by the complainant that the clause referred to does not create an exemption but only regulates the assessment of the property of banks.

On behalf of the defendant, it is insisted that the clause of the act directing a deduction of the amount of state bonds held for six months preceding the assessment was merely an attempt to create an exemption of this class of property, and was therefore unconstitutional and void.

Before considering either of these questions, it is deemed necessary to dispose of two preliminary questions. The first of these is that the money was paid voluntarily, and cannot therefore be recovered. We think this point is covered by the case of *Bright v. Halloman*, 7 Lea, 309, 312. In that case, it was held that the tax book was process equivalent to an execution in the hands of the officer, and payment under protest entitled the party to sue for so much as was deemed illegal; that this was true, although the taxes involved were county taxes, and no special provision was made for the payment of this class of taxes under protest under the act of 1873, carried into Shannon's Code as § 1059. See also *Little Rock & M. R. Co. v. Williams*, 101 Tenn. 146, 148, 46 S. W. 448, and *Union & 7 L.R.A. (N.S.)*

Planters' Bank v. Memphis, 107 Tenn. 66, 68, 73, 74, 64 S. W. 13. It was also held in a prior case (*Lea v. Memphis*, 9 Baxt. 103) that, although taxes were voluntarily paid, yet, if they were illegal, the city might lawfully agree to refund them, and that her paper obligations therefor would be good. On the same principle, we are of opinion that the city, when about to distrain for taxes, may make an agreement with the party paying, that such payment is under protest; and it would do right to carry out the agreement in any subsequent litigation instituted concerning such payment. Agreements of this character save expensive and embarrassing injunction suits.

The next preliminary point is that the tax was the debt of the stockholders of the bank, and not of the bank itself; therefore that the suit could not be instituted by the bank, but only by the stockholders themselves. In respect to this point, we are of the opinion that, under a proper construction of § 25 of chapter 258 of page 652 of the acts of 1903, the bank itself might properly pay the taxes assessed against its stock in the hands of the stockholders. Indeed, it is probably its duty to do so; but we do not decide this point. We need not go into this matter at large. We refer to the last five paragraphs of the section. We are of opinion that, under the portions of the section last referred to, the bank would have the right, at least, to pay the taxes on the stock for its stockholders, and, if the payment was made under protest, it could sue for and recover such taxes if illegally collected. Of course its recovery would be for the benefit of its stockholders. Having disposed of these preliminary questions, we shall now direct our attention to the merits of the controversy.

We shall first consider whether there is an implied exemption of state bonds. Under the Constitution of 1834 it was held that there was an implied exemption of state property (*Nashville v. Bank of Tennessee*, 1 Swan, 269) on the principle that it could not be supposed that the state would do so idle a thing as to tax itself for its own benefit, or that it would take money out of its treasury to be returned immediately thereto, or that it would permit its subordinate political divisions to impose such a burden upon it. It was said that the presumption was against the existence of any such intention. This case was followed and applied under the Constitution of 1870, in respect to municipal property, in the case of *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273, 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924.

The same principle is recognized in other states. *People v. Doe* G. 1,034, 36 Cal. 220;

State v. Atkins, 35 Ga. 315, Fed. Cas. No. 5350; *Rochester v. Rush*, 15 Hun, 239; *Cumru Twp. v. Directors of Poor*; 1 Woodw. Dec. 175; *Troutman v. May*, 33 Pa. 455; *McCaslin v. State*, 99 Ind. 428; *Camden v. Camden*, 77 Me. 530, 1 Atl. 689; *State, Newark, Prosecutor, v. Clinton Twp.* 49 N. J. L. 370, 8 Atl. 296; *Public School v. Trenton*, 30 N. J. Eq. 667; *Erie County v. Erie*, 113 Pa. 360, 6 Atl. 136; *Wayland v. Middlesex County*, 4 Gray, 500; *People ex rel. Wilson v. Salomon*, 51 Ill. 52, 53; *Schuykill County v. North Mannheim Twp.* 42 Pa. 21; *Louisville v. Com.* 4 Met. (Ky.) 63; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 365, 372, 94 Am. St. Rep. 301, 90 N. W. 1006; and authorities cited in note to *Board of Comrs. v. Ottawa* (Kan.) 33 Am. St. Rep. 400-406.

In *Miller v. Wilson*, 60 Ga. 506, the principle was applied to state bonds to the extent of holding that it will not be presumed that the legislature intended to tax such bonds merely from a direction that "taxable property" should be assessed, and that the court would not consider the question of the taxability of state bonds as raised in the absence of a provision in a statute expressly directing their taxation. In *Macon v. Jones*, 67 Ga. 489, the same doctrine was applied to city bonds. To the same general effect, *Augusta v. Dunbar*, 50 Ga. 387.

In *Louisiana* (*State ex rel. Da Ponte v. Board of Assessors*, 35 La. Ann. 654) the same rule was applied to state and city bonds. That case also went further, and held that such bonds were absolutely exempt, on substantially the same grounds that support an implied exemption of public property.

We are also referred to *State v. Stonewall Ins. Co.* 89 Ala. 335, 7 So. 753, as sustaining the same view, but that case is hardly an authority for the proposition, since it appears therein that the legislature had power, under the Constitution of the state, to grant such an exemption,—that is, one of state bonds,—and it had done so.

On the other hand, there are numerous authorities which hold that state, county, and municipal bonds are taxable. *Champaign County Bank v. Smith*, 7 Ohio St. 42; *People v. Home Ins. Co.* 29 Cal. 533, 538; *Com. v. Maury*, 82 Va. 883, 1 S. E. 185; *Hall v. Middlesex County*, 92 Mass. 100; *Com. v. Philadelphia*, 27 Pa. 497; *Wilkes-Barre Deposit & Sav. Bank v. Wilkes-Barre*, 148 Pa. 601, 24 Atl. 111; *State, Freese, Prosecutor, v. Woodruff*, 37 N. J. L. 139; *People ex rel. Niagara F. Ins. Co. v. Tax & A. Comrs.* 76 N. Y. 64. And see *State ex rel. O'Brian v. Keokuk & W. R. Co.* 153 Mo. 157, 77 Am. St. Rep. 704, 54 S. W. 559. The leading case is *Champaign County Bank v. Smith*, 7 L.R.A. (N.S.)

supra. In that case the court said: "Admitting, as we do, that a state may, by the express terms of her contract, limit to some extent the future exercise of her sovereignty; and that she may, from consideration of policy, or interest, bind herself not to exercise the taxing power over a specified subject-matter, or to exercise this power only in a specified mode; and that the power so to bind herself results from and can only be exercised in virtue of her sovereignty,—yet it is very clear that the simple contract of borrowing money has no relation to her sovereign character or power, and leaves them wholly unimpaired. By such a contract, it is true, a state and an individual are equally bound. The state of Ohio cannot, by virtue of her sovereignty, cancel or modify a contract to which she is a party; not because it is her contract, but because it is a contract. The lawful contracts of her humblest citizens are equally sacred. She cannot constitutionally impair the obligations of either. One man invests capital in state stocks, as a source of income and profit to himself. From the same motives of interest, other capital is invested in the bonds of a private corporation, or the notes of individuals. These investments are equally taxed, as property; as sources of profit and income. The consequence is that the profit is diminished in both cases. This is an effect, but not the object of the law imposing the taxation. It contemplates no such purpose. As between the parties, the contract is left in full force; but the property invested or acquired by the contract is taxed, not by way of interference with the rights of the parties as borrower or lender, but for the support of government and the consequent protection and welfare of the whole community. . . . The principle that, in the absence of any stipulation to the contrary, a sovereign state possesses the power of taxing all property held under it and within its jurisdiction is fundamental and essential to the very being of government. Property can only be acquired and held subject to this condition; and this infirmity of tenure, if it be one, furnishes the only adequate means for its protection. We readily concede that the state cannot affect the obligations of a contract to which she is a party, further or otherwise than in the case of a contract between other parties. But the claim here is that the state shall confer a bonus on her bondholders; for an exemption of moneys invested in her bonds from the burden of taxation, common to all other property within the state, would be a substantial and valuable bonus. In the absence of any such express stipulation in the contract, I do not perceive an equitable foundation upon which to rest a claim to an ex-

clusive privilege, so directly interfering with the sovereign power of the state."

The argument that a decision holding the bonds taxable will decrease their value we do not think entitled to much weight, since the same is true of all property. It is, without doubt, true that the states of the Union would be able to realize much higher prices for the land they have to sell, or grant away, if any exemption from taxation accompanied such grants; yet it has never been supposed that this was a good reason for implying such exemption. On the contrary, it is held that such lands become taxable immediately upon their passing into the hands of the vendees or grantees of the state. *Robertson v. State Land Office*, 44 Mich. 274, 6 N. W. 659; *State ex rel. Johnson v. Purcel*, 31 Ohio St. 352; *Townsen v. Wilson*, 9 Pa. 270; *Oswalt v. Hallowell*, 15 Kan. 154. And the same is true, even when public lands are leased; the leaseholders are taxable. *State ex rel. Sioux County v. Tucker*, 38 Neb. 56, 56 N. W. 718; *State, Morris Canal & Bkg. Co. Prosecutor, v. Haight*, 36 N. J. L. 471. And so of a mining privilege obtained from a state. *State v. Moore*, 12 Cal. 56.

We shall next dispose of defendant's contention that the clause of the act in question directing a deduction of Tennessee state bonds is but an attempt to create an express exemption of this class of property, and is therefore unconstitutional and void. Such, we think, was the purpose of the clause, and on this ground it must be held void. It violates the clause of the Constitution that "all property . . . shall be taxed," and the clause that "taxation shall be equal and uniform throughout the state." Const. art. 2, § 28. The section referred to contains a provision that the legislature may exempt certain kinds of property, and shall exempt certain other kinds. Under the first division, we find "such [property] as may be held by the state, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable; scientific, literary, or educational;" and, under the second, "\$1,000 worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee." This section expresses the whole mind of the people of the state in convention assembled, in respect to the properties subject to taxation, and the extent of the power of the legislature to create exemptions therefrom. Its force cannot be dissipated by construction. Similar provisions in other state Constitutions have been given a strict construction in support of the taxing power.
7 L.R.A. (N.S.)

In Arkansas it has been held that a constitutional provision that all real property shall be subject to taxation, saving certain excepted kinds therein enumerated, amounts to an inhibition on the legislature's exemption of other real property. *Fletcher v. Oliver*, 25 Ark. 289. The Constitution of North Carolina (art. 5, § 3) provides that "all property shall be uniformly taxed." Section 5 provides that the legislature may exempt property held for certain purposes. The supreme court of that state, construing these provisions, held that the legislature could exempt only the property specified in § 5. *Charlotte Bldg. & L. Asso. v. Mecklenburg County*, 115 N. C. 410, 20 S. E. 526. And in *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143, it was held that, while it was within the power of the legislature, and it was its duty, to prescribe the mode in which all property should be assessed, it could not, under the guise of regulating the duty of assessors, exempt property from taxation which the Constitution required to be taxed. And, prior to the case in 35 La. Ann. (*State ex rel. Da Ponte v. Board of Assessors*, p. 651), such was the rule laid down in Louisiana. *Morrison v. Larkin*, 26 La. Ann. 699; *Lefranc v. New Orleans*, 27 La. Ann. 188; *New Orleans v. Bank of Lafayette*, 27 La. Ann. 376; *New Orleans v. People's Ins. Co.* 27 La. Ann. 519; *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432. And that jurisdiction seems to have returned to the former doctrine in *First Nat. Bank v. Board of Reviewers*, 41 La. Ann. 188, 5 So. 408, wherein it is said: "Reduced to its last analysis, the contention is that a large part of the value of the shares belonging to the individual shareholders is exempt from taxation. . . . We read in the Constitution the unequivocal mandates: (1) That 'all property shall be taxed in proportion to its value, to be ascertained as directed by law;' (2) that 'the following property shall be exempt, and no other.' Bank shares are property. They are subject to taxation, and in this statute the legislature has affirmatively exercised the power of taxing them."

The case of *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, has been referred to as an authority against the power of taxation of securities by a state or political division thereof which had issued such securities. In that case it appeared the city of Charleston had issued securities bearing 6 per cent interest, and directed the officer of the city whose duty it was to pay the interest to deduct the amount of the tax from the interest, and pay over to the holder of the debt only the difference. It was held that this could not be done without a violation of the contract: that a contract to pay 6 per cent could not be complied with by the pay-

ment of 4 per cent, or any sum less than the sum fixed by the contract. It was not denied that the money so paid would be liable to taxation after it had reached the hands of the holder of the security, if he were a resident of the state; or that the obligations of a state might be taxed by a state. Our conclusion is that state bonds are not exempt from taxation.

But it is said there is no provision in the act of 1903 which would justify an assessment of the shares of stock in any other way than by making a deduction of state bonds. This is a mistaken view. After striking out the unconstitutional clause, the residue of § 25 contains ample provisions for assessing shares of stock in banks and other associations and corporations therein mentioned.

It is next insisted that chap. 366, § 3, p. 100, Acts 1903, is void because it purports to amend chapter 11, p. 15, Acts 1879, upon the subject of assessment for taxes; whereas there is nothing in the latter act upon the matter of assessment at all. We do not think there is any merit in this point. Section 9 of the act not only contains some provisions upon the subject, but that section is amended by chapter 84, p. 98, Acts 1879, upon the subject of assessments; and, by virtue of the amendment, the latter act became incorporated into the former; therefore it was not improper that the act of 1903 should purport to amend chapter 11, p. 15, without making special reference to chapter 84.

It is insisted that the action of the board of equalization was void, because one of their number was a nonfreeholder; whereas the act requires that the board shall be composed of freeholders. Such a question cannot be made in a collateral attack, as the present is, upon the action of the board.

Finally, it is insisted that the action of the board was void, because that body did not act upon any appeal prosecuted by complainants to it; that complainants were content with the action of the assessor in excluding the Tennessee bonds, but the board assumed, itself, to raise the assessment by disregarding such exclusion, and taking into consideration the Tennessee bonds in estimating the value of the shares of stock. We do not think there is any force in this position. The board was created according to the terms of the act, "for the purpose of revising the assessment when returned by such tax assessor." Their duty, as the name indicates, is to equalize the assessments, and in so doing they may make either additions or reductions. While they may entertain appeals of taxpayers, as indicated by the act, from the assessment made by the tax assessor, their jurisdiction is not depend-

ent on these appeals. It is necessary to the proper performance of their duties that they should have a general view of all the assessments, and be able to act upon all as their judgment and conscience may dictate, to the end that all may be equalized, as far as possible.

Our conclusion is that the chancellor acted correctly in sustaining the demurrer to the bill, and his decree must be affirmed, with costs.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.
ZEKE LEWIS.

(142 N. C. 626, 55 S. E. 600.)

Statute—revisal—effect.

1. The efficacy of a statute against lynching is not impaired by splitting it up when carrying it into a revisal, and placing the different sections under appropriate heads.

Same—definition.

2. A statute for the punishment of lynching is not defective for failure to define the crime otherwise than by name, or to state that it shall be a felony if a punishment is prescribed for it.

Indictment—venue—neighboring county.

3. The constitutional guaranty of im-

Case Note.—Power of legislature to provide for indictment in county or district other than where crime alleged to have been committed:—That, in the absence of any limitation by constitutional provision, the power of a state legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted, seems to be generally recognized. See *State v. Sweetsir*, 53 Me. 438, in which a statute providing that an indictment for polygamy may be found and tried in the county where the offender resides, or where he is apprehended, was held valid, the court saying that such statute was not to be taken as in derogation of the common-law right of indictment and trial in the county where the offense is committed, but rather as an enlargement of the jurisdiction of the court; *Steerman v. State*, 10 Mo. 503, in which a statute authorizing an indictment for any offense committed within the state, on board of any vessel in the course of any voyage or trip in any county through which, or any part of which, such a vessel should be navigated in the course of the same voyage or trip, or where such voyage or trip should terminate, was sustained, the court saying that it was competent for the legislature to change, modify, or alter the common-law principle that the venue must be proved as laid; *Dodge v. People*, 4 Neb. 220, in which a

munity from criminal prosecution except by indictment does not prevent the legislature from permitting the grand jury of one county to indict for crimes committed in an adjoining county, since, although indictment requires a grand jury, venue is not an essential element of it.

Same—conspiracy—necessary averments.

4. An indictment for conspiracy to break a jail for the purpose of lynching a prisoner is not defective for alleging conspiracy with others without naming them, or stating that they are to the jurors unknown, unless the statute requires such facts to be stated.

(Brown, J., dissents from proposition 2.)

(November 21, 1906.)

APPEAL by the State from an order of the Superior Court for Union County quashing an indictment charging defendant with conspiracy to lynch. Reversed.

statute authorizing the judge of any judicial district court to designate the county in his district wherein a felony committed within any unorganized county or territory attached to the district for judicial or other purposes may be inquired into by the grand jury, and, in case an indictment is found, the person or persons so indicted tried, subject to the right of the person indicted to apply for change of venue, was held valid, the court recognizing the fact that the common-law rule that offenses could be inquired into, as well as tried, only in the county where they were committed, was not absolute, but subject to such exceptions as the legislature might establish; *Ham v. State*, 4 Tex. App. 645, in which a statute providing that an indictment against the forger of a land title might be found either by the grand jury of a certain county or any county in which the offense was committed, or in the county where the land lies about which the offense was committed, was held valid, the court holding that, where not restricted by the Constitution, questions of venue and jurisdiction are subjects of legislative control.

It is well settled that the provisions of the Federal Constitution (art. 3, § 2, and 6th Amend.), requiring criminal trials to take place in the state and district wherein the crime shall have been committed, apply only to prosecutions in Federal courts. *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. Rep. 28; *Ex parte Pritchard*, 43 Fed. 915; *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Ex parte McNeeley*, 36 W. Va. 84, 15 L.R.A. 226, 32 Am. St. Rep. 831, 14 S. E. 436.

The question, then, resolves itself, as in the case in hand, into one of construction of the various constitutional provisions relating more or less directly to the venue of criminal prosecutions; and the grouping of

Statement by Clark, Ch. J.:

The defendant was indicted in the following bill:

North Carolina—Union County.

Superior Court, July Special Term, 1906.

The jurors for the state upon their oath present: That Zeke Lewis and others, late of the county of Anson, on the 28th day of May, in the year of our Lord one thousand nine hundred and six, with force and arms, at and in the county aforesaid, unlawfully, wickedly, wilfully, and feloniously did conspire together to break and enter the common jail of Anson county, the place of confinement of prisoners charged with crime, for the purpose of lynching, injuring, and killing one John V. Johnson, a prisoner confined in said jail, charged with the crime of murder, against the form of the statute

the following cases, therefore, is primarily with reference to the form of constitutional provision, rather than the character of the statute involved.

A conclusion different from that of the court in *STATE v. LEWIS*, as to the effect of a constitutional provision "that no person shall, for a felony, be proceeded against criminally, otherwise than by indictment," was reached in *Ex parte Slater*, 72 Mo. 102, in which the court held that the word "indictment," as used in the constitutional provision above quoted, must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law; that at common law an indictment signified an accusation by the oaths of grand jurors of the same county wherein the offense was committed, and that, therefore, the foregoing provision guarantees to every person the right to be exempt from criminal prosecution for a felony, except upon an accusation or indictment preferred by a grand jury of the county where the offense was committed; and it was accordingly held that a statute providing that, where a judge of a circuit court is satisfied, where the grand jury of a county has failed to find an indictment, that an impartial grand jury cannot be had in the county where the offense was committed, he shall order examination of the offense to be had in some adjacent county, was unconstitutional.

The correctness of the foregoing decision was reaffirmed in *State v. McGraw*, 87 Mo. 161, which holds a statute authorizing an indictment for burglary in another county than that where the burglary took place to be unconstitutional; *State v. Hatch*, 91 Mo. 568, 4 S. W. 502, in which a statute providing for an indictment for embezzlement in a county other than where the offense was committed was held invalid; *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, which holds a statute providing that an indict-

in such case made, and against the peace and dignity of the state. And the jurors for the state, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, unlawfully, wilfully, and feloniously did engage in breaking and entering the common jail of Anson county, the place of confinement of prisoners charged with crime, with intent to injure, lynch, and kill one John V. Johnson, a prisoner confined in said jail, charged with the crime of murder, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors for the state, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to wit, on the day and year aforesaid, with force and arms, at and in the county afore-

said, unlawfully, wilfully, wickedly, and feloniously did injure, lynch, and kill one John V. Johnson, a prisoner confined in the common jail of Anson county, charged with the crime of murder, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

Robinson, Solicitor.

The defendant moved to quash the bill "for the reason that it appears upon the face of the bill that the offenses charged were committed, if at all, in Anson county, and there is no warrant or authority of law for finding the indictment or trying him in Union county;" and also to quash the first count in the bill because it charges that "the defendant conspired with others," without naming or charging, "and others to the jurors unknown." Both motions were

ment for bigamy may be found in the county where the second or subsequent marriage or cohabitation shall have taken place, or in the county in which the offender may be apprehended, is invalid; and *Re McDonald*, 19 Mo. App. 370, in which a statute authorizing the finding of an indictment in either of two counties, for offenses committed on the boundary, or within 500 yards thereof, was held invalid.

It was also followed in *State v. Anderson*, 191 Mo. 134, 90 S. W. 95, in which a statute providing that an indictment for any offense committed on board of any vessel, or in any railroad car, may be found in any county through which, or a part of which, such vessel or railroad car shall be navigated or run in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate, was held to contravene a constitutional provision that "no person shall be prosecuted criminally for felony or misdemeanor, otherwise than by indictment or information, which shall be concurrent remedies;" and that, therefore, a proceeding by information under such statute, in a county other than that where the offense was committed, was illegal.

On the other hand, in *Mischer v. State*, 41 Tex. Crim. Rep. 212, 96 Am. St. Rep. 780, 53 S. W. 627, a statute providing that prosecutions for rape may be commenced and carried on in the county in which the offense is committed, or in any county of the judicial district in which the offense is committed, or in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed, was held not to contravene a constitutional guaranty that "no person shall be held to answer for a criminal offense unless on indictment of a grand jury." The court said: "If it could be shown, under § 10, that an indictment by a grand jury meant only a grand jury of the county where the offense was commit-

ted, then to deprive a defendant of that right (that is, to authorize him to be indicted by the grand jury in some other county) would not be due course of law. But we seek in vain in the Constitution or elsewhere for such a limitation. In England, where the grand jury system had its birth, a grand jury was drawn from the vicinage where the offense was committed. Indeed, as originally constituted, the jury that tried an offender was composed of the witnesses against him. But, if it be conceded that such was the rule at common law, we have the common law in force here only by adoption; and in the absence of statutory enactment, if we have no constitutional inhibition, our statutes must control in this matter as in every other; and, there being no constitutional inhibition, as we have seen, the legislative declaration on this subject is the supreme law."

A constitutional guaranty that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed was held in *Walls v. State*, 32 Ark. 565, to render a statute providing for indictment and prosecution for the crime of bigamy in any county in which the person accused might be apprehended, as if the offense had been committed therein, invalid; in *Dempsey v. State*, 94 Ga. 766, 22 S. E. 57, to invalidate a statute conferring jurisdiction on the courts of a county where the offender resides, to try cases arising under it, so far as it is applicable to cases in which it affirmatively appears that the offense was committed in some county other than that of the residence of the accused; and in *Craig v. State*, 3 Heisk. 227, to render invalid a statute conferring jurisdiction as to offenses committed within the state, or within 5 miles of the line thereof, on board a boat or vessel engaged in navigating the waters of the state, upon the courts of any

allowed, and the state excepted and appealed.

Messrs. Walter Clark, Jr., and R. B. Redwine, with Mr. Robert D. Gilmer, Attorney General, for appellant.

Messrs. J. A. Lockhart, H. H. McLendon, and W. J. Coxe for appellee.

Clark, Ch. J., delivered the opinion of the court:

The first statute passed in this state in regard to lynching was chapter 461, p. 441, Laws 1893. Each provision in that act

county through which the boat or vessel is navigated in the course of such voyage, or where such voyage shall terminate.

A statute conferring on either county jurisdiction over offenses committed within a specified distance of the boundary was held, in *Dougan v. State*, 30 Ark. 41, and *State v. Lowe*, 21 W. Va. 782, 45 Am. Rep. 570, to contravene the constitutional provision that trials of crimes and misdemeanors shall be in the county in which the alleged offense was committed; the word "county" being taken in its narrower meaning, and as not equivalent in this respect to vicinage.

And in *State v. Montgomery*, 115 La. 155, 38 So. 949, a statute authorizing the trial of an offense in the court of a parish on whose boundary line, or within 100 yards of whose boundary line, it was committed, was held to be in conflict with a constitutional provision that all trials shall take place in the parish where the offense was committed.

But in *Welty v. Ward*, 164 Ind. 457, 73 N. E. 889, such a constitutional provision was held not to confer upon a person charged with a felony any constitutional right to be tried only upon an indictment returned by a grand jury of the county in which the offense was committed.

But, where the Constitution guarantees a trial by a jury of the county or district wherein the offense shall have been committed, it is generally regarded as not so closely restricting the legislative power to regulate the venue of criminal prosecutions. Thus, in *State v. McDonald*, 109 Wis. 506, 85 N. W. 502, it was held that a statute providing that counties on the shores of a certain bay shall have jurisdiction in common of all offenses committed on that part of such bay which lies within the limits of the state was not unconstitutional; the word "district" being taken as having a different meaning from the word "county."

And in *Re Holcomb*, 21 Kan. 628, a statute providing for the prosecution of offenses committed in unorganized territory, in the organized county to which such territory might be attached, was held not to contravene the constitutional provision above stated, in view of another constitutional provision authorizing the attaching of new or unorganized counties to a judicial district.

And in *State v. Gut*, 13 Minn. 341, Gil. 7 L.R.A. (N.S.)

has been brought forward and incorporated, with very slight verbal changes under appropriate heads in Revisal 1905. Section 1 of said act, defining lynching and imposing the penalty, is now Revisal 1905, § 3698, and is in the chapter on "Crimes," under the subhead "Public Justice," and is as follows:

"3698. Lynching. If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person

315 (Affirmed in 9 Wall. 35, 19 L. ed. 573), such a constitutional provision was held not to be contravened by a statute authorizing the changing of the place of holding court to another county within the same judicial district.

As to the effect the employment of the phrase "or district," in the constitutional provision for trial in the county or district where the crime shall have been committed, may have upon the validity of a statute authorizing the prosecution of crimes committed beyond, but within a certain distance of, the boundary of the county, there is some difference of opinion.

In *Grogan v. State*, 44 Ala. 9, where the constitutional guaranty was relative to prosecutions by indictment, an objection to the constitutionality of such a statute was not sustained, the case not being one of a prosecution by indictment, although the offense was committed in another county than the one in which the defendant was prosecuted.

The effect of this decision seems to have been mistaken in *Jackson v. State*, 90 Ala. 590, 8 So. 862, in which the statute in question was sustained upon the authority thereof, in a case where an indictment was found for murder committed outside of, but near, the boundary of the county in which the indictment was found; the court declining to pass upon the soundness of the alleged decision in *Grogan v. State* as an original proposition.

In *State v. Robinson*, 14 Minn. 447, Gil. 333, such a statute was held not to be in violation of the constitutional provision above stated; the court saying that, the jury being taken from the body of the county within its territorial limits, the right guaranteed by the Constitution was substantially secured.

In *State ex rel. Brown v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429, the validity of such a statute was upheld on the ground that the words "or district," as used in the Constitution, were intended and understood to mean something different from the word "county" as therein used, and might be taken as referring to a criminal district extending beyond the territorial limits of the county to the extent provided by such statute.

On the other hand, in *Buckrice v. People*,

shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners,—he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than \$500, and imprisoned in the state's prison or the county jail not less than two, nor more than fifteen, years." Laws 1893, chap. 461, § 1, p. 440.

Section 2 is now Revisal 1905, § 3200, and provides that the solicitor shall prosecute and have the prisoners bound over to the superior court of an adjoining county. Sec-

110 Ill. 29, the use of the term "county" seems to have been regarded as overriding any broader meaning which might be attached to the term "district," and the statute in question was held unconstitutional,—at least as to offenses committed more than an inappreciable distance from the county line, the court arguing that, if the jurisdiction of a county over offenses outside its boundary may be extended at all, it may be extended for any distance, and the defendant thus be deprived of his constitutional rights.

In *Armstrong v. State*, 1 Coldw. 338, it was held that the validity of the statute could not be predicated upon the use of the word "district" in the Constitution, the word having been carried into the existing Constitution from the preceding one, in which it had reference to a state of affairs which existed under a former judicial system when there was only one court for several counties.

Where, instead of guaranteeing the right of trial in the county or district in which the offense was committed, the Constitution provides for such trial in the county or district in which the offense is alleged to have been committed, the question is somewhat varied. In *Watt v. People*, 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340, it was held that a statute which provided that, where an offense was committed on a railroad car rapidly moving through different counties, so that it is difficult or impossible to determine with any degree of certainty in which county it was committed, an indictment may charge the offense in any county passed through near the time of the commission of the offense. did not conflict with such a constitutional provision, since such constitutional right is with respect to the place alleged as the *locus* of the crime, and not the place in which the crime was actually committed.

That constitutional provisions of the kind hereinbefore discussed are available only to free citizens, and not to convicts, is held in *Ruffin v. Com.* 21 Gratt. 790, in which a statute conferring upon the court of a certain place jurisdiction to try offenses committed by convicts in the state penitentiary, irrespective of whether such offenses are committed within the territorial limits

tion 3 is as to witnesses testifying, and is Revisal 1905, § 3699. Section 4 of the said act of 1893 is Revisal 1905, § 3233, in the chapter on "Criminal Proceedings," subhead "Venue" and reads:

"XI. Venue. 3233. Lynching. The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender, to the same extent as if the crime had been committed in the bounds of such adjoining county; and, whenever the solicitor of the district has information of the commission

of the jurisdiction of such court, was held not to conflict with a constitutional right to trial by a jury of the vicinage.

In passing, it may be stated that statutes providing that, where a crime commenced in the state is consummated outside of the state, the jurisdiction is in the county in which the offense was commenced (*Green v. State*, 66 Ala. 40, 41 Am. Rep. 744); or authorizing criminal prosecutions in either of two counties in which an offense is partly committed (*Archer v. State*, 106 Ind. 426, 7 N. E. 225); or providing that a prosecution for homicide may be instituted either in the county where the wound is inflicted, or where the person dies (*Smith v. State*, 42 Fla. 605, 28 So. 758; *Com. v. Jones*, 118 Ky. 889, 82 S. W. 643; *Hargis v. Parker*, 27 Ky. L. Rep. 441, 69 L.R.A. 270, 85 S. W. 704; *State v. Pauley*, 12 Wis. 538); or authorizing prosecution in the jurisdiction where the blow was struck which caused the death (*Stout v. State*, 76 Md. 317, 25 Atl. 299); or providing for indictment in the county where the death occurs (*Com. v. Parker*, 2 Pick. 550; *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 320; *Ex parte McNeely*, 36 W. Va. 84, 15 L.R.A. 226, 32 Am. St. Rep. 831, 14 S. E. 436); or authorizing the prosecution of a thief in any county into which he may carry the stolen property (*State v. Johnson*, 38 Ark. 568; *State v. Price*, 55 Kan. 606, 40 Pac. 1000); or authorizing prosecution for pollution of a river in any county whose inhabitants are aggrieved thereby (*American Strawboard Co. v. State*, 70 Ohio St. 140, 71 N. E. 284).—are generally regarded as not in conflict with the various constitutional provisions hereinbefore noted, upon the theory that an offense may be considered as having been committed in any jurisdiction in which an element of such offense occurs.

The question of the constitutionality of statutes providing for a change of venue after indictment found, to counties or districts other than where the offense was committed, while involving the interpretation of the constitutional provisions hereinbefore discussed, does not fall within the scope of this note, and is reserved for future annotation.

of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice." Laws 1893, chap. 461, § 4, p. 440.

Section 5, as to witnesses answering questions, is made Revisal 1905, §§ 1638, 3201. Sections 6 and 7 are the same as Revisal 1905, §§ 1288, 2825. The whole of chapter 461, p. 440, Laws 1893, is thus in the Revisal, and its force and effect is not impaired by the fact that it has been split up, and its different sections placed under appropriate heads. It seems to us that the above provisions fully define the offense intended to be repressed, and designate the punishment and procedure. There are many offenses in this chapter on "Crimes" which, though not common-law offenses, are not defined save by using the term of common knowledge, as "abandonment," "lynching," etc. It is not necessary to prescribe that an act is a misdemeanor or felony; the punishment affixed determines that. Revisal 1905, § 3291; State v. Fesperman, 108 N. C. 772, 13 S. E. 14.

It was error to quash the bill on the ground that the offense was not committed in Union county, which is an adjoining county to Anson. Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the general assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. Without some such provision, an indictment could rarely be found in such cases. We cannot concur with the argument that such provision (Revisal 1905, § 3233) is beyond the scope of the law-making power, and unconstitutional. The legislature of North Carolina has full legislative power, which the people of this state can exercise as completely and freely as the Parliament of England or any other legislative body of a free people, save only as there are restrictions imposed upon the legislature by the state and Federal Constitutions. In the very nature of things, there is no other power that can impose restrictions. When the Constitution uses the words "jury" and "grand jury," they are interpreted as being the same bodies which were known and well recognized when the Constitution was adopted. But this is a rule of ascertaining the meaning of the words, and not a restriction upon the power of the legislature to make provisions as to venue, and the like incidental matters, which in no wise affect the nature and composition of a jury and grand jury. Hence, the qualification of jurors, the number of chal-

lenges, venue, and other similar provisions as to procedure, are in the discretion of the legislature. The legislative power can be restrained only by constitutional provisions. It cannot be restricted and tied down by reference to the common law or statutory law of England. There is nothing in the common law or statute law of England which is not subject to repeal by our legislature, unless it has been re-enacted in some constitutional provision. That the Federal government is one of granted powers solely, and the state government is one of granted powers as to the executive and judicial departments, but of full legislative powers, except where it is restricted by the state or Federal Constitution, is elementary law. This is nowhere more clearly stated than by Black, Const. Law, §§ 100, 101, as follows:

"Sec. 100. Under the system of government in the United States, the people of each of the states possess the inherent power to make any and all laws for their own governance. But a portion of this plenary legislative power has been surrendered by each of the states to the United States. The remainder is confided by the people of the state, by their Constitution, to their representatives constituting the state legislature. At the same time, they impose, by that instrument, certain restrictions and limitations upon the legislative power thus delegated. But state Constitutions are not to be construed as grants of power (except in the most general sense) but rather as limitations upon the power of the state legislature.

"Sec. 101. Consequently, the legislature of a state may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the Constitution of the United States or by that of the state, or unless it improperly invades the separate province of one of the other departments of the government, and provided that the statute in question is designed to operate upon subjects within the territorial jurisdiction of the state."

That eminent authority, Cooley, Const. Lim. 7th ed. p. 126, says: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted

with the general authority to make laws at discretion." On the next page he further says that "the American legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed" by some inhibition in the state or Federal Constitution; but the legislature cannot exercise the judicial and executive functions of the British Parliament, which is supreme. This is a clear cut and very exact statement.

In *State v. Matthews*, 48 N. C. (3 Jones, L.) 458, Judge Pearson said: "With the exception of the powers surrendered to the United States, each state is absolutely sovereign. With the exception of the restraints imposed by the Constitution of the state and the Bills of Rights, all legislative power is vested in the general assembly." This is quoted by Bynum, J., with approval, in *State v. Richmond & D. R. Co.* 73 N. C. 537, 21 Am. Rep. 473. Our legislature has the same legislative power as the British Parliament, except where some legislative power is expressly denied it by the Constitution of the state or Union, but, unlike Parliament, it cannot exercise judicial or executive functions, and that only because the Constitution has bestowed those functions upon the other two departments. If the state had adopted no Constitution, as was the case in Rhode Island till 1846, the legislature would have been supreme, as in England, subject only to the Federal Constitution; and there is now, and necessarily can be, no limitations upon the legislature, save those expressly imposed by the state and Federal Constitutions, as Judge Cooley well says. Under the North Carolina Constitution of 1776, the legislature elected all the executive officers of the state, and created and modified at will the judicial department, and chose its officers. The subsequent changes in the state Constitution have put the other two departments upon a more independent footing, but have not added any other limitations upon the legislative power of the general assembly.

It has long been the statute that in the interest of justice the court can remove any cause, civil or criminal, to some adjacent county for trial. Revisal 1905, §§ 426-428. If the trial before the petit jury can, by legislative authority, be transferred to another county, the far less important matter of the venue of the inquiry and finding by the grand jury can also be transferred. In fact, it has often been provided that the grand jury may find a true bill in certain cases where the offense was committed beyond the limits of the county, as will be seen by reference to other sections of the subhead in which Revisal 1905, § 3233, is found, i. e.: "3234. When crime commit-

ted on waters dividing counties. . . . " "3235. When assault in one county, death in another. . . . " "3236. Assault in this state, death in another." "3238. Death in this state, mortal wound given elsewhere." "3237. Person in this state injuring one in another." Also §§ 3403 and 3404 as to embezzlement and conspiracy by railroad officers confer jurisdiction upon any county through which the railroad passes, and there are still other statutes giving the grand jury jurisdiction to inquire as to offenses committed out of their own county. The legislature is not likely to increase needlessly the instances in which a grand jury can inquire into offenses committed out of its own county, but of the necessity of such statutes the general assembly is sole judge. Up to 1739, indictments for offenses occurring anywhere in North Carolina were cognizable by a grand jury sitting in Chowan county, at Edenton. In that year the venue was changed to New Berne. From 1746 to 1806 (for sixty years) indictments were found in district courts, though the grand jury did not sit in the county where the offense was committed, unless that happened to be the county in which the court was held; and this is the case still with all indictments in the Federal courts.

If it were possible to hold that the legislature cannot shape the criminal procedure of this state to provide remedies required by the exigencies of the present time, unless the same remedies had been found to be necessary in England, and had occurred to and been adopted by those administering its laws in years long gone by, we find that in fact this same necessity of providing for the investigation by the grand jury of another county had been there provided for as to many offenses. In 4 Bl. Com. 303, we find that, while a grand jury could not usually inquire as to offenses committed out of their county, by legislative authority this could be done in very many instances, among others: "Offenses against the black act (9 Geo. I. chap. 22) may be inquired of and tried in any county in England, at the option of the prosecutor." "So felonies in destroying turnpikes . . . [etc.] may, by statutes, 8 Geo. II. chap. 20 and 13 Geo. III. chap. 84, be inquired of and tried in any adjacent county," and "murders, also, whether committed in England or foreign parts, may, by virtue of . . . 33 Henry VIII. chap. 23, be inquired of and tried" in any shire in England. "Any felonies committed in Wales may be indicted in any adjoining county in England (26 Henry VIII. chap. 6)." And there are very many similar statutes there mentioned which were enacted, like the above, long prior to the

American Revolution; thus showing that the venue of offenses cognizable before any grand jury is a matter of legislative enactment.

In 1 Stephen, History Crim. Law in England, 277, it is pointed out that there are 18 exceptions by statute to the rule requiring an indictment to be found by a grand jury of the county (the first having been enacted as far back as 2 & 3 Edw. VI.), and says their very number proves "that the general principle which requires so many exceptions is wrong." And, on page 278, that distinguished judge and author adds: "A rule which requires eighteen statutory exceptions and such an evasion as the one last mentioned in the case of theft—the commonest of all offenses—is obviously indefensible. It is obvious that all courts otherwise competent to try an offense should be competent to try it irrespectively of the place where it was committed; the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offense was committed would be the most convenient place for the purpose." England has about the same area as North Carolina,—40 counties,—and a far denser population, now more than 30,000,000; North Carolina has nearly two and one half times as many counties (97) and about 2,000,000 people. The population of the average English county is therefore forty times that of an average county in this state. If, nevertheless, the public interest requires that, even in England, the finding of an indictment shall not be restricted always to a grand jury in the county where an offense is committed, for a stronger reason the legislature here must have power, in its judgment, to change the venue in the interest of justice, with our smaller counties and sparse population. The venue of a grand jury "is a matter under the control of the legislature." *State v. Woodard*, 123 N. C. 710, 31 S. E. 219. *State v. Patterson*, 5 N. C. (1 Murph.) 443, is put on the express ground that the statute did not give the grand jury jurisdiction of an offense committed in an adjacent county, as had been the case under the previous district system. Besides, if there had been a defective venue, the remedy was by a plea in abatement, which is practically a motion to remove to the proper county, and not a motion to quash. Revisal 1905, § 3239; *State v. Carter*, 126 N. C. 1012, 35 S. E. 591; *State v. Lytle*, 117 N. C. 801, 23 S. E. 476.

It was also error to quash the first count. The indictment is against Lewis, and in charging that he "conspired with others" (L.R.A.(N.S.).

the bill fully complies with Revisal 1905, § 3698, which simply provides that, "if any person shall conspire to break," etc. It was not required to name the others, or to charge that they were unknown. The words "with others" are tautology and mere surplusage. The "con" in the word "conspire" embraces the idea that it is an act done "with" another or others. Even if the statute had used the words "with others," it would have been sufficient to recite in the bill "with others," without charging their names or that they were unknown. Revisal 1905, § 3250; *State v. Hill*, 79 N. C. 658; *State v. Capps*, 71 N. C. 96.

Reversed.

Connor, J., concurring:

I concur in the opinion of the court in this case with much hesitation. I do not concur in some of the reasons which are given to sustain it. The court held in a well-considered and able opinion by Mr. Justice Shepherd in *State v. Barker*, 107 N. C. 913, 10 L.R.A. 50, 12 S. E. 115, that, although the term "grand jury" is not found in our Constitution the section of the bill of rights guaranteeing immunity from criminal prosecutions except upon "presentment, indictment, or impeachment" must be construed to mean "indictment by a grand jury," as defined by the common law,—citing with approval the language of Judge Cooley in that connection. Const. Lim. 59. It was held in that case, because at common law "the concurrence of 12 jurors was absolutely necessary" to find a bill of indictment, it was equally so in North Carolina, and that the legislature had no power to dispense with such "absolute necessity." *English v. State*, 31 Fla. 340, 12 So. 689. If my investigation had led me to the conclusion that the venue entered into and was an essential element in the term "indictment" at common law at the time of the "separation from the mother country," I could not hesitate to declare that, in my opinion, it was not within the power of the legislature to abrogate the common law in that respect. I cannot concur in the suggestion that such power is vested in the legislature. The people, with whom alone is political sovereignty, have expressly declared that their governmental agencies must act and move within the orbit assigned to them by the Constitution. There is no place for arbitrary power in our governmental system of checks and balances. I do not sympathize with the suggestion that no part of the common law is imbedded in our Constitution. Speaking of the common law, after noting some of its defects, Judge Cooley wisely says: "But, on the whole, the system was the best foundation on which to erect an enduring

structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed, in an unusual degree, to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles; . . . and, if the Criminal Code was harsh, it, at least, escaped the inquisitorial features which were apparent in the criminal procedure or other civilized countries, and which have ever been fruitful of injustice, oppression, and terror." [Const. Lim. 7th ed. p. 50.] That those who came to this colony, and "buiilded" our institutions, well knew and jealously guarded these great principles, every page of our early history illustrates. The language of Judge Cooley applies with special force to them. "From the first, the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. . . . Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation, and protested against the trampling under foot of that time-honored principle that trials for crime must be by a jury of the vicinage." [Const. Lim. 7th ed. p. 51.] When the courts in this and other states have been called upon to approve departures from common-law principles and procedure in criminal trials, they have steadily refused to do so. In *State v. Branch*, 68 N. C. 186, 12 Am. Rep. 633, it was shown that a judge on the circuit had directed the witnesses to be examined by the grand jury in open court. Chief Justice Pearson, sustaining a motion to quash the bill for that reason, said: "This procedure is opposed to the principles of the common law," which means "common sense." He further says: "There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever 'in force and in use in the colony of North Carolina;' very certainly such has not been the practice in the state of North Carolina, and it must be rejected as inconsistent with the genius of a republican government." In *Lewis v. Wake County*, 74 N. C. 194, Bynum, J., in a very strong opinion, denying the right of a solicitor to be present when the grand jury are discharging its duties, finds authority

for the decision in the common law. After noticing the English practice, as described by Blackstone and others, he says: It "is more consonant to justice and the principles of personal liberty. The powers of the grand jury, therefore, should not be extended farther beyond these conservative and salutary principles than is clearly warranted by public necessity and the most approved precedents." In *State v. Miller*, 18 N. C. (1 Dev. & B. L.) 500, while the judges differed in respect to the law, both the chief justice and Judge Gaston concurred that in considering questions pertaining to the rights of the accused, in trial by jury, recourse must be had to the ancient common law. The same is true in every case where the question has come into debate, and the citizen has asserted his rights in respect to the manner in which he could be called to answer and put upon trial for a criminal offense. *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. In *Byrd v. State*, 1 How. (Miss.) 176, Sharkey, Ch. J., said: "The right of trial by jury, being of the highest importance to the citizen, and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the Constitution of this and all the other states as sacred and inviolable. The question naturally arises, How was it adopted by the Constitution? That instrument is silent as to the number and qualifications of jurors. We must therefore call in to our aid the common law for the purpose of ascertaining what was meant by the term 'jury.' It is a rule that when a statute or the Constitution contains terms used in the common law without defining particularly what is meant, then the rules of the common law must be applied in the explanation." The Opinion of the Justices, 41 N. H. 550, strongly states the law in this respect. *Brucker v. State*, 16 Wis. 333; *People v. Powell*, 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481. I agree, of course, that there is much of the common law which is in force in this state by virtue of Revisal 1905, chap. 15, § 932, which is but the re-enactment of the acts of 1716 and 1778; and as to this the legislature may, as it has in many instances done, repeal or modify it. In respect to those elementary principles and provisions, upon which the security of life, liberty, and property depend, guaranteed by Magna Charta, which was ingrafted, either in express terms or by necessary implication, into our Bill of Rights, I do not concede that the power exists, in either department of the government, to abrogate or modify them. To do this is among "the reserved rights" to be exercised only by the people themselves in convention. This is one of "the powers not dele-

gated" to the legislative department of the government. I cannot therefore assent to the proposition, sometimes found in judicial opinions, that the legislature has all of the powers of the British Parliament, except when expressly restricted. In the discussion of this very important and delicate question, Judge Cooley says: "But to guard against being misled by a comparison between the two, we must bear in mind the important distinction . . . that with the Parliament rests, practically, the sovereignty of the country, so that it may exercise all the powers of the government, if it wills so to do; while, on the other hand, the legislatures of the American states are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative." Const. Lim. p. 105. He further says: "So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American legislatures, in regard to their ultimate powers, cannot be traced very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people, and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but which has been placed in their hands with well-defined restrictions." This, I think, the sound view. *People ex rel. Nichols v. McKee*, 68 N. C. 430. The difficulty which I have experienced in arriving at a conclusion in this case is to fix the line at which the legislature may change or abrogate the procedure, venue, etc., in regard to indictments as they were by the common law recognized and administered by the courts in England. That it may not lessen the number required to concur in finding a bill, or permit witnesses to be examined before the grand jury in public, or to permit the prosecuting officer to remain with the grand jury while in session, is settled upon the ground that such things were not permissible by the common law. The only decided case which was cited by counsel, or I have been able to find in this country, in point, is *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. There the statute provided that for cutting timber on the public lands the person charged could be proceeded against in the county where the offense was committed, or such other county as the attorney general should direct. The defendant in error was prosecuted under the act in a county other than

that in which the offense was committed. He was arrested upon a *capias*, and upon *habeas corpus* was discharged. He brought the action against plaintiff in error, who procured the information and arrest, and recovered judgment for false imprisonment. Several irregularities in the proceedings were alleged. In regard to the validity of the statute authorizing the change of venue, Cooley, J., said that the act was "manifestly in conflict with one of the plainest and most important provisions of the Constitution. Now, that in jury trial it is implied that the trial shall be by jury of the vicinage is familiar law. Blackstone says: "The jurors must be of the viane, or neighborhood;" which is interpreted to be of the county. 4 Bl. Com. 350. This is an old rule of the common law; citing *Hawk. P. C.*, bk. 2, chap. 40; 2 Hale, P. C. 264. He refers to certain statutory changes made by Parliament prior to the separation of the colonies, saying: "But it is well known that the existence of such statutes, with the threat to enforce them, was one of the grievances which led to the separation of the American Colonies from the British Empire. If they were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written Constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. . . . But no one doubts that the right to a trial by jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible." After pointing out in strong language the injustice and oppression to which the citizen may be subjected if compelled to answer an indictment in a county otherwise than that in which the offense was alleged to have been committed, he concludes: "We have not the slightest hesitation in declaring that the act of 1857, so far as it undertakes to authorize a trial in some other county than that of the alleged offense, is oppressive, unwarranted by the Constitution, and utterly void." I find a number of cases cited by counsel denying the right of the state to remove a criminal trial from the county of the alleged offense for local prejudice. It is so held in a strong opinion by the supreme court of California (*People v. Powell*, supra). Judge Cooley says: "But this may be pressing the principle too far." It was so held in *Kirk v. State*, 1 Coldw. 344, and *Osborn v. State*, 24 Ark. 629. But in both these states the Constitution expressly guaranteed a alleged to have been committed. I have carefully examined the history of parlia-

mentary legislation in England on the subject, for the purpose of learning how far the venue in criminal proceedings has been regarded in that country, as fixed by *Magna Charta*. Fitz James Stephen, in the "History of the Criminal Law," vol. 1, 274, gives an interesting account of the statutory changes made in the law in regard to venue. Some of them are pointed out in the opinion of the chief justice. See also 2 *Mews's Fisher, Com. Law Dig.* 2263. In *Brucker v. State*, *supra*, Dixon, Ch. J., discussing the right of the legislature to provide that 17 persons might compose the grand jury, said: "The foundation of the objection is that this was the rule at common law [that the grand jury should consist of not more than 23 nor less than 12] recognized by the Constitution, against which the legislature has no power to provide. Upon examination of the authorities, we find no such fixed common-law principle. The only inflexible rule with respect to numbers seems to have been that there could not be less than 12 nor more than 23 jurors. The concurrence of 12 was necessary to find a bill, and there could not be more than 23 in order that 12 might form a majority. . . . We are of opinion, therefore, that it is competent for the legislature, within the limits prescribed by the common law, to increase or diminish the number of grand jurors to be drawn and returned, without infringing the rights of the accused, granted by the Constitution." In *Byrd v. State*, 1 *How. (Miss.)* 176, Sharkey, Ch. J., discussing the subject, says: "The legislature cannot abolish or change substantially the panel or jury, but it may, it is presumed, prescribe the qualifications of the individuals composing it." I have noted these cases to show that it is held by courts adhering to the principle that the guaranty of immunity from criminal prosecutions, otherwise than by indictment, that the legislature may change the law in particulars nonessential, such as qualification of jurors, etc., but in regard to essentials, such as number, etc., the constitutional provisions must be read and construed in the light of the common law, and are not subject to legislative change.

In the absence of express legislative enactment, there can be no question that the venue is the county in which the offense is alleged to have been committed. I incline to the opinion, at least to the extent of surrendering my doubts to the judgment of the majority of the court, that the act is not violative of the right of the defendant. In doing so, I am also influenced by the wise and salutary principle, so frequently announced by the greatest judges who have sat upon the state and Federal benches, 7 *L.R.A. (N.S.)*

that every presumption should be made to support the constitutionality of a statute. While I am by no means certain that the beneficial results anticipated by the legislature will be realized, I sympathize so strongly with the desire and purpose to provide all possible means for detecting, and, after trial and conviction, punishing, those engaged in the crime of lynching, hoping to suppress it, that I am the more willing to surrender my doubts to its best judgment. It is the first time in our history that the question has been presented, because it was not until the act of 1893 that the grand jury of any other county than that of the offense was given power to find a bill of indictment. It would seem that in England it has been deemed necessary to change the venue, and permit indictments to be found in counties other than those in which the offense was committed. For many years the statute permitting the court, upon motion of the solicitor, supported by affidavits, to remove a criminal case for trial to an adjoining county on account of local feeling, has been invoked without question. While the right to remove, after a judicial determination that a fair trial could not be had in the county of the offense, might be distinguished from the right to indict and try in the county of the solicitor's selection, I concede that the recognition of the validity of the removal statutes weighs in my mind in favor of the act of 1893. I have felt impelled to say this much because of the importance of the subject, and a desire to proceed with the utmost caution in experimental legislation of this kind. While it is not for the judiciary to trench upon the domain of the legislature, I trust that I may, without impropriety, express the hope that the occasion and condition which in its judgment called for this act may soon pass away, and that we may return to the common-law way of securing to every man immunity from being called to answer for violation of the law otherwise than by indictment preferred by a grand jury summoned from the county where the crime is supposed to have been committed. *Cooley*, 392; *Story, Const. § 1769*. In addition to the humane policy which protected a man in his hour of trial from being carried away from his home, deprived of the opportunity to have his witnesses, and the benefit of such reputation and character as he had made among his neighbors, this ancient way placed upon the people of each county or neighborhood the responsibility for securing a fair, firm, and just administration of the law, detection and punishment of the guilty, and protection of the innocent. How far removing from the people of each county

this stimulus, and by carrying their citizens into adjoining counties for trial, will promote the end desired, is not clear to my mind. These are questions, however, committed to the wisdom of the legislature. I disclaim any right to question the constitutionality of an act of the legislature because it does not accord with my judgment. This would be to move out of the orbit assigned to the judge. Judges must not be wiser than the law, but be content to construe and declare it in the light of principle, precedent, and constitutional limitations.

Walker, J., concurring:

I concur in the result reached in this case and in the opinion of the Chief Justice, except in so far as it is therein impliedly stated that the powers reserved in the Constitution by the people may be exercised by their representatives in the general assembly. My opinion is that the legislature has only the powers delegated to it by the people, and all powers not so given are reserved to the people themselves, just as by the 9th and 10th articles of Amendment to the Constitution of the general government it is provided that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people; but the powers not delegated to the United States by that instrument, or prohibited by it to the states, are reserved to the states respectively, or to the people. The Constitution is a grant of specific powers, and not a restriction upon powers granted, which, but for that restriction, would be general and plenary in their nature. The powers granted are to be exercised only as prescribed, and those of a legislative character by the general assembly; but all not specially granted remain with the people, to be afterwards granted or withheld by them as they may deem best for the public welfare. In this respect the language of the Constitution of this state is substantially like that of the Constitution of the United States, so far as they both confer power upon the three departments of government, and for this reason they should receive practically the same construction. The legislative power under neither is unlimited, except as it may be said that it is not to be restricted so long as the legislature moves within its legitimate orbit. The words of article 1, § 37, it seems to me, could have no force under any other construction. As we must ultimately construe that instrument and say what it means, we should be exceedingly careful to see that no power is taken from the people that they have not given in their Constitution, but confine each of the departments and every agency of government to

the particular sphere of action assigned to it. I do not care to enter upon a discussion of the question whether the legislature had the power to pass the act under which the indictment was found in this case, and thereby to authorize the laying of the venue in Union county. Such power existed, in my opinion; and I am content to rest my assent to the conclusion of the court upon the reasoning and the authorities as contained in the opinions of the Chief Justice and Mr. Justice Connor. This power should be confined within reasonable limits and the court should see that it is not exercised to the oppression of the citizen, or in such a manner as to seriously imperil his natural rights. There is no such case presented here. My only purpose in giving expression to my views at all is that I may refer to a matter which is not discussed in the opinion of the court.

It is suggested that the act of 1893, p. 440, chap. 461, as brought forward in Revisal 1905, §§ 3233, 3698, does not cover this case as § 3698 does not define the crime of lynching, and no statute can be found that creates such an offense. It is therefore argued from that premise, and I think erroneously, that, as § 3233 confers jurisdiction upon the court of any county adjoining that in which the crime is committed only in those cases where the offense charged is "lynching," it follows that the section is nugatory,—a dead letter on the statute book. It will be strange indeed if the legislature had made so great a mistake; but I do not think it has. The first count of the indictment charges that the defendant conspired with others to break and enter the jail of Anson county for the purpose of lynching, injuring, and killing John V. Johnson, a prisoner confined therein and charged with the crime of murder; the second that he actually did break and enter the jail for the same purpose; and the third that, after so entering, he did lynch, injure, and kill the said prisoner, and all the counts in the bill conclude against the statute and also at common law. When we examine the Revisal, we find several sections relating to the crimes charged in the bill, namely, §§ 1288, 2825, 3200, 3201, 3233, and 3698. The first (§ 1288) relates to the costs incurred in the prosecution of persons conspiring to break and enter, or for breaking and entering, a jail for the purpose of killing or injuring a prisoner therein confined. The second (§ 2825), to the duty of the sheriff to guard the jail, and protect prisoners against persons who may threaten to break and enter it for the purpose aforesaid, and prescribes how he shall proceed. The third (§ 3200), to the duty of the solicitor; and provides that he shall cause immediate investi-

gation to be made before a judge or other proper officer, who shall bind the person found to be probably guilty to the ensuing term of the superior court of some adjoining county, or commit him to the jail of said county. The fourth (§ 3201), to the testimony of witnesses, requiring all persons to give evidence in such cases, but pardoning those who participated in the crime. The fifth (§ 3233) confers full and complete jurisdiction upon the court of any adjoining county to indict and try offenders against the statute. The sixth (§ 3698) makes it a felony to conspire to break or enter a jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or injuring any prisoner so confined, or to engage in breaking or entering any jail or like place with intent to kill or injure any prisoner therein confined, and fixes the punishment. These sections were all taken from the Acts of 1893, chap. 461, p. 440, but they are not arranged consecutively in the Revisal nor in the order in which they appear in said acts, but the sections are severally assigned to their appropriate titles or chapters in the Revisal. All of the sections except those numbered 2825 and 3698 have special reference to the crime of lynching, but there is no offense created by law, and known or designated by that name; and when, therefore, §§ 3200 and 3233 require that persons guilty of that crime shall be bound to the superior court of an adjoining county, and indicted and tried in that county, we are unable to know what the legislature means, unless we refer to the original act, which makes everything plain. We are at liberty to make this reference because the statute will otherwise be incapable of any intelligent construction. It is not only obscurely worded and of doubtful import, but it can have no meaning at all, whereas it plainly appears that it was intended to have some meaning, and to secure the detection and prosecution of a very dangerous class of offenders. Shall we close our eyes to the only source from which we can secure light, and by which the meaning and intent will be made manifest, and thus defeat the legislative will, or shall we turn the light on that we may see and know what was meant? The law in such a case, I think, permits, and, indeed, enjoins, that the latter course should be taken. *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *The Conqueror*, 166 U. S., at page 122, 41 L. ed. at page 943, 17 Sup. Ct. Rep. 510. It is a general rule in the construction of statutes that, when a provision of a Revision or a Code is plain and unambiguous, the court cannot refer to the original statute for the purpose of ascertaining its meaning; 7 L.R.A. (N.S.)

but, if it is of doubtful import, or without such reference the provision is meaningless, it is proper to resort to the prior act, which has been codified or revised, for the purpose of solving the ambiguity; and especially should this be the rule where the provision is so worded as to be incapable of a fair construction without considering the original statute. *Endlich*, *Interpretation of Statutes*, §§ 50, 51; *Black*, *Interpretation of Laws*, § 136, pp. 365-367; *Lewis's Sutherland*, *Stat. Constr.* 2d ed. §§ 450-453 and 271. "But if it were conceded that the statute be somewhat ambiguous, we are authorized to refer to the original statutes, from which the section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply." *The Conqueror and United States v. Lacher*, *supra*.

If the headings or marginal notes of the different sections of the Revisal cannot be used to explain their meaning, then the introduction of the words "the crime of lynching" into § 3233 renders it not only ambiguous, but insensible, as there is then no such crime created by the law, and there was no crime known by that name at the common law; and in that event we are clearly permitted by all the authorities to look at the original statute, although it may have been repealed by the Revisal, in order to ascertain what particular crime the legislature intended to describe when it used those words. When the original statute (*Acts 1893*, chap. 461, p. 440) is examined, we find that § 4 of that act which corresponds with § 3233 of the Revisal of 1905, refers to § 1, which is § 3698 of the Revisal of 1905; so it appears from this comparison that the words "the crime of lynching" were used by the revisers as a convenient form of expression, in view of the fact that they had placed headings, titles, or marginal references to each section, indicating what was meant by the term "lynching," under express authority given to them by the act of 1903 (chap. 314, page 512), which provided for a compilation and revision of the statutes of the state, and by which commissioners were appointed for that purpose. This being so, § 3233 should be held to refer to § 3698; and this is also true of § 3200 and the other sections above enumerated, as they all were taken from the same act, and by the same rule of construction are to be taken as referring to each other. When these several sections of the Revisal are thus considered, we find that the superior court of the county of Union had jurisdiction to indict through a grand jury in that court, and the power to hear, try, and determine the indictment when found,—at least so far as the two offenses mentioned in § 3698 are

concerned; and these are the two offenses described in the first two counts of the bill. The same result may be reached by applying to the Revisal another rule of construction. It is generally held that the title of an act is a part of the same, but not in the sense that it can be used to construe it, unless the meaning of the act is ambiguous; in which case we may consider it for the purpose of ascertaining the true meaning. *State v. Patterson*, 134 N. C. 612, 47 S. E. 808. But this rule does not apply to revisions of statutes where the revisers have been authorized to insert marginal references to the original statutes, and to distribute the statutes under appropriate titles, divisions, and subjects, as was done by the act of 1903 (chap. 314, § 1, page 512; *Endlich, Interpretation of Statutes*, §§ 51, 69; *Bishop, Written Laws*, § 46); for as the eminent writer last mentioned says, such headings, and the like, in revisions and Codes, are deemed to be of somewhat greater effect than the ordinary titles to legislative acts, and to indicate at least the nature of the enactment. If this rule is applied, we find that the intent that § 3233 should refer to the jurisdiction of offenses described in § 3698 is made perfectly clear and manifest. As to the right to construe the several sections with reference to each other, see *Fortune v. Buncombe County*, 140 N. C. 322, 52 S. E. 950.

My conclusion is that the indictment sufficiently charges the commission of an offense made criminal by § 3698, and that §§ 3200 and 3233 refer to the crimes described in that section when they authorize the indictment to be found and the trial to be had in an adjoining county. This makes it unnecessary to inquire whether the indictment is otherwise sufficient to show jurisdiction in the court, under §§ 3200 and 3233, or, to speak more generally, whether the jurisdiction of the court can be sustained on other grounds. As there is at least one offense, if not more than one, charged in the bill of which the court has jurisdiction, the motion to quash should be denied, and the defendant required to plead to the indictment.

Brown, J., dissenting:

I concur in so much of the opinion of the court as upholds the power of the general assembly generally to provide for the removal of criminal actions to an adjoining county either before bill found or after. I know of no clause of our Constitution, Federal or state, which prohibits it. Assuming that the jurors must be summoned from the "vicinage," as at common law, I think an adjoining county might well be held to be within the neighborhood," for that is what the term signifies, although in England, 7 L.R.A. (N.S.)

where the counties are very large, it is held to be a jury from the county. I would hesitate to hold that the legislature has the power to enact that one who commits a crime in Cherokee may be indicted and tried in Currituck. My convictions, however, compel me to dissent upon other grounds from the judgment of my brethren that the grand jurors of Union county had jurisdiction over the offense charged in the bill of indictment. The act of 1893 (chap. 461, page 440), together with its title, was as effectually effaced and blotted out from the statute law of the state by the Revisal of 1905 as if it had never been enacted. Revisal 1905, § 5453. Therefore, at the time of the commission of the alleged offense and the finding of the bill, the only statute law which it is contended gives jurisdiction to the grand jurors of Union county is § 3233 of the Revisal of 1905. The bill alleges that the offenses therein charged were committed in Anson county. A plea in abatement is not therefore necessary. This court can see on the face of the bill that the superior court of Union had no jurisdiction unless the statute confers it. It is familiar learning that a motion to quash may be made at any time, where it is apparent upon the face of the record that the court was without jurisdiction.

The bill of indictment is drawn under § 3698 of the Revisal of 1905, which is copied in the opinion of the court. The first count charges a conspiracy to break into the common jail of Anson county, entered into within said county, and the second charges the actual breaking into said jail. The third count charges no offense either against common law or statute.

In order to give the superior court of Union county jurisdiction under the terms of § 3233, it must plainly appear that § 3698 creates an offense and defines it as "lynching," for § 3233 confines the exercise of jurisdiction by the superior court of the adjoining county to the "crime of lynching," and to that alone. Now, does § 3698 create and define in terms a crime known as lynching? That is the *crux* of this case. Being a criminal statute, it must be construed strictly, as the sacred right of the liberty of the citizen forbids a liberal construction and a reading into the statute of words that are not there. The word "lynching" is nowhere used in the body of the statute, and no such distinct offense is named and created by it. Had the statute (§ 3698) declared in express terms that the acts therein denounced shall constitute the "crime of lynching," or that any person committing such acts "shall be guilty of lynching," I should say the superior court of Union county had jurisdiction, under § 3233. But the

body of the statute fails to so declare. It is attempted, however, to "piece out" the statute by bringing in a so-called title. It must be admitted that the title to the act of 1893 cannot be looked to, for that is as dead as the body of the act, as I have shown. The only title that can be looked to is the one word "lynching," which is printed in large letters between the number and the body of § 3698. If that can be called a title, then, according to the authorities, it does not help the contention of the state. It has been established in England since Lord Coke's time, by an unbroken line of judicial decisions, that the title of a statute is not a part of it, and is therefore excluded from consideration in construing it. Endlich, *Interpretation of Statutes*, 73; *Powtler's Case*, 11 Coke, 33b. In this country, while the title of a statute, in the absence of a constitutional provision, is not regarded as a part of the statute, it is legitimate to resort to it as an aid in ascertaining the meaning of the statute, but only when the language and provisions in the body of the act are ambiguous and of doubtful meaning. Endlich, *Interpretation of Statutes*, p. 74, and cases cited. Such is the ruling of this court. *Hines v. Wilmington & W. R. Co.* 95 N. C. 434, 59 Am. Rep. 250. In *State v. Patterson*, 134 N. C. 612, 47 S. E. 808, Clark, Ch. J., says: "The caption of an act was not at all considered, to any extent whatever, in construing it, for reasons given in *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; but the modern doctrine is that, when the language of the statute is ambiguous, the courts can resort to the title as aid in giving such act its true meaning; but that this cannot be done when the language used is clear and unambiguous." The statute construed in that case was, like the one under consideration, free from ambiguity, but in conflict with its title. The title was disregarded, and the body of the statute followed. The title of a statute cannot control or vary the meaning of the enacting part, if the latter is plain and unambiguous, as the statute in the present case is, nor can the title be used for the purpose of adding to the statute or extending or restraining any of its provisions. Black, *Interpretation of Laws*, p. 173. "Cases which are clearly not within the contemplation of the enacting clause cannot be brought within it merely because the title appears to include them." *Id.* p. 173. "Lynching" is a word of much more general and extended meaning and significance than any words contained in the body of § 3698, and, being a penal statute, especially, the term ought

not to be read into it. Black, *Interpretation of Laws*, p. 173; *United States v. Briggs*, 9 How. 351, 13 L. ed. 170. There is no such crime as lynching known to our law, and, if the body of this statute does not create it, then it does not exist. The word in its well-known significance and generally accepted meaning embraces many illegal acts which do not come within the purview of this statute, and does not embrace those mentioned in it. The acts made illegal by it constituted indictable offenses before its enactment, and, were it repealed, would still be indictable in the counties where committed. While no statute of this state defines what is lynching, the lexicographers and historians have given it a well-defined and perfectly understood meaning, which excludes any of the crimes denounced in the act. The great Scotch novelist refers to a species of lynching when he refers to what was called "Jedwood" justice, "hang in haste and try at leisure." Again, the same versatile author, in his introduction to the *Border Minstrelsy*, speaks of a sort of lynching called "Lydford Law," quoted by Mr. Justice Connor in *Daniels v. Homer*, 139 N. C. 239, 3 L.R.A.(N.S.) 997, 51 S. E. 992. A most interesting writer in the *American Law Register* (Mr. John Marshall Gest) says that "the lynch law of our country has a very ancient and respectable pedigree." He refers to the Vehmic tribunals, originating in Westphalia, which executed thieves and murderers caught in the act without trial or delay, and speaks of them as "Judge Lynch's cousin German." The word "lynching" has been defined by legal as well as other lexicographers, and according to such definitions, and as the term is generally understood, the illegal acts commonly termed "lynching" cannot be committed by a single individual; yet one person alone could be guilty of the crime of breaking and entering a jail with intent to kill under this statute. "Lynching" is defined by *Rapalje & Lawrence* as "mob vengeance upon a person suspected of crime." *Law Dictionary*, 778. It is "a term descriptive of the action of unofficial persons, organized bands, or mobs, who seize persons charged with or suspected of crimes, or take them out of the custody of the law, and inflict summary punishment upon them, without legal trial, and without the warrant or authority of law." Black, *Law Dict.* p. 737. "A common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offense." 2 *Bouvier, Law Dict.* 287. See also *State v. Aler*, 39 W. Va. 558, 20 S. E. 585. *Worcester and Web-*

ster define the word as the infliction of punishment without legal trial by a mob, or by unauthorized persons. The word derives its origin, according to Worcester, from a Virginia farmer named Lynch, who, having caught a thief, instead of delivering him to the officers of the law, tied him to a tree and flogged him with his own hands. Lynching has no technical legal meaning. It is merely a descriptive phrase, used to signify the lawless acts of persons who violate established law at the time they commit the acts, and is universally understood to signify the illegal infliction of punishment by a combination of persons for an alleged crime. As I have said before, the offense of lynching was not known to the common law, and is unknown to the laws of North Carolina, because we have no statute creating and defining the offense. We are, therefore, in the anomalous situation of having a statute fixing the venue for the trial of persons charged with lynching, and yet there is no such crime known to our law or created by the act. The statute not only fails to declare that the acts therein set out shall constitute the crime of lynching, but those acts do not come within any known definition of the term, as I think I have plainly shown. A conspiracy to break or enter a jail for the purpose of killing a prisoner has never yet been called "lynching." Neither has the breaking into jail with the intent to kill or injure a prisoner been so denominated. Such acts were recognized indictable offenses before the passage of the act, and are now indictable independent of it. But nowhere have they ever been termed "lynching." This phrase, by common usage, is applied only when the unlawful act is consummated and the illegal punishment actually inflicted. It is plain to me that the so-called title not only is no aid to a proper construction of the act, but the title, tested by every known definition of it, bears no relation to, and does not embrace, the crimes set out in the act. There is nothing in the statute open to construction. Its words are as simple and unambiguous as any that could have been used, and their meaning free from doubt. It is not "construing" that the statute needs, but amendment. That is what, with all deference, in my opinion this court has done to it.

For the reasons given, I do not think that § 3233 of the Revisal of 1905 can reasonably be held to give to the superior court of Union county jurisdiction over persons charged with offenses committed in Anson county and indicted in Union, under § 3698. I am of opinion that his Honor, Judge Shaw, was correct in quashing the bill.
7 L.R.A.(N.S.)

NORTH CAROLINA SUPREME COURT.

LOUISE B. SMITH

v.

SUSAN E. MOORE et al., Appts.

(142 N. C. 277, 55 S. E. 275.)

Evidence—transactions with deceased persons.

1. In an action to set aside a deed for fraud, evidence is not admissible as to statements made in the presence of the grantee by his attorney at the time of the execution of the deed, where the grantee is dead, under the statute forbidding the admission of evidence of transactions with a person since deceased,—especially where the attorney is dead also.

Same—declarations of deceased person.

2. Evidence of declarations by one in possession of real estate, that he has conveyed the property to another by deed based upon a meritorious consideration, is admissible, in a suit after his death, to set aside a purported deed on the ground of fraud in that the signature was procured under the representation that it was a will.

Same—effect on third persons.

3. In an action by a remainder-man to set aside a deed signed by himself and the life tenant, on the ground that it was procured under the representation that it was a will, declarations by the life tenant, since deceased, are admissible, to the effect that the estate had been conveyed, as tending to show that the alleged representations were not made.

Deed to agent—presumption—fraud.

4. A conveyance by one to his general agent having control and management of all his affairs, and who is his confidential adviser and friend, is presumed in law to be fraudulent; and the grantee has the burden of overcoming the presumption.

Same—withholding from record.

5. Upon the question of fraud in procuring the signature of a deed under a mis-

Case Note.—Effect of statute relating to the competency of a party to testify in regard to transactions or communications with a deceased person on the admissibility of his testimony as to transactions with the attorney or agent of such person:—Owing to the various forms of statutes governing the competency of parties as witnesses in actions by or against the personal representatives of, or parties claiming through or under, deceased persons; some of which broadly declare the survivor an incompetent witness as to matters occurring before the other party's death, while others expressly make testimony of the kind under discussion admissible by creating an exception where the contract in issue was made with a person still living and competent to testify, or where the person deceased was represented in the transaction by an agent still living and capable of testifying,—

representation as to its character, the jury may be permitted to consider the fact that it was kept off the record for a period of ten months.

Same—equitable estate—statute of uses.

6. The conveyance of his property by the remainder-man, in case property is devised in trust to hold it for the life of one person and convey the remainder to another, will, whether he has acquired the legal title or not, vest the remainder in the grantee; so that, upon the falling in of the life estate and termination of the trust, the statute will vest the use in the grantee, and perfect his title to the whole estate.

(October 16, 1906.)

APPPEAL by defendants from a judgment of the Superior Court for New Hanover County in favor of plaintiff in an action brought to set aside a deed which was alleged to have been secured by fraud. Reversed.

Statement by Walker, J.:

The object of the action is to set aside a

the scope of this note is limited to decisions as to the competency of a party to testify as to transactions with an agent of the deceased person, which involve statutes substantially like that construed in *SMITH v. MOORE*, restricting the incompetency of the party to personal transactions or communications with the deceased.

The essential inquiry, then, is whether the agent is so identified with his principal that a transaction with, or communication to, him is equivalent to a personal transaction or communication with his principal, within the meaning of the statute; and the general rule, which is subject, however, to an exception within which the case of *SMITH v. MOORE* falls, is that he is not.

In *Bowie v. Hume*, 13 App. D. C. 286, it was held that a statute providing that, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," did not render defendant incompetent to testify as to a transaction with an agent of plaintiff's testator, who was not present therat. The court said: "The great and leading principle of this and similar statutory provisions is to preserve entire mutuality as between the parties, that each shall be competent, and required if necessary, to state his version of the transaction under investigation. It is important, therefore, to look to the parties in fact and who are actively engaged in the transaction, in order to get the real facts as they transpired, and as they may be remembered by all parties concerned. If the transaction involved has been conducted by an agent, and that agent be a competent witness to support his version of what occurred, there can be no good reason for excluding the other party to the transaction; and there does not appear to be anything in the terms of the statute to require such construction. We think the statute should receive a liberal construction in order to maintain the principle of mutuality, and that seems to be the construction adopted by other courts where similar statutes prevail."

deed for a lot in the city of Wilmington at the northeast corner of Second and Red Cross streets which was executed to Mr. Moore, the husband of the defendant Susan E. Moore, and the father of her codefendants, by Mrs. Mary E. Smith, and her daughter, the plaintiff, and which it is alleged was obtained by fraud. The lot was devised in 1802 by Samuel Frink, the father of Mrs. Mary E. Smith and grandfather of the plaintiff, to his son Lorenzo Frink and Henry Nutt and the survivor of them, in trust for the sole and separate use of his daughter, Mary E. Smith, for and during her life, and at her death to such of her children as should then be living and the issue of such as might be dead, the issue to take *per stirpes*. Mr. Nutt died in 1881, and on February 27, 1885, Lorenzo Frink conveyed the said lot "to Mary E. Smith for life with remainder to Louise B. Smith in fee, reciting in the deed that the lot had been devised to Mary E. Smith for her sole and separate use, so that it would not become liable for the debts of her then husband, that the latter had since died, leaving his

cerned. If the transaction involved has been conducted by an agent, and that agent be a competent witness to support his version of what occurred, there can be no good reason for excluding the other party to the transaction; and there does not appear to be anything in the terms of the statute to require such construction. We think the statute should receive a liberal construction in order to maintain the principle of mutuality, and that seems to be the construction adopted by other courts where similar statutes prevail."

And in *Andrews v. Hunt*, 7 Mackey, 311, it was also held that such statute does not extend to transactions with the agents of the deceased.

In *Ward v. Ward*, 37 Mich. 253, and *Smith v. Smith*, 91 Mich. 7, 51 N. W. 694, it was held that a statute declaring the incompetency of the party to testify as to matters equally within the knowledge of the decedent is inapplicable to transactions with an agent of the decedent, where the decedent was not present.

In *Pratt v. Elkins*, 80 N. Y. 198, and *Waterhouse v. Gilman*, 6 N. Y. S. R. 283, it was held that testimony as to transactions with the agents of a deceased party is not within either the letter or the spirit of the statutory prohibition of testimony concerning personal transactions or communications between a party and the decedent.

A like conclusion was reached in *Dodd v. Skelton*, 2 Neb. (Unof.) 475, 89 N. W. 297.

In *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729, it was said, *obiter*, that a conversation with an agent alone would not fall within a statute providing that, in actions against executors, administrators, heirs at law, or next of kin, neither party shall be allowed

widow, Mary E. Smith, who was well advanced in years, and an only child, Louise B. Smith, his other children being dead without issue surviving them. He had three children, Rebecca Smith (who was the first wife of Mr. Moore and died in 1869 leaving one child who died in 1884), the plaintiff, and another who died without having married. Mrs. Mary E. Smith died intestate in April, 1895, and Mr. Moore died in 1900. The plaintiff attacked the deed from her mother and herself to Mr. Moore upon the ground that, at the time it was executed, his attorney stated to her in the presence of her mother and Mr. Moore that it was a will; that she was ill at the time and confined to her bed, and that she signed the deed thinking that it was a will, and she did not know it was a deed until after Mr. Moore's death. There was evidence in corroboration of the plaintiff's testimony, consisting of statements to the same effect made afterwards by her to other persons. It was admitted that Mr. Moore was "the agent, confidential friend, and adviser of the plaintiff and her mother." It was also in evidence that the plaintiff and her mother remained in possession of the

premises conveyed by the deed until the mother's death, and that after her death the plaintiff has continued in possession to the present time. The deed to Mr. Moore was executed March 3, 1885, and registered January 23, 1886. The defendants introduced in evidence a paper writing in the form of a lease from Mr. Moore to Mary E. Smith and the plaintiff, dated March 15, 1885, by which he covenanted and agreed that they should occupy and possess the said lot "for and during the term of their joint lives, and after the death of either of them, then for the term of the natural life of the survivor of them, yielding and paying therefor annually on the 15th day of March in each and every year during the said terms one cent as rent." The plaintiff put in evidence a letter from Mrs. Smith to Mr. Moore's attorney, dated March 2, 1885, in which she expressed the greatest affection and esteem for her son-in-law, Mr. Moore, and referred in strong terms to his many kindnesses and to his sympathy for her; and further, to the fact that he had paid her taxes and insurance for twenty years, repaired her house, and in other ways assisted her in time of need. She states it to be her first

to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party.

In *Guillaume v. Flannery* (S. D.) 108 N. W. 255, it was held that a statutory provision like the foregoing will not render a party incompetent to testify concerning any communications he may have had with persons representing the decedent.

On the other hand, in *Cottrell v. Woodson*, 11 Heisk. 681, it was held that such a statute was applicable to a contract made with the agent of plaintiff's intestate.

That the general rule as above stated is unaffected by the fact that the agent also may be dead, is held in *Morgan v. Bunting*, 86 N. C. 66, in which the statute under construction excluded testimony in regard to any transaction or communication between the witness and a person at the time of such examination on deceased, insane, or lunatic, as a witness against the party then prosecuting or defendant, as executor, administrator, etc.; and in *Voss v. King*, 33 W. Va. 236, 10 S. E. 402, in which the statute provided that no party to any action should be examined as a witness in his own behalf in regard to any personal transaction or communication between such witness and a person then deceased, or against the executor, administrator, heir at law, etc., of such deceased person. In the latter case the court held that, where there has been a transaction or communication had personally by a party with an agent of the deceased person, such party is a competent witness under the statute to testify on his own behalf in reference thereto, against the ex-

ecutors, heirs, etc., of such deceased person; and that it can make no difference in principle whether the agent is dead or alive at the time the testimony is offered; saying: "The deceased person referred to in the statute is the principal in the transaction, and not the agent. According to what we may suppose to be the spirit of the statute, transactions or communications had personally with a deceased agent ought to be excluded; but, as the legislature did not see proper to so enact the law, we are not at liberty to disregard the plain and express terms of the statute upon any supposition or fanciful idea of its spirit, or what it ought, or the legislature might have intended it, to be."

The exception to the general rule, above referred to, occurs where the transaction with the agent takes place in the presence of the principal, in which case there are clearly grounds for regarding it as a personal transaction with the principal himself; and is supported by the case in hand and the decision in *McRae v. Malloy*, 90 N. C. 521, stated at length in the opinion therein.

In connection with this subject, reference may also be made to the closely related case of *Dolan v. Leary*, 69 App. Div. 459, 74 N. Y. Supp. 981, Affirmed without opinion in 174 N. Y. 540, 66 N. E. 1107, which holds a husband incompetent to testify as to the execution of deeds by his wife to an intermediary, and by the intermediary to the husband and wife jointly, on the ground that the transaction was in effect a personal transaction with the wife, who was then deceased.

and greatest wish, if she should outlive her child (the plaintiff), that the house and lot should "descend" to him and his children; and she evinced the greatest anxiety that he should own the lot free from any claims against her. Then she states that she gives to him all of her household furniture, books, pictures, and silver to dispose of as he thinks best. The plaintiff stated that this letter was introduced to show that the attorney was not authorized to draw a deed but a will. The defendants put in evidence the deposition of Mrs. Boudinot, and proposed to prove by her that Mrs. Smith, who was her sister, had stated to her that she had executed the deed to Mr. Moore, and gave substantially the same reasons for so doing as those set forth in the letter to the attorney. The testimony was excluded by the court, and the defendants excepted. On cross-examination she testified that Mrs. Smith had told her the deed had been executed, giving in detail what was said by her about the deed. She also stated that the plaintiff had told her "that she had signed a deed, and that she and her mother had fixed it all up." The defendants objected to the testimony of the plaintiff as to what was said to her by his attorney in the presence of Mr. Moore at the house, and also as to what was done at that time. The objection was overruled, and the defendants again excepted. It was shown that the attorney had died before this action was commenced. The court charged the jury that, if Mr. Moore was the agent of the plaintiff and her mother, and attended to their business, and they were in the habit of relying on him for advice, this would constitute such a confidential relation between them that from it the law raised a presumption of fraud, which would be evidence of fraud to be considered by the jury, and the burden would then rest on the defendants to show that the transaction was fair and honest, and, if they had failed to do so, the jury should answer the issue "Yes;" that this presumption was rebuttable, and if, upon all the evidence, the jury found that the transaction was fair and honest, they should answer the issue "No;" that the letter of March 2, 1885, did not authorize the attorney to draw a deed in fee simple, and that the listing of the property for taxes by Mr. Moore in the name of Mrs. Smith and after her death in the name of her heirs, the failure to register the deed from March 3, 1885, to January 23, 1886, and the continued possession of the lot by the plaintiff, were each circumstances to be considered by the jury. The defendants objected to that part of the charge as to the nonregistration of the deed. The court further charged that, if the jury should

find the facts to be those related by the plaintiff in her testimony as to what occurred at the time the deed was executed, the transaction would be fraudulent and they should answer the issue "Yes;" but, if they did not find by the greater weight of the evidence that the execution of the deed was procured by fraud, they should answer the issue "No." The jury for their verdict found that the deed was procured by fraud, and, judgment having been entered thereon, the defendant appealed, and specially assigned as errors the several rulings and the instructions of the court to which exceptions had been taken.

Messrs. Roundtree & Carr and Bellamy & Bellamy, for appellants:

The recording of a deed is not essential between the parties signatory thereto.

13 Cyc. Law & Proc. p. 594; Code 1905, § 980; Pub. Laws 1885, chap. 147, § 1; *Phifer v. Barnhart*, 88 N. C. 333; *Austin v. King*, 91 N. C. 286; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. 443.

The delay of ten months should not be used against the defendants, who derive their title from the grantee in said deed.

24 Am. & Eng. Enc. Law, pp. 113, 114.

Messrs. John D. Bellamy & Son and E. K. Bryan for appellee.

Walker, J., delivered the opinion of the court:

The testimony of the plaintiff as to what was said and done when Mr. Moore and his attorney were at her home for the purpose of having the deed executed was incompetent, because the witness, under the admitted circumstances of this case, was disqualified by the statute to speak of that matter, and not because the facts related were not pertinent to the inquiry. It is a principle of the common law, and one of its favorite maxims, as well as an indispensable requirement of justice, that they who are to decide shall hear both sides, giving the one an equal opportunity with the other of knowing what is urged against him and of making good his claim or defense, if he has any. This rule, so essential to the fair administration of the law, was embodied in the maxim, "No man should be condemned unheard" (*audi alteram partem*). At common law, no party to an action, or person having an interest in the event of the same, was permitted to testify in his own behalf, with certain well-defined exceptions. The legislature, deeming this exclusion to be founded upon an insufficient reason and to be unjust in itself, changed the law in this respect, and admitted interested parties as witnesses, subject to the wise provision that

no such party should be allowed to testify in his own behalf against the other party representing a deceased person as to a transaction or communication between him and such deceased person. Code, §§ 589, 590; Revisal 1905, §§ 1629, 1631. So we see that the ancient principle of the law, to which we have referred, has been preserved in this enactment, and one of the parties to the transaction will not be heard if the other is dead and cannot, therefore, be called in reply. "The proviso rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground, that the other party to the action has no chance, even by the oath of a relevant witness, to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." *McCanless v. Reynolds*, 74 N. C. 301. This construction was approved in *Pepper v. Broughton*, 80 N. C. 251, and the defendant forbidden, as a witness, to testify that he had not refused to speak to Lougee, his father-in-law, who was then deceased, although the plaintiff introduced testimony showing the mere declaration of Lougee that he had, and although both parties claimed under the deceased person. The idea was that the opposing testimony should be of the same kind, whereas, in fact, *Pepper* had only an unsworn declaration to stand against and overcome the proposed sworn testimony of *Broughton*. In *McRae v. Malloy*, 90 N. C. 521, the defendant proposed to show a conversation between himself and the attorneys of the plaintiff's intestate (who were then living, and who were present at the time of the communication) touching a matter relevant to the controversy. The testimony was excluded, and this court held the ruling to be correct, although the attorneys were still living at the time of the trial, and could have testified and thus arrayed two witnesses in behalf of the plaintiff against only one for the defendant, and he the defendant himself and therefore vitally interested. This seemed to present a strong reason for making an exception to the rule of exclusion, but the court adhered to the principle that the dead man could not be heard, and therefore the living one must not be. The attorneys were present and speaking and acting for their client, and with his constant and direct sanction in all that was said and done, and it was the same as if he had acted personally. *Qui facit per alium facit per se*. It will be observed that there the attorneys were living and here the attorney is dead. The case is directly in point and de-

cisive of this one, though this is much stronger, if anything, than that one, by reason of the fact that the attorney is dead. The law is explicit that the one party shall not testify if the other cannot, and this without reference to the presence of third parties at the time of the transaction, unless the representative is himself examined in his own behalf, or the testimony of the deceased person is introduced, as to the same transaction. If we reverse the position of the parties on the record, *Halyburton v. Dobson*, 65 N. C. 88, is a case exactly like ours. There the plaintiff's testator, *Harshaw*, went with the defendant to the office of the testator's attorney, *Pearson*, who advised him to take certain money from the defendant, and the latter proposed to show this by his own testimony, it being material to the controversy. He was held to be incompetent, though he took no part in the conversation, which was confined to *Pearson* and *Harshaw*. Judge *Reade*, for the court, said: "The reason for the exception is apparent. There could never be a recovery against an unscrupulous party if he were permitted to testify where it would be impossible to contradict him. The statute ought to be construed in view of this mischief." The result is that, where an attorney acts or speaks for his client, or an agent for his principal, in their presence, the one is by the law thoroughly identified with his client and the other with his principal, as much so as if the attorney or agent had not been present at all and the client or principal had acted for himself, or the existence of the former had been merged into the latter. We thus preserve the saving principle of the law that the litigants must both be heard, each being given an equal chance, and equality of opportunity means that the one shall be silenced unless the other also is living and can speak. The court erred in admitting the testimony to which the defendants objected. This case is not like either *Peacock v. Stott*, 90 N. C. 518, or *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271. There the deceased had been jointly interested with another person, who was present at the time of the transaction and who survived. *Re Peterson*, 136 N. C. 13, 48 S. E. 561. This is sufficient to dispose of the appeal did we not think other questions are raised which should be considered, as, in all probability, they will again be presented; and it is well to express our views in regard to them for the guidance of the judge who will preside at the next trial.

The second assignment of error, embracing the next six exceptions, relates to the exclusion of a part of *Mrs. Boudinot's* testimony which was taken by deposition.

She deposed, among other things, that Mrs. Smith, who was her sister, had told her that she had made a deed to Mr. Moore for the lot, and, in the conversation with her, used language substantially similar to that which is contained in her letter to Mr. Moore's attorney, dated March 2, 1885. It seems that the defendants, by questions 16 and 17, and her answers thereto, on the cross-examination, had received the full benefit of her testimony as to the fact that both the plaintiff and her mother, Mrs. Smith, had admitted the execution of the deed, or of the paper in question as a deed. But if the testimony of Mrs. Boudinot, which was excluded, is competent, it was error to reject it, and besides, all of what was said by Mrs. Smith to her sister, Mrs. Boudinot, is not included in the answers of the latter to questions asked on her cross-examination. We will therefore consider the competency of all that was said. The testimony was evidently ruled out by the court because it was regarded as nothing more than hearsay; but we think it comes within one of the well-known exceptions to the rule excluding such testimony. Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) that he had no probable motive to falsify the fact declared. 1 Elliott, Ev. §§ 439-454, where the subject is fully discussed. The declaration is admissible as an entirety, including statements therein which were not in themselves against interest, but which are integral or substantial parts of the declaration, the reason why this is so being that the portion which is trustworthy, because against interest, imparts credit to the whole declaration. It will be well to consider the origin and development of these two principles separately. The earliest case on the subject of such declarations is *Searle v. Barrington*, 2 Strange, 826 (on appeal) 3 Bro. P. C. 593, 8 Mod. 278. In that case, decided in 1730, an indorsement of a payment of interest on a note was admitted to repel the statute of limitations. The case was ably argued and remarkably well considered. It originated in the court of King's bench, and was tried at Guildhall before Lord Raymond, then chief justice, who admitted the proof of payment, and afterwards it was heard in the exchequer chamber and the House of Lords respectively, where the ruling was sustained. It is regarded as the first and leading case, 7 L.R.A.(N.S.)

and is reviewed, in connection with the subsequent cases on the same question to the year 1833, in *Gleadow v. Atkin* (Exch.) 3 Tyrw. 289. It was there held, following the lead of the earlier case, that, as the declaration was against interest and as there was no motive to misrepresent, it was admissible, not only against privies in blood or estate, but against all the world. The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against, interest, is so strong, that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility. A discussion of this rule of evidence, which shows how thoroughly it has been adopted by the courts, whether the declarations are in the form of mere words or of written entries, will be found in 1 Greenl. Ev. 16th ed. §§ 147-154; 2 Wigmore, Ev. §§ 1455-1471; McKelvey, Ev. pp. 254-261. The case of *Higham v. Ridgway*, 10 East, 109, 3 Smith, Lead. Cas. 9th Am. ed. 1607, recognized the principle to its fullest extent, and held that it embraced, not only the particular statement which was against interest, but others contained in it, Lord Ellenborough saying that it is idle to admit a part without the context. "All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." 2 Wigmore, Ev. § 1465. Especially should the part of the declaration that is not dis-serving be admitted if it is not in itself self-serving and tending, therefore, to promote the interest of the declarant. In *Queen v. Birmingham*, 1 Best & S. 763, the rule was held to apply to oral declarations as well as to written entries or averments, the difference between the two affecting rather the weight than the competency of the testimony.

The three leading cases we have cited have been approved in the later decisions,

and are regarded by the law writers as having firmly settled the principle to which they severally relate. 9 Am. & Eng. Enc. Law, 2d ed. pp. 8-13; 16 Cyc. Law & Proc. pp. 1217-1222; Davies v. Humphreys (Exch.) 6 Mees. & W. 153; Warren ex dem. Webb v. Greenville, 2 Strange, 1129; Doe ex dem. Reece v. Robson, 15 East, 32; Doe ex dem. Baggalley v. Jones, 1 Campb. 367; Marks v. Lahee, 3 Bing. N. C. 408; Percival v. Nanson (Exch.) 7 Welsby, H. & G. 1; Queen v. Birmingham, 1 Best & S. 703; Doe ex dem. Smith v. Cartwright, 1 Car. & P. 216; Roe ex dem. Brune v. Rawlings, 7 East, 279; Middleton v. Melton, 10 Barn. & C. 319; Taylor v. Witham, L. R. 3 Ch. Div. 605. In the case last cited Sir George Jessel said: "It is no doubt an established rule in the courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes," and that the argument against its competency, based upon the nature of the particular evidence offered, as affecting its weight, has nothing to do with it. "The question of admissibility is not a question of value." The cases decided in this country are quite as emphatic and as much to the point. Elsworth v. Muldoon, 15 Abb. Pr. N. S. 440. That case also decides that it makes no difference whether the deceased and the party against whom the declaration is offered were in privity or not. Cases which are very instructive, and which review the English decisions at length, are Mahaska County v. Ingalls, 16 Iowa, 81; Livingston v. Arnoux, 56 N. Y. 519, Humes v. O'Bryan, 74 Ala. 78, and Halvorsen v. Moon & K. Lumber Co. 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28. See also McDonald v. Wesendonck, 30 Misc. 601, 62 N. Y. Supp. 764; Heidenheimer v. Johnson, 76 Tex. 200, 13 S. W. 46; Quinby v. Ayers, 1 Neb. (Unof.) 70, 95 N. W. 464; Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457; Taylor v. Gould, 57 Pa. 152; Bartlett v. Patton, 33 W. Va. 71, 5 L.R.A. 523, 10 S. E. 21; Georgia R. & Bkg. Co. v. Fitzgerald, 108 Ga. 507, 49 L.R.A. 175, 34 S. E. 316. They all support the doctrine of the leading cases we have cited. This species of evidence was at one time said to be anomalous and to stand on the *ultima thule* of competent testimony; but an unbroken line of decisions in England, and one almost so in this country, have established beyond question that verbal declarations are receivable under the conditions we have mentioned, even in controversies between third parties. The law is thus strongly stated in Hinkley v. Davis, supra; "In many cases where a man has the means of knowing a fact, and it is against his interest to admit it, his admission is evidence

even against another person. The evidence results, in such a case, from the improbability of a man's admitting as true what he knows to be false, against his interest. In some cases such an admission is as strong against another person as it is against the person who makes it." Lord Ellenborough thus tersely presented somewhat the same view of the matter when, in Doe ex dem. Reece v. Robson, supra, he said: "The ground upon which this evidence has been received is that there is a total absence of interest in the persons making the entries [or declaration] to pervert the fact, and at the same time a competency in them to know it."

There is nothing that so strongly attests the truth of what a person declares, not even his oath and the searching light of a cross-examination, as when he has asserted the existence of a fact and it appears that his interest at the time lay the other way. Doe ex dem. Baggalley v. Jones, supra. The words of sacred writ, "He that sweareth to his own hurt and changeth not," were uttered long before the era of our jurisprudence, and set before us not only one of the most exalted attributes possessed by the exemplar of true virtue and probity, but embodied at the same time the highest standard by which we can safely gauge our trust and confidence in human testimony. It is not at all a matter for surprise, therefore, that the common-law jurists should have regarded it as a perfectly safe test for discerning the truth in judicial investigation. This rule of evidence has been fully adopted by this court, as its decisions will show. The principal case is Peck v. Gilmer, 20 N. C. 391 (4 Dev. & B. L. 249). Recognizing the authority of the cases at common law, to which we have referred, Judge Gaston, for the court, thus states the principle: "It is a well-established rule that where a person who has peculiar means of knowing a fact makes a declaration or a written entry of that fact which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons." This case was followed, and the rule as therein stated applied, in Peace v. Jenkins, 32 N. C. (10 Ired. L.) 355; Patton v. Dyke, 33 N. C. (11 Ired. L.) 237; Williams v. Alexander, 50 N. C. (5 Jones, L.) 162; Carr v. Stanley, 52 N. C. (7 Jones, L.) 131; Jones v. Henry, 84 N. C. 324, 37 Am. Rep. 624; McCanless v. Reynolds, 67 N. C. 268; Braswell v. Gay, 75 N. C. 515. We must not confuse these declarations with entries made in a due course of business or in the discharge of a public duty, nor with a declaration which accompanies and explains an act, and deemed, therefore, to be a part

of the *res gesta* (Yates v. Yates, 76 N. C. 142), because, while they are all admitted as evidence, they are not so admitted for the same reason.

We must now consider whether the declaration of Mrs. Smith to Mrs. Boudinot comes within the rule stated. Was it a declaration against her interest at the time she made it? We think it was. She was then in possession of the lot and ostensibly the owner thereof; and when she declared that she had parted with her title, and did not own the estate of which she was apparently seised, it could not be anything other than such a declaration. In *Ivat v. Finch*, 1 Taunt. 141, Lord Mansfield, speaking of the declaration of a party that she had assigned or transferred certain property, said: "The evidence ought to have been received, though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission, supposed to have been made by Mrs. Watson, was against her own interest." The evidence was received. To the same effect are *First Nat. Bank v. Holland*, 99 Va. 501, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; *Queen v. Birmingham*, supra; *Chadwick v. Fonner*, 69 N. Y. 404; *Turner v. Tyson*, 49 Ga. 165; *Bowen v. Chase*, 98 U. S. 254, 25 L. ed. 47. Cases which appear to be directly in point are *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *Tuggle v. Hughes* (Tex. Civ. App.) 28 S. W. 61, and *Howell v. Howell*, 47 Ga. 492. We have seen that any other statement associated in the declaration with the one against interest is just as competent as the latter, and especially is that true in a case like the one at bar where the collateral statement bears directly on the other, and tends to confirm and strengthen it. The deed to Mr. Moore is attacked for fraud, because what was in fact a deed was represented to be a will, and the declaration by Mrs. Smith to Mrs. Boudinot was, not only that she had made a deed, and therefore, knew the character and contents of the paper writing, but that she executed it upon a meritorious consideration, and substantially that she acted freely and voluntarily when she did so. What could be more against her interest than such a statement, and what could carry with it more conclusive evidence of its truth and accuracy? It was in disparagement of her apparent title and made at a time which was recent with respect to the date of the main transaction, when it must be supposed she had a clear recollection of what had occurred, and also long prior to the beginning of this controversy,—*ante litem motam*. Her interest was all on the side of

herself and her daughter who lived with her, or at least it must now be supposed to have been that way, nothing else appearing. Her motive was a most commendable one,—gratitude for what Mr. Moore had done for her,—and she spoke with feeling and emphasis; but this does not have the effect in law, as the cases show, to rebut the presumption that she was declaring against her own interest. But it may be suggested that she was not in privity with her daughter, the plaintiff, as she had but a life estate and her daughter a contingent remainder, which, since the death of her mother, has become a vested one in interest and possession. This is true, but it does not prevent the application of the rule, for, the declaration being against interest, it is admitted because of the likelihood of its being true and of its general freedom from any reasonable probability of fraud or imposition, and is for that reason held to be competent as to third parties. It is not, therefore, within the principle of exclusion as being *res inter alios acta*. *Lyon v. Ricker* and *Higham v. Ridgway*, supra.

It may be further objected that, even if the declaration is otherwise competent, the fact that Mrs. Smith supposed she had executed a deed is not evidence that the plaintiff had the same opinion as to the nature of the instrument. There is every reason, we think, why, under the peculiar facts of the case, we should hold this objection to be untenable and the reason for it to be unsound. The allegation is that the deed was executed at the home of Mrs. Smith and her daughter, in the presence of Mr. Moore, the attorney, and some other persons who are now dead, the plaintiff being the sole survivor of those then present. The deed was executed by the mother and daughter then and there, and the alleged representation of the attorney was to both of them at that time. It was all one and the same transaction, without a single break in its continuity from beginning to end. Under such circumstances, can it be denied that the impression received by Mrs. Smith of what was said and done, the execution of the deed being a joint act, is at least some evidence as to what the true nature of the transaction was; and, as she heard what the attorney said, should it not be received as some evidence of what his words were and what they really meant; and finally, may it not safely be admitted to show that possibly the plaintiff is mistaken as to what was said and as to what did occur? Where two persons have equal opportunity of knowing a fact, one is as competent to give a correct version of it as the other, or at least should be. We frequently receive the evidence of two persons, one against the

other, as to whether a certain thing was done or not, one testifying that he saw it done and the other that he did not. The declaration of Mrs. Smith was equivalent to her saying that she did not hear any such representation made as that which is imputed to the attorney, or that it was not in fact made, according as her testimony is construed. We are constrained to think that the evidence is both competent and relevant, and should be heard by the jury in its entirety.

Before taking leave of this part of the case, we will refer to three cases which seem to be very much in point just here. The first is that of *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92, which bears a striking resemblance to our case in several of its features. There it was held, when it was attempted to establish a trust in certain property, that a declaration of a life tenant as to the subject under investigation was competent against the remainder-man, as it disparaged her own estate in the property, and was, therefore, against her interest; and that the additional statements relevant to the principal fact and embraced with it in the declaration against interest were also competent. In that case, as here, the life tenant and remainder-man acquired their interests under a settlement in trust for their benefit. The two cases are practically parallel. The second is *Howell v. Howell*, supra, in which the deed in question was attacked as having been procured by undue influence and fraud. The declarations of the donor were held competent to show that he knew the nature and contents of the paper, and to repel the imputation of fraud. The third is *Bowen v. Chase*, supra, which, while not precisely like the other two cited cases, nor like our case, in the object for which the suit was brought, is, in its main features, and so far as the general question now being discussed is concerned, enough like them to be an important authority in support of the principle we have already stated and applied. The cases in our own reports which approach more nearly than any others to a decision of the very question here presented, are *Peace v. Jenkins* and *Patton v. Dyke*, supra.

The fact that the plaintiff relies on the continued possession of the lot by herself and her mother, after making the deed, as evidence of the false representation, imparts still greater significance to the mother's declaration; as, from her declaration the jury might have found that she did not so regard the retention of possession by her and her daughter, and that the latter shared in that view, the fraud being alleged to have been practised upon both of them at the same instant of time, and it being,

therefore, at least probable that it produced the same impression upon both. Speaking with reference to a case somewhat similar, Judge Nash said: "The declarations were made by a man, upon the subject in controversy, against his interest, and when he could have no conceivable interest to declare that which was not true." *Peace v. Jenkins*, supra. And so we say here concerning the declaration in question. The text-books and the cases do not justify the statement that this species of evidence is anomalous in character and approaches the verge of admissible testimony, for even a cursory examination of the authorities will show that it is well-nigh universally conceded to be an established exception to the rule excluding hearsay, and an unshakable principle in the law of evidence. As Lord Ellenborough said in the opening passage of his opinion in *Higham v. Ridgway*, 10 East, 109: "I should be extremely sorry if anything fell from the court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but, in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren ex dem. Webb v. Greenville*," 2 Strange, 1129.

Having disposed of this exception, we now proceed to consider the remaining questions in their order.

We cannot sustain the exception to the instruction of the court that, from the relation of the parties, Mr. Moore being the "agent, confidential friend, and adviser of the plaintiff and her mother," the law raised a presumption of fraud as to any transaction between them, which is evidence of fraud to be considered by the jury, and imposes upon the defendants the burden of showing that the transaction was fair and honest, and that, if the defendants had failed so to do, the jury should answer the issue as to fraud, "Yes." With reference to fiduciary relations from which presumptions of fraud or undue influence are raised, that of principal and agent is thus classified: (1) When one is the general agent of another, and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud, as matter of law, arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted. (2) When the only relation is that of friendly intercourse and habitual

reliance for advice and assistance and occasional employment in matters of business as agent, a presumption of fact only is raised from such a transaction which may be strong or slight according to circumstances. The latter is for the jury to consider and act upon. *Lee v. Pearce*, 68 N. C. 76; *Timmons v. Westmoreland*, 72 N. C. 587; 1 *Bigelow, Fr.* (1890) p. 295. "When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion, or, it is often said, a presumption, of fraud; a suspicion or presumption, arising as matter of law, that the transaction brought to the notice of the court was effected through fraud or, what comes to much the same thing, undue influence by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable." 1 *Bigelow, Fr.* pp. 261 et seq. This presumption is raised where there have been dealings between the parties, because of the advantage which the situation of the parties respectively gives to one over the other. The doctrine rests on the idea, not that there actually was, but that there may have been, fraud; and an artificial effect is given to the fiduciary relation beyond its natural tendency to produce belief of the fact that fraud really existed. *Lee v. Pearce*, supra. It does not appear clearly from the evidence or the admission whether or not Mr. Moore was the general agent of the plaintiff and her mother at the time the deed was executed, and had the management of their entire business; nor does it appear what was the nature and scope of his agency. It is merely said that he was their agent. We take it that this was intended to mean a general agency investing him with control and management of all of their affairs, and so considered, in connection with the other part of the admission, that he was also their confidential friend and adviser, we think the charge of the court was correct. In *Lee v. Pearce*, the chief justice, referring to the facts of that case (68 N. C. at page 87), says: "Our case would seem, from what appears by the statement sent, to come under the last instance [second class mentioned above], for there is no evidence that Pearce was the general agent of Mrs. Lind-
7 L.R.A. (N.S.)

say, intrusted with the management of all of her affairs or business, although he was looked up to by her, and relied on for advice and assistance, and frequently acted as her agent in buying wood and leasing her property; all of which evidence should be passed upon by a jury, as raising a presumption of fraud or undue influence, and as being a link in a chain of circumstantial evidence." It may be that the proof at the next trial will disclose just such a relation as there described, and change the nature of the presumption or weaken its force. Be this as it may, we do not think his Honor, upon the facts as presented at the trial, and, as we now construe them, misapplied the rule, as stated in *Lee v. Pearce*. The presumption of fraud is, of course, a rebuttable one.

The last assignment of error questions the correctness of the charge so far as it relates to Mr. Moore's failure to register the deed from the day of its date, March 3, 1885, to January 3, 1886, it being ten months. In the trial of questions of fraud the evidence necessarily takes a wide range, and great latitude is allowed in adducing proof, to disclose the true nature of the transaction; and it has been said to be enough if the evidence falls within a broad interpretation of the rule of relevancy. Circumstances very slight and apparently trivial in themselves are permitted to be shown in connection with the other facts in order to sustain the allegation of fraud. 1 *Bigelow, Fr.* 146. The plaintiff does not contend that Mr. Moore was compelled to register the deed under the statute, it being good as between the parties without registration, which is required only to protect the grantee against creditors and subsequent purchasers. *Nadal v. Britton*, 112 N. C. 180, 16 S. E. 914. But she says that withholding this deed from record was some evidence of a purpose to conceal it, so that the public could not see it and thereby diminish the chance of the grantor's discovering that it was a deed instead of a will. While perhaps very slight evidence and inconsequential in itself, we yet think that it was a circumstance to be left to the jury with the other facts. But the court should be careful, in submitting it, to direct their attention also to the fact that the deed was registered on January 3, 1886, and has remained on the record to the bringing of this suit. This fact they should consider in connection with the other, in order to determine what weight they will give to the latter.

We have discussed all of the exceptions as they may be repeated if there is another appeal and we had not done so; but we order a new trial because of the error com-

mitted in permitting the plaintiff to testify as to what the attorney said in the presence and hearing of herself and her grantee, now deceased.

The plaintiff's counsel contended that the deed of Lorenzo Frink to her and her mother vested the legal title in them in trust to serve the uses declared in the will of Samuel Frink, and that Mr. Moore, under the deed to him, took the title in the same plight as they formerly held it. It is not necessary to discuss this proposition so far as the life estate of Mrs. Smith is concerned, as it terminated at her death, and is therefore out of the way. But see *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728. If the plaintiff acquired the legal title by the deed of the trustee, Lorenzo Frink, it either merged with her equitable estate; or, if it was held by her separately from it, as contended, then when Mrs. Smith died, there being no longer any need for the separation of the two estates, the plaintiff's contingent remainder having become a vested one, the statute, if she had not conveyed to Mr. Moore, would have transferred the seisin or possession to the use. By her deed to Mr. Moore, she passed both the legal and equitable estate held by her,—that is, all the interest she then had,—and when Mrs. Smith died the statute executed the use in the same manner, if he who was then entitled to the use had not already, in another way, acquired the seisin and the operation of the statute was not, therefore, required to vest it in him. It is not necessary to inquire whether the deed of Lorenzo Frink had the effect to convey his legal title, as the same result would follow if it did not have that effect, for in that case it would have descended to his heirs charged with the trust, and their seisin would, at the death of Mrs. Smith, have been transferred to the use, as it was no longer required to remain in them to serve the purposes of the trust. *Cameron v. Hicks*, supra. If the plaintiff did not acquire the legal title by the deed of Lorenzo Frink, or if she did and it was held by her separate from the use, her deed, she having at the time a contingent remainder, was sufficient to pass the latter to Mr. Moore, by way of equitable assignment, and operated not merely as an executory contract to convey, but as an executed one by way of passing her interest. This was expressly decided in the recent case of *Kornegay v. Miller*, 137 N. C. 659, 107 Am. St. Rep. 505, 50 S. E. 315, where the subject is so fully and clearly discussed by Mr. Justice Connor as to make it unnecessary that we should pursue the inquiry any further. See also *Cheek v. Walker*, 138 N. C. 440, 50 S. E. 863; *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363; *Bodenhamer v.* 7 L.R.A.(N.S.)

Welch, 89 N. C. 78; *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665, 14 S. E. 640. So that, *quacunqve via data*, Mr. Moore got the complete and perfect title, legal and equitable, by the transaction, and his widow and her heirs are entitled to keep and enjoy the same, unless the deed to him was obtained by the fraud charged in the complaint, or can in some other way be invalidated.

For the reason we have already stated, a new trial is awarded.

New trial.

Hoke, J., concurs in the result.

VIRGINIA SUPREME COURT OF APPEALS.

FAYETTE NATIONAL BANK, Plff. in Err.,
v.

C. G. SUMMERS.

(105 Va. 689, 54 S. E. 862.)

Check—deposit—bank as owner.

1. Whether or not a bank receiving and crediting to a depositor a check on another bank is entitled to enforce it as owner depends upon its having been the intention of the parties that the deposit shall be treated as cash, which fact is to be determined by the jury.

Sale—false representations—repudiation—payment.

2. One who repudiates the purchase of a horse because of false representations on the part of the seller, and turns him into a pasture where he is injured so that he has to be killed, cannot defeat recovery on the purchase-money note so far as the animal had a value at the time the contract was repudiated.

(September 13, 1906.)

Case Note.—Title of bank to check drawn on another bank, which has been credited to depositor:—When checks or other commercial paper are deposited in a bank, indorsed, "For collection;" or where there is a definite understanding that such is the purpose of the parties at the time of deposit,—there is no question that the title to the paper remains in the depositor. So, checks deposited as checks do not give rise to the relation of debtor and creditor, and the title to them remains in the depositor, the bank merely acting as an agent of the depositor for the purpose of collection. *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40, 19 S. W. 334; *Rapp v. National Secur. Bank*, 136 Pa. 426, 20 Atl. 508; *Baillie v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717.

If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is

ERROR to the Circuit Court for Pulaski County to review a judgment in defendant's favor in an action brought to enforce payment of a promissory note. Reversed.

The facts are stated in the opinion.

Mr. T. L. Massie for plaintiff in error.

Mr. J. C. Wyssor for defendant in error.

Keith, P., delivered the opinion of the court:

Upon the trial of an action of assumpsit brought by the Fayette National Bank against C. G. Summers, there was a verdict and judgment for the defendant, and the case is before us upon a writ of error allowed by one of the judges of this court.

The plaintiff, to maintain the issues at the trial, introduced a check drawn on the

Pulaski National Bank by C. G. Summers to the order of John T. Hughes for \$500 dated October 26, 1903. This check was indorsed by Hughes to the Fayette National Bank, and, when presented for payment, was duly protested. It appears that this check was given to Hughes for the purchase price of a horse. Summers was engaged in the business of breeding saddle horses, and went to Kentucky to purchase a stallion. There he met with John T. Hughes, who lived at Lexington, and told him that he wished the horse for breeding purposes, and wanted a horse that carried a high, straight tail, as he wished to breed it for his own use and profit, and that a horse carrying a low, crooked tail was not good for breeding purposes, as that quality would be transmitted

clear that the title passes to the bank. But, where a check is deposited without any definite understanding as to the way it is to be treated, but is credited to the bank by the depositor as cash, and is so entered upon the depositor's pass book, the question frequently arises whether the title to the check passes immediately to the bank, or remains in the depositor.

Prima facie, according to the weight of authority, the passing to the credit of the depositor, of a check bearing an indorsement, not indicating that it was deposited for collection merely, passes the title to the bank. Some cases, which cannot be reconciled with this view and must therefore be regarded as opposed to it, will be cited at the close of the note.

In the meantime, however, it is to be observed that, according to the weight of authority, the rule above stated is not an absolute rule, and is prima facie merely, and yields to the intention of the parties, expressed or implied from the circumstances.

Some of the cases which have applied the rule, and accordingly held that the title passed to the bank, have clearly recognized its prima facie character, and its subordination to the intention of the parties.

Thus, in *Re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336, it was held that the general rule is that, upon a deposit being made by a customer in a bank in the ordinary course of the business, of money, drafts, or other negotiable paper received and credited as money, the title to the money, drafts, or other paper immediately passes to the bank, which thereby becomes debtor to the depositor for the amount, and, if no facts appear except these, they will be held conclusively to show that such is the intention of the parties; but the question is wholly one of intention of the parties, and neither the fact that the indorsement of the paper by the customer is unrestricted, nor the fact that he is, before collection, credited with the amount on his account, with the privilege of drawing against it, will conclusively show that the title is in the bank, when the intention of

the parties is to the contrary. This decision was followed in *South Park Foundry & Mach. Co. v. Chicago G. W. R. Co.* 75 Minn. 186, 77 N. W. 796.

And, in *Bank of Guntersville v. Webb*, 108 Ala. 132, 19 So. 14, a deposit by the payee of a sight draft with a bill of lading attached was held a sale and sufficient to pass title, although the drawer afterwards paid part of the draft to the payee, and the deposit slip was indorsed, "To be paid when collected," where the depositor could not read the deposit slip, and the bank paid a portion of the draft to him upon his check at the time of the deposit, and he claimed that the understanding with the bank at the time was that it was to be considered a sale.

The intention of the parties as the controlling factor may be shown in different ways, as, for instance, by the right accorded to the depositor to draw upon the funds.

Thus, in *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891, where a regular customer of a bank deposited with the bank his draft payable to his own order and indorsed, "For deposit to the credit of" the drawer, and the same was entered to his credit on the books of the bank, and the drawer, by course of dealing, had the right to draw against such deposit, and in fact did draw against it, and his checks were honored, it was held that the title to the draft passed to the first bank, and, when collected by the second, the proceeds were not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property not of the drawer, but of the first bank. This case distinguished *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160, where the facts were almost identical, except that in the latter case it did not appear that the depositor had the right to draw against the proceeds of the check before they were collected.

And in *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282, where a depositor sent a check with an unrestricted indorsement to the bank, with the direction that it be credited to his account, and the bank treated it as such, and immediately honored checks of

to its offspring. Hughes showed Summers a horse four years of age, stated that it was a thoroughbred, but had not been registered; that it was sound and carried a high, straight tail. Summers drove and rode the horse, and had it ridden and driven for him, examined it carefully, and noticed a small scar under the horse's tail and called Hughes's attention to it. Hughes stated that he had not noticed it before, but that he knew it had not been cut for the purpose of straightening the tail, as he had raised the horse.

After bringing the horse home, Summers discovered that in driving him he would carry his tail well and straight for a time, but, upon becoming fatigued, he would hold it to one side. There was no other fault

found with the horse than the one mentioned.

Having discovered this defect, Summers determined not to pay the check, and instructed the bank to protest it when presented for payment, and then wrote Hughes that the horse had been misrepresented to him, that he did not carry a high, straight tail, and that he did not want it, as it was valueless to him for breeding purposes. Having notified Hughes that the horse did not suit him, and that he would not pay the check, he turned it out in the pasture where the horse broke one of its legs and was killed. Upon examination of its tail after death, evidence was found that an operation had been performed upon its tail, leaving a

the depositor, drawn upon the proceeds, it was held that these facts clearly indicated the intention of the parties to treat the deposit as cash, and the title to the check would pass, in the absence of any proof that it was intended for collection. And to the same effect are *Friberg v. Cox*, 97 Tenn. 550, 37 S. W. 283, and *Showalter v. Cox*, 97 Tenn. 547, 37 S. W. 286.

Some cases emphasize the form of the indorsement as a feature indicating what the intention of the parties is.

Thus, in *Ditch v. Western Nat. Bank*, 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138, where, on an indorsement, "For deposit," a check was credited as cash by the bank which received it, and thereafter, by an indorsement in the same form, was transferred to another bank, which in good faith credited it as cash and paid the proceeds to the former bank, which afterwards made an assignment for creditors, it was held that the title to the check was in the bank which held it and had paid for it. In this case the court lays particular stress upon the form of indorsement, and the decision is in harmony with *Tyson v. Western Nat. Bank*, 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520, which held that entering the amount of commercial paper deposited with a bank, "For collection," as cash in the pass book of the depositor, and to his credit on the books of the bank, would not pass to the bank the title to the paper if it was not intended to be an absolute credit, but was to be charged back if not collected.

And in *Hoffman v. First Nat. Bank*, 46 N. J. L. 604, it was held that a check indorsed generally and deposited in a bank, and passed to the credit of the depositor on the books of the bank, became the property of the bank, and the bank became liable to the depositor to pay any checks drawn against the deposit. The court said that, had the deposit of the check been intended for collection only, such intention should have been made clear by the addition of the words, "For collection," to the indorsement.

Where checks were received by the bank 7 L.R.A. (N.S.)

and credited partly as cash and partly as payment of overdrafts, it was held, in *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588, that the bank became the owner of the checks as fully as if they had been legal-tender notes or bank bills; and, if there was any evidence to take the case out of the general rule, it should have been submitted to the jury to determine whether the bank took the checks as cash or otherwise.

Where a customer had a deposit account in a bank, to which checks deposited by him were credited by the bank, and against which he was accustomed to draw, it was held, in *Security Bank v. Northwestern Fuel Co.* 58 Minn. 141, 59 N. W. 987, that the title to a check payable to his own order, and indorsed, "For deposit," in the bank to the credit of the depositor, would pass to the bank, such indorsement being held not to be restrictive or qualified, in the absence of any positive and different understanding.

The general course of dealing between the bank and the depositor is frequently mentioned as an indication of the intention of the parties. In a number of cases this feature is especially emphasized.

Thus, in *St. Louis & S. F. R. Co. v. Johnston*, 23 Blatchf. 489, 27 Fed. 243, where a draft was deposited in a bank, and the amount of the draft was credited by the bank on its books to the plaintiff as a cash item, it was held that the title passed to the bank, and the transaction was equivalent to a discount of the paper by the bank. In the course of its opinion, the court said: "When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. . . . If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper."

It was held in *Midland Nat. Bank v. Roll*, 60 Mo. App. 585, that while, ordinarily, an indorsement, "For collection," or an indorse-

scar, to which Summers had called the attention of Hughes.

On the part of the bank, it was shown that Hughes indorsed the check to the Fayette National Bank, which placed the proceeds to his credit; that, upon receiving notice of the protest of the check, the bank, without the knowledge of Hughes, charged the check back to him. As soon as Hughes was made aware of this fact he protested against this being done, and insisted that there was no liability upon him with respect to the check, except as indorser upon it, and that the bank must proceed to make the money out of the drawer of the check. Thereupon the bank did as directed, credited Hughes with the amount of the check, and instituted this suit.

ment, "For collection and credit," does not carry the title to the paper, yet, when such an indorsement is made in pursuance of an understanding and dealings between the parties, whereby the check is taken, credited, and treated as a cash deposit subject to the check, the ordinary rule does not obtain, and the title passes; and the charging back to the account of the depositor of the amount of such check does not necessarily reinvest the title in the depositor, nor conclude the bank upon the question of title.

One of the leading cases upon the subject of title to checks deposited in a bank is *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, where certain checks were deposited in a bank for collection, and, at the same time, others were deposited and entered as cash on the depositor's pass book; and, as to the latter checks, it was held that the title passed to the bank, and that they were not again subject to the depositor's control. The court said: "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. . . . If, as the appellant insists, the check had been deposited for a specific purpose,—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances. These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent."

And there is a long line of decisions in New York state holding that the prima facie rule is that the title passes when the check is passed to the credit of the depositor. 7 L.R.A. (N.S.)

There is no evidence that the bank had any knowledge whatever of any equities or set-offs existing between Hughes and Summers when it in the first instance passed the amount of the check to the credit of Hughes.

Both plaintiff and defendant asked for instructions, all of which were refused by the court, which then proceeded to instruct the jury as follows:

"The court instructs the jury that if they shall believe from the evidence that the plaintiff bank received the check which is the . . . of this suit as a deposit to be treated as cash, and that such was the intention of the parties (Hughes and the bank), at the time the check was received and deposited, then title to said check passed to the bank at that time. But, if the jury shall

or, but the intention of the parties governs; and that the intention may be shown by usage, the custom of the depositor and the bank, by the form of the indorsement, or otherwise. Among these cases may be noted: *Re Franklin Bank*, 1 Paige, 249, 19 Am. Dec. 413; *Commercial Bank v. Hughes*, 17 Wend. 94; *Clark v. Merchants' Bank*, 2 N. Y. 380; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Market Bank v. Hartshorne*, 3 Keyes, 137; *Riverside Bank v. Woodhaven Junction Land Co.* 34 App. Div. 359, 54 N. Y. Supp. 286; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407; *Justh v. National Bank*, 4 Jones & S. 273; *Gordon v. Rasines*, 5 Misc. 192, 25 N. Y. Supp. 767; *Moore v. Riverside Bank*, 25 Misc. 720, 55 N. Y. Supp. 615; *Walton v. Riverside Bank*, 29 Misc. 304, 60 N. Y. Supp. 519; *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. 511. And in *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766, this rule was held to be the law in New York state.

Other cases, which hold that the title to the check did not pass to the bank, are reconcilable with the cases above cited, holding that the title did pass, for the reason that the former more or less clearly stated or implied that prima facie the title passes to the bank, but that the prima facie showing was overcome by circumstances indicating a different intention in the particular instance.

Thus, the facts that a depositor kept an account in the defendant bank, made from time to time remittances to it, and drew drafts upon it, and had an arrangement with it whereby he was allowed interest upon his average balances, were held in *Scott v. Ocean Bank*, 23 N. Y. 289, not sufficient to show that a bill of exchange deposited with the bank became its property, where it was not shown that the bill had been credited to the depositor, or was intended to be so credited as cash until the same should be paid.

And in *Middlesex County v. State Bank*, 32 N. J. Eq. 467, where the state treasurer, on hearing that one of his depository banks

believe from the evidence that the parties intended that the bank should not receive said check as cash, but only as an agent for collection, then title to said check did not vest in the bank at the time of the deposit.

"The court further tells the jury the question as to whether the parties intended the check when deposited to be treated as cash, or merely for collection, is one of fact for the jury, under all the facts and circumstances proved in the case, relating thereto and throwing light thereon.

"If the jury shall believe from the evidence that the parties (Hughes and the bank), at the time the check was received and deposited, intended that the same should be treated as cash, then the plaintiff is entitled to recover in this action, unless they further believe from the evidence that, at the time of the deposit, the plaintiff had

notice of the matters affecting Hughes's right to recover on said check, if any.

"But, if the jury shall believe from the evidence that the check was intended by the parties to be deposited merely for collection, then the plaintiff cannot claim to be a purchaser for value, and without notice of the matters affecting the consideration of the check; but, if the jury shall believe that after said check was protested the bank purchased the check, it is entitled to recover whatever amount of said check, if any, the jury may find due after allowing any offsets, if any, they may find due under the evidence, on account of the matters alleged in defendant's special plea."

We are of opinion that these instructions correctly apply the law to the facts of the case.

"Checks deposited and credited as cash do

was embarrassed, drew on that bank, and deposited the draft in another bank, for which he was given credit as cash on its books, it was held that the bank, by such credit, did not in any wise make the draft its own, as it was the intention of the treasurer merely to have his check collected, the bank acting solely as his agent.

In *Strong v. King*, 35 Ill. 9, 85 Am. Dec. 336, it was held that, if a check was deposited in the usual course of business, the presumption would be that it was for collection merely, and not as money. This decision seems to be opposed to the rule that *prima facie* the title passes; but the court appears to have based its decision upon the ground that in the ordinary course of business deposits would be received by a teller, and according to the usage of banks a teller would not have the right to receive paper in any way other than for collection. And the court evidently did not intend to depart from the general rule, as it stated further on in the opinion: "If, however, a banker receives a check as and for so much money, and gives the depositor credit therefor, such an act is an appropriation of the check by the holder, and operates as a payment of the bill for which it was received from the moment the deposit was made. And from that time the check becomes the absolute property of the banker with whom it is deposited."

Where there was a tacit agreement between the parties, as shown by their course of dealing, that, though the amount of the check was credited to the depositor and he could draw against it, yet, if the papers so deposited were not paid on presentation, the amount thereof was to be charged up to the depositor's account, or taken off his next deposit slip, it was held, in *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365, that such a deposit was a mere bailment for collection.

Some cases apply the rule that the title passes to the bank, without intimating that it is dependent upon, or liable to be defeated by, the intention of the parties;

though the silence on this point probably furnishes but little, if any, support to the view that the rule is an absolute one, and will not yield to a contrary intention of the parties.

Thus, in *First Nat. Bank v. Dickson*, 6 Dak. 301, 50 N. W. 124, certificates of deposit had been received and credited as cash in a bank, and, while on their way for collection, were attached by a creditor of the depositor, upon hearing which the bank charged them back to the depositor. In an action for the value of the certificates, the court held that the title was not re-vested in the depositor by the act of the bank.

Where tax receipts were received by a bank in good faith as deposits, and credited as so much money, it was held, in *Wasson v. Lamb*, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729, that the bank became at once legally liable to the depositor as for so much cash deposited. The court said: "Upon principle, there can be no reason why, if parties choose to treat a deposit of paper or other securities as cash, so that it is available to the depositor as cash, the transaction should not be regarded as equivalent to a deposit of money."

And where the checks and drafts were indorsed by the depositor at the time the deposit was made, and his account was credited for the whole sum in cash, and a like credit was given upon the pass books, against which amount under a course of dealings the depositor had a right to draw immediately, it was held, in *Ayres v. Farmers' & M. Bank*, 79 Mo. 421, 49 Am. Rep. 235, that the check so deposited became at once the property of the bank, and the bank became the debtor of the depositor to the amount of the check so deposited. And this decision is followed in *Bullene v. Coates*, 79 Mo. 426; *Flannery v. Coates*, 80 Mo. 444; and *Kavanaugh v. Farmers' Bank*, 59 Mo. App. 540.

So, also, in *American Exch. Nat. Bank v. Gregg*, 37 Ill. App. 425 (Reversed on another

not become the property of the bank, . . . even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper." Morse, *Banks & Banking*, 4th ed. § 586.

In *National Commercial Bank v. Miller*, 77 Ala. 173, 54 Am. Rep. 50, it is said: "When a check is deposited it is taken generally for collection by the bank as the agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be that, if it is passed to the credit of the depositor, and mingled with the general funds of the bank, it is *prima facie* a payment on deposit; but the bank may permit, as matter of favor and convenience, checks to be drawn against it before payment; the depositor in the event of non-payment being responsible for the sums drawn, not by reason of his indorsement, the

check not having ceased to be his property, but for money paid."

Conceding that there was a false representation upon which the defendant was entitled to a set-off against the check, it still appears that the horse was of considerable value for other than breeding purposes; in other words, that the damages sustained by reason of the false representation did not go to the full amount of the check, which represented the entire value of the horse. The defendant, Summers, admits that the horse was worth \$125, and there was other evidence tending to prove that it was of even greater value. The verdict of the jury, which denied the right of the plaintiff to recover anything, ought to have been set aside by the trial court as contrary to the evidence.

For these reasons, its judgment must be reversed, and a new trial awarded.

point in 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 830), it was held that the general rule is that, a deposit having been made by a customer in a bank in the ordinary course of the business, of checks credited as money, the title to the checks immediately vests in the bank and becomes its property; and the subsequent failure of the bank to realize on the paper is not a circumstance which will excuse it from performing its implied contract to honor the checks of the depositor, drawn against such credit.

So, also, in *American Trust & Sav. Bank v. Guelder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227, where a check was indorsed, "For deposit," and was received by the bank through the mail, and, upon receipt of the check, the bank gave the depositor credit for its amount on the depositor's account, the same as though it had been cash, and the depositor became entitled at once to draw upon the amount, it was held that the deposit was, in legal effect, a negotiation of the check, so as to vest the legal title thereto in the banker, with the right on his part to charge it back to the depositor in case it was not paid. Although the right of the bank to charge back the amount would appear to indicate that the transaction was a bailment, the court said: "The transaction, then, was one which, in the absence of fraud, would have passed the title irrevocably to" the bank.

And where a person deposited a check in a bank, and had the amount placed in a pass book by the officers of the bank, and took possession of the pass book as his own, it was held, in *Rawls v. Saulsbury*, 66 Ga. 394, that the relation of debtor and creditor existed between the depositor and the bank, the bank becoming the depositor's debtor to the amount charged in the bank book.

Where a forged check of a customer was received by a bank as cash, and passed to the credit of a depositor (who was ignorant of the forgery, and who had paid the full amount of the check), it was held in *Levy v. Bank of United States*, 4 Dall. 234, 1 L. 7 L.R.A. (N.S.)

ed. 814, equivalent to an actual payment; and if the depositor, after having been informed of the forgery, on a sudden misconception of his rights, agreed that, if the check was a forgery, it was no deposit, it would not constitute a promise to refund.

As intimated at the beginning of the note, there are a few cases which deny even that *prima facie* the title is deemed to have passed to the bank, and hold, on the contrary, that *prima facie* the title remains in the depositor, and that circumstances indicating a contrary intention are necessary to place the title in the bank. As applied to a given case, this view may work out the same result as that which regards the title as *prima facie* vested in the bank, since either view yields to the intention of the parties.

The leading case holding that *prima facie* the title does not pass to the bank upon the deposit is *Balbach v. Frelinghuysen*, 15 Fed. 675, where a check was deposited in a bank, and, before it had been collected, the bank failed, and the depositor sought to recover the check or its proceeds from the receiver. It was insisted by the receiver that the indorsement of the check to the bank, and its credit on its books and upon the pass book, to the depositor, and the right of the depositor to draw immediately against the amount, passed the title to the bank. It was held, however, that, notwithstanding these circumstances, the deposit would be considered a deposit for collection, and the bank the mere agent of the depositor, in the absence of any understanding, express or implied, to the contrary. The court said, in reference to the contention that the title passed: "The reply is twofold: (1) That in all cases where credits are thus made, banks claim and always exercise the right of charging checks returned to them for nonpayment to the account of the depositor, which could not be done if the check had become the property of the bank, and did not remain the property of the depositor until collected. (2) The practice, which has

grown up among banks, to credit such deposits at once to the account of the depositor, and to allow him to draw against them before the collection has been made. is reckoned by the ablest text writers a mere gratuitous privilege, which does not grow into a binding legal usage." It may be noticed, in connection with this case, that there was nothing to show that the bank did exercise or claim the right to charge back against the depositor's account the amount of unpaid checks; but it did appear that the check in question had not been drawn against.

The above case is cited with approval, and followed, by *Beal v. Somerville*, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 649, where it was held that no title to a check on another bank passes to the bank with which it is deposited, although it is indorsed, "For deposit," and its amount is immediately credited on the depositor's pass book, in the absence of some special agreement to that effect, or some practice or custom equivalent to such agreement. Hence, if the depository bank becomes insolvent before collecting the check, it acquires no title to the proceeds; and the right of the depositor to draw against the proceeds will in no wise tend to support the position that the title is in the bank, unless that right is so absolute that the bank cannot lawfully suspend it by notice or otherwise pending the collection. And the opinion, after mentioning *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, says that while, perhaps, that case may state the law of New York state, its authority is not binding upon the Federal courts.

In *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697, it was held that, when checks on another bank are deposited with the receiving teller, and the credit for them entered on the pass book, it cannot be contended that they are received as cash, or otherwise than for collection.

And in *United States Nat. Bank v. Geer*, 53 Neb. 67, 41 L.R.A. 439, 73 N. W. 266, it was held that an indorsement upon a certificate of deposit directing payment to the order of a cashier of a bank, "For account," was ambiguous, and that the effect of such indorsement depended solely upon the intent of the parties. But, upon a rehearing in 55 Neb. 462, 41 L.R.A. 444, 70 Am. St. Rep. 390, 75 N. W. 1088, it was held that such an indorsement was a restrictive indorsement, and not ambiguous, and vested no general property to the paper in the indorsee, but merely constituted him an agent for the purpose of collection; and parol evidence was not admissible to establish that the transfer to the title was absolute.

Where a deposit in a bank consisted of checks or drafts, it was held, in *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704, that the result might be either an increase of the debt from the bank to the depositor, or a mere bailment of the check or draft. The court said: "The actual result depends upon either what

actually passes between the parties at the time, or what the custom and practice prevailing between them is, and upon the situation of the account between the dealer and banker. If a depositor deposits a check or draft on a third party with the understanding, either expressed or implied, that he is to draw against it at once as if it were cash, and the bank agrees to accept it and treat it as cash, and the depositor draws against it before the amount is realized by the bank, then it is properly treated as a deposit of cash. Or, if the depositor is already indebted to the bank, and the deposit is received in whole or partial payment, the same result follows. But, in the absence of an understanding or situation of this kind, it is a mere bailment."

In the absence of a special agreement, it was held, in *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50, that when a check was deposited it was taken generally for collection by the bank as agent of the depositor, and the bank did not owe the amount until the collection was accomplished; that while, if it was passed to the credit of the depositor and mingled with the general funds of the bank, it might prima facie be a payment on deposit, yet the bank might permit, as a mere matter of favor and convenience, checks to be drawn against it before payment, the depositor being liable for the sums drawn as for money paid; but, where a check was indorsed, "For deposit," and the depositor had for some time previously kept a deposit account with the banker, in which he was accustomed to deposit checks payable to him, entries of which were made in his pass book, and to draw against such deposits, such an indorsement, in the absence of a different understanding, was presumptive of more than a mere agency or authority to collect; and the effect of the indorsement was to vest the bank with the title to and the control of the check.

Numerous cases hold that a check may be reclaimed by the depositor where the bank, at the time of the deposit, was insolvent, and the officers knew that it was insolvent; but these cases are not necessarily opposed to the general rule that the title passes upon the deposit, as the decisions are made solely on the ground of the fraud of the bank, which vitiates the contract as it would any other contract. Among the cases which hold that a check may be reclaimed from an insolvent bank, the following may be noticed: *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; *Wasson v. Hawkins*, 59 Fed. 233; *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227; *First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232; *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Klepper v. Cox*, 97 Tenn. 534, 34 L.R.A. 536, 56 Am. St. Rep. 823, 37 S. W. 284; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 34 L.R.A. 532, 37 S. W. 286; *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282.

Although, as between the depositor and his bank, there may be no question that the title to the check remained in the depositor, yet he may have placed himself in such a position that he cannot enforce his claim to the check as against a third party. Such a situation frequently arises where the depositor indorses paper in blank and deposits with the bank for collection, and that bank sends it to another bank indorsed for collection, and by the custom of the banks the amount is credited on the books of the second bank to the first, to be drawn upon at will by the first bank. In some cases as in *Cody v. City Nat. Bank*, 55 Mich. 379, 21 N. W. 373, it may be difficult to determine whether the case really turns upon the question of the title to the check as between the depositor and the bank, or upon the question of the estoppel of the depositor.

Cases involving the estoppel of the depositor, or involving the question of a custom and usage existing between banks, are not within the intent and scope of this note, which has been confined to cases where the decision turns primarily upon the question whether or not the title to the check passes, immediately upon the deposit, to the bank, or remains in the depositor.

As shown by the title, this note is also confined to cases where the check was drawn on another bank, and excludes cases like *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766, where the check was drawn upon the same bank in which it was deposited.

WISCONSIN SUPREME COURT.

JOHN A. BASSLER et al., Appts.,

v.

JOHN REWOLINSKI et al., Respts.

(— Wis. —, 109 N. W. 1032.)

Joint tenancy—definition.

1. A joint tenancy, by the common law, is one where the interests are created by one and the same person and by one and the same conveyance, and commence at one

Headnotes by MARSHALL, J.

Case Note.—Right of wife, under statute removing disabilities of married women, to devise property held by her husband and herself as joint tenants:—The apparent absence of other decisions involving the precise question passed upon in the foregoing case is doubtless attributable to the fact that in most jurisdictions it is either held that a conveyance to husband and wife makes them tenants by the entirety, or it is expressly provided by statute that, where a conveyance is made to husband and wife, they shall take as tenants in common; so that instances of joint tenancy in husband and wife are comparatively rare.

In connection with the subject, however, reference may be made to the case of *Fisher* 7 L.R.A.(N.S.)

and the same time, and are held by one and the same possession, and so have the four unities of interest, title, time, and possession.

Same—survivorship.

2. A joint tenancy, by the common law, differs from others in that, if the four unities continue till the death of one of the parties, the other or others immediately become the owners of such interest as joint tenants by right of survivorship.

Tenancy in common.

3. Anything which destroys the unity of title or interest, as by alienation of one joint tenant, makes the owners of the several interests a tenant in common with the remaining joint tenant.

Joint tenancy—devise.

4. There can be no destruction of a joint tenancy by devise, since the right of survivorship takes precedence thereof.

Same—abolition by statute.

5. Joint tenancies, according to the common law, except as expressly declared, were abolished generally by § 2068, Rev. Stat. 1898, but an exception was made by § 2069 as to husband and wife.

Tenancy by entireties.

6. At the common law, circumstances making a joint tenancy generally, as to husband and wife, make them tenants by the entireties, differing from joint tenancies, in that there is no right of severance, terminating the right of survivorship.

Same—statutory change.

7. The added element mentioned, creating tenancies by the entirety, has not existed in this state since the revision of the statutes of 1878. Since that time husband and wife taking title under such circumstances as by the common law would make them tenants by the entireties are joint tenants.

Joint tenant—married woman—devise.

8. A married woman, joint tenant, is under all the disabilities of a joint tenant by the common law. She cannot under the statute, as regards her capacity to take, hold, enjoy, or convey property, devise her interest held as joint tenant. She has the same right as if she were unmarried, which

v. *Provin*, 25 Mich. 347, in which it was held that, where a husband and wife did not take as tenants in common property conveyed to them, a constitutional provision that the real and personal estate of every female, acquired both before and after marriage, shall be and remain the estate and property of such female, and may be devised and bequeathed by her as if she were unmarried, and an act based thereon, enabling the wife to convey, did not convert such estate into a tenancy in common; and *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. 225, which holds that a statute enacting that all grants and devises of lands made to two or more persons shall be construed to create estates in common, and not in joint tenancy, un-

would not include that of devising property held in joint tenancy.

(December 4, 1906.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Milwaukee County in favor of defendants in an action brought to enforce liens on certain real estate. Affirmed.

Statement by Marshall, J.:

Action to enforce alleged liens on real estate claimed to have been created as indicated by the facts found by the trial court, which may be stated briefly thus: (1) Johanna Ertman died in 1899 leaving her surviving Paul Ertman, her husband, and the plaintiffs, sons by a former husband. (2) January 22, 1892, said Paul Ertman, who was the owner of the real estate in question, and the said Johanna, his wife, conveyed such property to Valentine Lukaszewski, who reconveyed the same to them as husband and wife, and they owned and occupied it thereafter until the death of Johanna. (3) April 10, 1895, they duly mortgaged the property to Henry Herman to secure indebtedness to him of \$800, and on May 10, 1897, they mortgaged the same to him to secure a like indebtedness of \$100. After the death of Johanna her husband mortgaged the property to said Herman for \$900, to take up the two prior mortgages. (4) Thereafter said Paul Ertman sold the said real estate and conveyed the same to the defendants, who have since occupied it. (5) Johanna Ertman left a last will and testament, which was in due time duly admitted to probate, whereby she willed \$200, to each of the plaintiffs, to be paid out of her interest in said real estate; and she willed the residue of such

less so expressly declared. and excepting from its operation devises or grants made to husband and wife, so far as it provides for the creation of an estate in joint tenancy by a conveyance to husband and wife, was not impliedly repealed by a statute providing that the real and personal estate of every female, acquired before or after marriage in any manner, shall be and remain her estate and property, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with the same effect as if she were unmarried.

That the interest of a joint tenant is not devisable, since, as the paramount right of the survivor or survivors instantly prevails upon the death of the testator, there remains no estate of inheritance upon which the will can operate, is held in *Duncan v. Forrer*, 6 Binn. 193; and *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. 68, 590.

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realty to her husband. (6) The will was admitted to probate November 8, 1899, by the county court of Milwaukee county, Robert E. Bailey being appointed executor. (7) Said Johanna left no personal property and no real estate, except that in question. (8) July 7, 1903, the said county court, in due form, assigned said realty to Paul Ertman without prejudice to any conveyance made by him, subject to the payment of \$200, to each of the plaintiffs, and \$45.15, to the executor, which were declared to be liens upon the property. On these findings the court concluded, as matter of law, that at the time of the death of Johanna Ertman she and her husband were joint tenants of the realty, and thereupon that the latter took the whole by right of survivorship free from anything contained in the former's will, and that the defendants, as owners under Paul Ertman, were entitled to judgment dismissing the complaint with costs. Judgment was rendered accordingly, from which this appeal was taken.

Mr. J. E. Wildish for appellants.

Messrs. Roemer & Aarons, for respondents:

Conveyance of land running to husband and wife makes them joint tenants, and the wife may convey her interest as if she were unmarried.

Wallace v. St. John, 119 Wis. 585, 97 N. W. 197.

A devise by one joint tenant of his interest will be ineffective and void.

Co. Litt. 185b; 2 Bl. Com. 185; 17 Am. & Eng. Enc. Law, 2d ed. p. 650; 1 Washb. Real Prop. 3d ed. 559; *Tiedeman, Real Prop.* § 238; *Swift ex dem. Neale v. Roberts*, 2 Ambl. 617; *Moyses v. Gyles*, 2 Vern. 385; *Duncan v. Forrer*, 6 Binn. 193; *Wil-*

It has been held in New York that the separate-property acts relating to the rights of married women do not abrogate the common-law doctrine that, under a conveyance to husband and wife, they take as tenants by the entirety, and upon the death of either the survivor takes the whole estate (*Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361), but that such acts have the effect to make them tenants in common of the use (*Hiles v. Fisher*, 144 N. Y. 306, 30 L.R.A. 305, 43 Am. St. Rep. 762, 39 N. E. 337).

On the other hand, in *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, it was held that such legislation was without effect upon the common-law doctrine of tenancy by the entirety.

As to the effect of various statutes upon the effect of a conveyance to husband and wife, see note in 30 L.R.A. 305, on tenancy by entireties.

kins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. 68, 590.

Marshall, J., delivered the opinion of the court:

This case turns upon whether a joint tenancy in lands of husband and wife has the same characteristics as to survivorship under our statutes as between others at common law. It is conceded that the circumstances detailed in the findings satisfy all the essentials of a joint tenancy at common law in cases other than those of husband and wife. The interests were created by one and the same purchase and by one and the same conveyance; they commenced at one and the same time, and were held by one and the same possession. Thus we have the four unities, unity of interest, unity of title, unity of time, and unity of possession.

The special significant incident of joint tenancy is the right of survivorship by which, on the death of any tenant, his interest goes to his survivors. Anything which destroys the unity of title or interest without affecting the unity of possession will turn the interest severed from the others into a tenancy in common as regards the remaining joint tenants. 2 Bl. Com. 192; 1 Washb. Real Prop. 6th ed. § 864. The most familiar method of so severing the interest of one joint tenant from the interests of others is by alienation. As such severance to be effective, is required to occur during the lifetime of the joint tenant, a devise by such a tenant is inoperative. The rule on that subject is thus stated at § 865 in Washburn on Real Property: "A devise by one joint tenant of his share will be inoperative, inasmuch as the right of survivorship takes precedence of such devise. And so far does this principle prevail that, if such deviser be himself the survivor, he must republish his will after the survivorship has accrued, in order to give it effect."

Section 2068, Rev. Stat. 1898, which originated before the conveyance in question, abolishes joint tenancies, except where the tenancy is expressly declared to be in joint tenancy, but by § 2069 grants to husband and wife are excepted. So, circumstances that would create a joint tenancy generally at common law will create one between husband and wife under the statutes, unless there be some other statute than those referred to to the contrary. In case of husband and wife, circumstances that would, as between other parties, create a joint tenancy only, would, as to them, add another element in the absence of any statutory regulation making them tenants by the entirety, as to which there could be no sev-

erance by partition or alienation. 17 Am. & Eng. Enc. Law, 2d ed. p. 652. That feature has not existed here since the Revision of 1878. Circumstances which prior thereto made the husband and wife tenants by entirety subsequently have made them joint tenants with the common-law characteristics thereof. That is clearly the effect of Citizens' Loan & T. Co. v. Witte, 116 Wis. 60, 92 N. W. 443, and Wallace v. St. John, 119 Wis. 585, 97 N. W. 197. The subject was, in the latter case, treated at length by the present chief justice. Nothing can be gained by going over the same anew. Citing from the earlier case with approval, the court said: "Both sections, as so amended [referring to § 2340 and § 2342], as well as the revisers in their notes, treat the estate created by deed running to husband and wife, as in the case at bar, as an estate 'held in joint tenancy,' instead of being held as tenants of the entirety, as at common law. . . . Manifestly, the revisers intended by the amendments to cover cases of tenants of the entirety held by husband and wife,—especially as in one section the words 'held in joint tenancy,' follow the words 'the real estate of every description,' and in the other section follow the words 'any interest or estate therein of any description,' and in both sections they are followed by the words, 'and the rents, issues, and profits thereof,' or their equivalent. Unless that is so, the new provision inserted in the sections is without significance."

Counsel for appellant earnestly contend that § 2342 aforesaid, abolishing the disabilities of married women as to the acquirement and enjoyment of property, inferentially at least, clothes such a woman, who is a joint tenant of property with her husband, with the capacity to pass her interest in such property by devise. These words are referred to, "any married female may . . . convey and devise real and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband, . . . with like effect as if she were unmarried." It is urged that nothing contained in Wallace v. St. John, supra, is inconsistent with the claim that such statute permits a joint tenancy between husband and wife to be severed by a devise by the wife, since the case only dealt with severance by alienation. The conclusive answer to that seems to be that in both of the cases cited the court held that, since the Revision of 1878, a conveyance of land to husband and wife, instead of creating estates by the entirety, creates a joint tenancy with all the common-law characteristics thereof. The language of § 2342, as suggested by counsel for respondent, gives to a married

woman joint tenant the same rights in the property as she would possess if she were unmarried; but, as in the latter case she cannot defeat the right of survivorship by devising the property, she cannot in the former.

So the learned trial court reached the right conclusion. Johanna Ertman being a joint tenant of the property with her husband, she was under a disability, the same as he was, to pass her interest or to in any way encumber it by will. Her attempt to do so did not affect his right of survivorship. Upon her death he became the absolute owner of the whole property, and the respondents, as his grantees, succeeded to such ownership.

Judgment is affirmed.

ARKANSAS SUPREME COURT.

D. A. EOFF, Collector, Appt.,
v.
WILLIAM KENNEFICK et al.

(— Ark. —, 96 S. W. 986.)

Tax—property of nonresident.

Personal property of a nonresident, which, for the performance of a railroad-construction contract, is in the state on the day taxes are to be assessed, is subject to assessment under a statute making taxable all real and personal property in the state.

(July 23, 1906.)

Case Note.—Local situs within the state of tangible personal property of nonresident for the purposes of local taxation:— It is settled beyond all question that the maxim, *Mobilia sequuntur personam*, in accordance with which the situs of personal property for many purposes is regarded as at the domicile of the owner, and not at the place where it may be found, does not apply so as to exclude the power of the state in which personal property has an actual situs, assuming it is not transiently there, to subject it to local taxation. This, of course, includes tangible as well as intangible property. Among many other cases in which this principle is stated or recognized, the following may be mentioned: *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Denver & R. G. R. Co. v. Church*, 17 Colo. 1, 31 Am. St. Rep. 252, 28 Pac. 468; *Rieman v. Shepard*, 27 Ind. 288; *Buck v. Miller*, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Parker v. Strauss*, 49 Ia. Ann. 1173, 22 So. 329; *Leonard v. New Bedford*, 16 Gray, 292; *Lamson Consol. Store Service Co. v. Boston*, 170 Mass. 354, 49 N. E. 630; *Winkley v. Newton*, 67 N. H. 80, 7 L.R.A. (N.S.)

A PPEAL by defendant from a decree of the Chancery Court for Boone County enjoining the collection of certain taxes. Reversed.

The facts are stated in the opinion.

Messrs. G. J. Crump, G. L. Trimble, and Garner Fraser, for appellant:

A state can tax all property in the state.

Ft. Smith v. Scruggs, 70 Ark. 554, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679; *Cooley, Taxn.* 2d ed. p. 5; *McCulloch v. Maryland*, 4 Wheat. 316, 418, 4 L. ed. 579, 604; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

The property, in a legal sense, is not shown by the proof to have been temporarily here.

Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Pullman's Palace Car. Co. v. Pennsylvania*, 141 U. S. 26, 35 L. ed. 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 154; *Hardesty v. Fleming*, 57 Tex. 395; *People v. Niles*, 35 Cal. 282; *Clampitt v. Johnson*, 17 Tex. Civ. App. 281, 42 S. W. 866.

Messrs. Pace & Pace, for appellees:

The property was not taxable.

Com. v. American Dredging Co. 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Bagley v. Castile*, 42 Ark. 77; *Lyman v. Howe*, 64 Ark. 436, 42 S. W. 830.

35 L.R.A. 756, 36 Atl. 610; *New York v. McLean*, 57 App. Div. 601, 68 N. Y. Supp. 606. Affirmed in 170 N. Y. 374, 63 N. E. 380; *State v. Fidelity & D. Co.* 35 Tex. Civ. App. 214, 80 S. W. 544.

The fact that personal property has been taxed for the same period at the domicile of the owner does not prevent its taxation in another state, in which it has a local situs. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Prairie Cattle Co. v. Williamson*, 5 Okla. 488, 49 Pac. 937; *Hudson v. Miller*, 10 Kan. App. 532, 63 Pac. 21; *Winkley v. Newton*, supra; *Kelley v. Rhoads*, 7 Wyo. 237, 39 L.R.A. 594, 75 Am. St. Rep. 904, 51 Pac. 593; *Griggsby Constr. Co. v. Freeman*, 108 La. 435, 58 L.R.A. 349, 32 So. 399; *Collins v. Green*, 10 Okla. 244, 62 Pac. 813; *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742; *Leonard v. New Bedford*, 16 Gray, 292.

It is nevertheless true that the tangible personal property of a nonresident which is merely in transit is not subject to local taxation. *Ogilvie v. Crawford County*, 2 McCrary, 148, 7 Fed. 745; *Burlington Lumber Co. v. Willetts*, 118 Ill. 559, 9 N. E. 254; *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Brown County v. Standard Oil Co.* 103 Ind. 302, 2 N. E. 758; *Fennell v. Pauley*, 112 Iowa,

Battle, J., delivered the opinion of the court:

The assessor of Boone county listed and assessed for taxation for 1903 the following property of the Kennefick-Hammond Company: 14 horses, 88 mules, 75 wagons, 17 boilers, 2 light plants, 2 air compressors, harness, and blacksmith tools, valuing the boilers, light plants, air compressors, harness, and blacksmith tools, in the aggregate, at \$20,670. This property was situated in Boone county on the first Monday in June, 1903,—how long before and how long after does not appear. It was used by the Kennefick-Hammond Company in the construction of a roadbed for a railroad through a portion of Boone county, about 15 miles in length. How long it required to complete the roadbed was not shown at the hearing of this cause. The taxes of 1903 were levied upon it, and the collector of Boone county was proceeding to collect the same when he was restrained from so doing by an order made by the chancellor of the Boone chancery court, upon application of the Kennefick-Hammond Company, which was afterwards made perpetual by the court.

The Kennefick-Hammond Company was a partnership composed of William Kennefick and F. S. Hammond, and they were citizens and residents of the state of Missouri before, on, and after the first Monday in June, 1903.

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, Mr.

94, 83 N. W. 799; *Coe v. Errol*, 62 N. H. 303, Affirmed in 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *State, Detmold, Prosecutor, v. Engle*, 34 N. J. L. 425; *Kelley v. Rhoads*, *supra*.

Many of the cases, however, which sustain the last proposition do not turn upon the question of local situs, but upon the principle that the local taxation of tangible personal property while the subject of interstate commerce would be an unlawful interference with interstate commerce; and they are therefore not in point in this note, which is confined to the question as to when, apart from other obstacles to local taxation, the tangible personal property of a nonresident may be regarded as having a situs within the state for the purposes of local taxation. As to the liability of property in transit to local taxation, so far as the question is affected by the commerce clause, see note in 60 L.R.A. 660.

Assuming that the property of the nonresident is not the subject of interstate commerce so as to be immune from local taxation on that ground, the question whether it has acquired a situs within the state for the purpose of taxation depends very largely upon the circumstances of the particular case.

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Justice Gray, speaking for the court, said: "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that, only so far as the comity of that state allows, can such property be affected by the law of any other state. The old rule, expressed in the maxim, *Mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place, where the property is kept and used. . . . For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax."

The statutes of this state provide that "all property, whether real or personal, in this state . . . shall be subject to taxation," except property exempted by the Constitution, of which the property in question is not a part. Personal property must

The case which on its facts most resembles *EOFF v. KENNEFICK* is *Griggsby Constr. Co. v. Freeman*, *supra*, which is sufficiently set forth in the foregoing opinion.

In *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377, it was held that a traveling circus and menagerie owned by a nonresident, brought into the state for exhibition, and then to be taken into two other states for the same purpose, was not subject to taxation within the state.

The decision in *Fennell v. Pauley*, *supra*, and the decision of the Wyoming supreme court in *Kelley v. Rhoads*, 7 Wyo. 239, 39 L.R.A. 594, 75 Am. St. Rep. 904, 51 Pac. 593, also discussed in that opinion, are supported by *Russell v. Green*, 10 Okla. 340, 62 Pac. 817, holding that cattle brought into Oklahoma for grazing purposes between March and September were subject to local taxation, under the statute providing that, "when any personal property shall be located in any county of this territory after the 1st day of March of any year, which shall acquire an actual situs therein before the 1st day of September, such property is taxable therein for that year; . . . whenever any live stock shall be located in this territory for the purpose of grazing

be assessed in the name of the person who was the owner on the first Monday in June in the year in which the assessment was made. Kirby's Dig. §§ 6873, 6913. And in all cases in which it is necessary for the assessor, "in consequence of the sickness or absence of the person whose duty it is to make out a statement of personal property" or his refusal to do so, "to ascertain the several items and the value thereof," the assessor may do so and make return thereof from the best information he can get. Kirby's Dig. §§ 6966, 6968.

But plaintiffs insist that the property was in the state, at the time it was assessed, temporarily; that it had not been incorporated in and become a part of the property of the state; had not gained a situs here, but was *in transitu*, and not subject to taxation in this state. Tangible personal property of a nonresident, in transit, is not subject to local taxation in the state in which it may be temporarily. But when does property cease to be in transit and become of such permanency as will justify taxation in its new situs? It cannot always be in transit.

In *Kelley v. Rhoads*, 7 Wyo. 237, 39

it shall be deemed to have acquired an actual situs therein."

A number of other cases, decided and reported in connection with the last case, are apparently to the same effect, although in some of them it appears only by implication that the owners of the cattle were nonresidents.

And, under the same statute, it was held in *Prairie Cattle Co. v. Williamson*, supra, that a nonresident owner was taxable in Oklahoma upon the average number of cattle that ranged and grazed therein during the entire year, notwithstanding that the owner of the cattle endeavored to keep them out of the territory.

In *Hudson v. Miller*, 10 Kan. App. 532, 63 Pac. 21, cattle belonging to a nonresident, which were brought into Kansas on February 10, to be fed with grain preparatory to marking them, and were shipped out by the last day of the following July, were held to be locally taxable.

Ice stored in ice houses, from which it is to be taken for sale when wanted, is taxable to a nonresident owner, under a statute providing for a tax on "stock in trade, employed in any town, owned by a person not a resident therein," although but a small portion of it is to be sold at that place, and most of it is to be taken to a city in another state for delivery as wanted. *Winkley v. Newton*, 67 N. H. 80, 35 L.R.A. 756, 36 Atl. 610.

So, ice cut in New Jersey by a foreign corporation, and stored in that state with the intention of selling it from the office of the corporation in another state, is subject to taxation in New Jersey while it remains 7 L.R.A. (N.S.)

L.R.A. 594, 75 Am. St. Rep. 904, 51 Pac. 593, the "plaintiff, who was a resident and a citizen of the state of Kansas, was the owner of certain sheep, numbering about 10,000 head, which, on or about October 29, 1895, were in the county of Laramie [in the state of Wyoming] in charge of an agent, who was driving and transporting them through the state of Wyoming from Utah to Nebraska. In driving said sheep it was the practice to permit them to spread out at times in the neighborhood of a quarter of a mile, and, while being so driven, to graze over land of that width," and they were maintained solely in that way. They were driven across Wyoming for the purpose of shipment, and were not brought into the state for the purpose of being maintained permanently therein. The time consumed in driving the sheep through Wyoming was from six to eight weeks, and the distance traveled was about 500 miles. "For shipment purposes, it was not necessary that the sheep should be driven into Wyoming, and the railroad over which they were shipped could be reached from the point from which they were first driven by traveling a less distance than was required

there. *John Hancock Ice Co. v. Rose*, 67 N. J. L. 86, 50 Atl. 364.

In *Coe v. Errol*, 62 N. H. 303, it was held that logs cut in New Hampshire by a nonresident, and taken to a town on a river in that state to await a convenient opportunity for their transportation to another state, had a local situs in New Hampshire for the purposes of taxation, and that they were not in transit in such a sense as to render them immune from local taxation under the commerce clause. This decision was affirmed by the United States Supreme Court in 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475. To the same effect is the decision in the *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. 54.

In *Standard Oil Co. v. Bachelor*, 80 Ind. 1, barrel staves purchased by a foreign corporation in Indiana for shipment to its place of business in Ohio were held to have lost their situs as taxable property in Indiana, and to be *in transitu*, notwithstanding at the time of their attempted assessment they were piled near a railroad track in Indiana awaiting an opportunity for shipment. This decision, however, would seem to be referable to the commerce clause, and therefore not to involve the proposition that, apart from that clause, the property of a nonresident, under such circumstances, cannot be assigned a local situs for the purposes of taxation.

In the subsequent case of *Brown County v. Standard Oil Co.* 103 Ind. 302, 2 N. E. 758, staves purchased by a foreign corporation, and piled in yards within the state awaiting a process by which they were to be cut of uniform length and thickness, it

to drive them to any point" in Wyoming. The question was, Were the sheep subject to taxation while in Wyoming? The supreme court of Wyoming held that they were. The court said: "We are of the opinion, therefore, that, in determining the purpose and the situs, the course and method of travel is a proper subject and one of the elements for consideration. We do not dispute the proposition that an owner of live stock, if not otherwise disobedient to the law and observant of the police regulations of the state, has the right to transport them to market by driving on foot as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation."

This case (*Kelley v. Rhoads*) was taken to the Supreme Court of the United States,

and the judgment therein was reversed on the ground that the sheep were property engaged in interstate commerce. 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259. The Supreme Court of the United States said: "The question to be determined, then, is whether the stock of the plaintiff was brought into the state for the purpose of being grazed at the time it was assessed for taxation. . . . Had the state court found directly the ultimate fact that these sheep were brought into the state for the purpose of being grazed, such finding might have bound us; but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment. . . . The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." Again it says: "The question turns upon the purpose for which the

being stipulated with the contractor that the staves should be allowed to stand in piles for a period of three months before shipment, unless sooner called for by the company, were held to have a situs in Indiana for the purposes of taxation. The decision in the last case was distinguished upon the ground that the staves in that case were merely in the state temporarily, awaiting facilities for transportation, while in the case at bar they were awaiting a partial process of manufacture.

In *Burlington Lumber Co. v. Willetts*, 118 Ill. 559, 9 N. E. 254, saw logs belonging to an Iowa lumber company were held to have a situs in Illinois, rendering them subject to local taxation, where they were left in a harbor on the Illinois side of the Mississippi river for safe-keeping until needed, it appearing that the owner had leased land along the shore for that purpose and employed an agent to take care of the logs, and had kept logs at such place for several years because they could be kept there in greater safety and at less expense than at its place of business in Iowa.

So, ship timber owned by a nonresident, who had purchased the same during the winter and spring previous to its return for taxation intending to remove the same from the state after the opening of navigation, was held, in *Carrier v. Gordon*, 21 Ohio St. 605, to have a situs within the state for the purposes of local taxation. The court said that the safer and better rule is to consider property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of 7 L.R.A.(N.S.)

the owner or to his residence in or out of the state.

Merchandise shipped by a nonresident manufacturer in bulk to a storage company, and stored by it awaiting orders for its distribution to purchasers, is subject to local taxation. *Merchant's Transfer Co. v. Des Moines*, 128 Iowa, 732, 2 L.R.A.(N.S.) 662, 105 N. W. 211. See note to this case on the question as to when transit commencing in another state is deemed to have terminated or been definitely interrupted, so as to render goods liable to local taxation.

As already intimated, many of the decisions holding that the property of a nonresident was not subject to local taxation turned upon the commerce clause of the Federal Constitution, and are therefore not in point here. It may be noted in this connection that vehicles of commerce are not exempt from local taxation merely because engaged in foreign or interstate commerce. See *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, and note in 60 L.R.A. 653. Hence, the liability of such property, when owned by nonresidents, to local taxation, is dependent upon the question whether or not it has acquired a local situs. This question, however, as applied to vehicles of commerce, is quite distinctive, and is therefore reserved for future treatment in a separate note.

The question as to when a debt may have a situs for the purposes of taxation, apart from the domicile of the creditor, is treated in a case note in 2 L.R.A.(N.S.) 637.

sheep were driven into the state. If for the purpose of being grazed, they are expressly within the 1st section of the act [that is, subject to taxation in Wyoming]. But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit." After repeating a part of the facts, it says: "It thus appears that the only purpose found for which this herd of sheep was being driven across the state was for shipment, and the agreed statement [of facts] wholly fails to show that they were detained at any place within the state for the purpose of grazing or otherwise. As they consumed from six to eight weeks in traveling about 500 miles, or, as the Supreme Court found, at the rate of about 9 miles per day, it does not even appear that they loitered unnecessarily on the way. As they required sustenance on the journey, and could obtain it only by grazing, it would appear, though there is no testimony upon that point, that they could hardly have been driven more rapidly without a loss of flesh during the transit."

The doctrine of the Wyoming court is not questioned by the Supreme Court of the United States, but the difference of the two courts is in its application to the facts in the case. As interpreted by the latter court it is applicable and should control in the case before us.

In *Fennell v. Pauley*, 112 Iowa, 94, 83 N. W. 799, the plaintiff was a resident of the state of Missouri in 1895-96. In December, 1895, he brought into Fremont county, in Iowa, 202 head of cattle for feeding purposes, and kept them upon land owned by him. In April, 1896, the cattle were taken back to the state of Missouri. The court said: "The contention is that this property, belonging to a nonresident and being only temporarily in this state, was not taxable here. Section 812, Code 1873, provides that all personal property shall be taxed in the name of the owner on the 1st day of January. That property of this nature is taxable is fixed by §§ 797-801; and § 817 requires personal property in the hands of an agent to be listed by the assessor. Section 823 requires the assessor to return all personal property found in his township. We understand that property in transit through the state cannot be taxed here, nor can such as belongs to a nonresident, which is here only as an incident of its transfer elsewhere. To give the right to assess the personal property of a nonresident found within this state, it must be located here with something like permanency, or for some purpose other than mere-

ly aiding its transit. . . . These cattle were here to be fed, in order to increase their weight and value for market. . . . In principle, it was the same as the investment of money in this state, and we cannot see why they should not be taxed here." To the same effect see *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 154; *Hardesty v. Fleming*, 57 Tex. 395.

Griggsby Constr. Co. v. Freeman, 108 La. 435, 58 L.R.A. 349, 32 So. 399, is a case like this. In Louisiana all property in that state is subject to taxation, except that expressly exempted from taxation by law. The statutes provide that, in case the taxpayer fails or refuses to furnish a list of his property within the time prescribed, the assessor "shall himself fill out the list from the best information he can obtain." "In making his assessment for the year 1901 the assessor of the parish of Natchitoches called upon the plaintiff's agent to furnish, as required by law, a list of its property situated in the parish and subject to taxation. The plaintiff is a Texas corporation, having its domicile at Dallas, Texas. It operates in that state and adjoining states in the construction of dams, dikes, levees, railroad beds, and other earthwork, and for that purpose has outfits, consisting of mules, scrapers, wagons, commissary store goods, tents, etc., which it sends to the places where work is to be done. At the time when its agent was thus called upon by the assessor, plaintiff was doing grading work for the Texas & Pacific Railroad in the parish of Natchitoches, and the property sought to be assessed was a construction outfit and other movables necessary or convenient in the doing of that work. The agent questioned whether said property was liable to taxation in Louisiana, and asked for time to consult counsel. A second attempt was made to get from the agent a list of the property of plaintiff, and, this second attempt proving equally fruitless, the assessor, as required by law, made out a list of the property as best he could, and put same on his roll. Plaintiff failing to pay the tax thus assessed, the tax collector proceeded to enforce payment by seizure of some of the mules assessed, and plaintiff brought this suit, enjoining the seizure." The supreme court of Louisiana held that the property was subject to taxation, and said: "In the instant case the property was not in course of transportation, but was here for use and for a use likely to be of some duration,—possibly a full year,—and for the time being was incorporated in the bulk of the property of the state. It was distinguishable from the rest of the property of the taxing district in no respect except the intention of the owner to remove it at some future time

more or-less distant. Under these circumstances, its situs approached nearer to permanency than did that of the sheep in the Wyoming case, or that of the coal in *Brown v. Houston*, 114 U. S. 633, 29 L. ed. 261, 5 Sup. Ct. Rep. 1091. 1 *Parmele's Wharton*, Conf. L. § 80a, and cases cited.

The property of plaintiff in this case was not in transit, but was here, chiefly, if not solely, for use and profit, and was subject to taxation.

Decree is reversed, and the complaint of appellees is dismissed for the want of equity.

Petition for rehearing denied October 8, 1906.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

JOSEPH HODGE, Appt.

(142 N. C. 665, 55 S. E. 626.)

Compounding felony—indictment.

An indictment for compounding a felony by agreeing not to prosecute persons arrested for larceny is insufficient, which does not charge that a larceny had been committed.

(December 4, 1906.)

Case Note.—Actual commission of antecedent crime as an ingredient of the offense of compounding a felony: — There are but few criminal cases in point.

The point actually decided in *State v. Leeds*, which is freely quoted in the above case, was that an indictment for compounding a crime, which did not distinctly aver and set forth the preceding crime with such particularity as to enable the party accused of compounding to make preparation for rebutting the charge, was defective, and should be quashed. It would seem to follow, however, that, unless the evidence showed that the preceding crime had actually been committed, the prosecution would fail.

In *Fribly v. State*, 42 Ohio St. 205, cited and criticized in *STATE v. HODGE*, the court gave as a plausible reason for holding as it did, that the contrary rule would impose upon the state the double burden of proving beyond a reasonable doubt the actual commission of two crimes,—the felony compounded, and the compounding of the felony,—and that this, in most cases, would require the injured party to establish his own guilt of the preceding crime.

Although not necessary to the decision in *State v. Carver*, 69 N. H. 216, 39 Atl. 973, it was said, in effect, that the crime of compounding a public misdemeanor is committed by the bargain and acceptance of the reward; and, in such a case, the party may be convicted though no offense liable to a pen-
7 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the Superior Court for Rutherford County denying a motion in arrest of judgment upon a verdict convicting him of compounding a felony. Reversed.

Statement by Connor, J.:

The defendant was tried and convicted upon an indictment in the following words, to wit: "The jurors for the state upon their oaths present that Joseph Hodge, late of the county of Rutherford, on the 4th day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously compound a felony, to wit, did swear out a warrant before Squire H. S. Taylor against Addie Yelton and Wm. Yelton, charging them with the larceny of certain berries and cherries, and after they had been arrested on said warrant, and before they had their trial, proposed to said defendants and their friends that if they would pay him (\$10.00) ten dollars and pay his lawyer (\$5.00) five dollars that he would drop the matter and not appear against them, said money was paid, and said prosecution abandoned, against the form of the statute in such case made and provided, and against the peace and dignity of the state." Upon the rendition of the verdict, defendant moved in arrest of judg-

alty has been committed by the person from whom the reward is taken.

Under some forms of the statute on this subject, the accused, to be guilty, must have had knowledge of the commission of the crime compounded. This being so, it would seem necessarily to follow that the crime alleged to have been compounded must actually have been committed. Such statutes controlled the decisions in *Watt v. State*, *People v. Byron*, and *State v. Henning*, cited in *STATE v. HODGE*.

The question under discussion has arisen in a number of civil cases in which actions on contracts have been defended upon the ground that the consideration was the compounding of a felony.

Thus, in *Manning v. Columbian Lodge No. 117*, 1 I. O. O. F. 57 N. J. Eq. 338, 45 Atl. 1092, Affirming (N. J. Eq.) 38 Atl. 444, it was held that, where defendant in an action on a note defends on the ground that it was given to compound a felony, he must plead and prove the actual commission of the preceding crime alleged to have been compounded.

In *Deere v. Wolff*, 65 Iowa, 32, 21 N. W. 168, where it was contended that a sale was invalid, in that the consideration thereof was the compounding of a felony, it was held that, before the vendee could be found guilty of compounding a felony, it must be established that the vendor was guilty of felony; and that a mere charge of guilt,

ment. Motion denied. Judgment, and appeal by defendant.

Mr. D. F. Morrow for appellant.

Mr. Robert D. Gilmer, Attorney General, for the State.

Connor, J., delivered the opinion of the court:

Defendant in this court assigns several grounds for his motion for arresting the judgment. We have found no difficulty in disposing of all save one,—that the indictment does not aver that the persons with whom he is charged with entering into the agreement, and from whom he received the money as the consideration for “dropping the matter and not appearing as a witness” on the trial, were guilty of the larceny charged against them. We have given the question anxious and careful examination, and find the authorities unsatisfactory and conflicting. In the absence of any statute in this state defining the offense of compounding a felony, we are compelled to look to common-law sources. Our Reports disclose but one indictment for the offense, and from this we derive no aid in the solution of the question presented here. There was no motion presenting the question respecting the sufficiency of the indictment. *State v. Furr*, 121 N. C. 606, 28 S. E. 552. Blackstone (4 Com. 134), after discussing the crime of receiving stolen goods, knowing them to be stolen, and a kindred offense, says: “Of a nature somewhat similar to the two last is the offense of theft bote, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprison-

ment.” Russell, Crimes, 194. Bishop defines the offense as “an agreement with the criminal not to prosecute him.” *Crim. Law*, 648. “The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter’s making reparation or on receipt of a reward or bribe not to prosecute.” *Black’s Law Dict.* 240; 8 *Cyc. Law & Proc.* p. 492, where several definitions are given. There is no substantial difference in the definitions given by the writers on criminal law and in well-considered cases. All of them concur with Blackstone that, to constitute the crime, the agreement must be not to prosecute the person guilty of the felony, or, as said in some cases, “the guilty person” or “the criminal.” It would seem that, in the light of the language uniformly used, there could be no doubt that, before a conviction can be had, it must be made to appear that a felony has been committed by the person with whom the corrupt agreement was made.

In the indictment before us, the solicitor charges that defendant “did unlawfully, wilfully, and feloniously compound a felony.” His Honor, following the decision of this court in *State v. Furr*, supra, instructed the jury, “that, before they could convict, they would have to find beyond a reasonable doubt that the Yeltons had committed a felony.” The editor of *Cyc. Law & Proc.* (vol. 8, p. 495) says: “The actual commission of a preceding crime would seem to be essential to the offense of compounding the same, and in the majority of jurisdictions this is the view taken, although in some the rule is otherwise,”—citing *State v. Leeds*, 68 N. J. L. 210, 52 Atl. 288. Dixon, J., says: “It is generally held that, to sustain an indictment for compounding a crime, it must be shown that the crime alleged to have been compounded had been committed,”—

or an indictment for the crime, would not authorize the conclusion that there had been any compounding of a felony.

In *Swope v. Jefferson F. Ins. Co.* 93 Pa. 251, where a mortgagor claimed that the compounding of a felony committed by his son was the only consideration for the execution of the mortgage, it was held necessary for the mortgagor to show by such preponderance of evidence that his son had actually committed a felony as would justify the jury in so finding; though the proof of guilt need not be of that conclusive character that would be necessary to convict.

In *Chandler v. Johnson*, 39 Ga. 85, it was held that the defendant, when sued upon his note given to compound a felony, need not establish a clear case of guilt on his part; but that it would be sufficient to show that there was a bona fide charge against him.

In *Treadwell v. Torbert*, 122 Ala. 297, 25 7 L.R.A. (N.S.)

So. 216, a bill was filed to cancel a deed, and defendant insisted that the real consideration of the deed, as shown by the bill, was the compounding of a felony, and that, therefore, a court of equity would not interfere to relieve the parties. But the bill averred that the charge preferred by defendant against plaintiff’s husband was false, malicious, and “trumped up;” and that defendant knew it to be false. It was held that, under the facts alleged, defendant was not guilty of compounding a felony; that had he been indicted for the compounding of a felony by receiving the deed from complainant in consideration of his promise to conceal or to abstain from a prosecution of her husband, it would have been a perfect defense to have shown that the charge and prosecution against the husband was unfounded, and could not have been successfully maintained.

citing 1 Hale, P. C. 619, wherein it is said: If "A hath his goods stolen by B, if A receives his goods again simply, without any contract to favor him in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is theft bote, punishable by imprisonment and ransom, but yet it makes not A an accessory, . . . but if he take money of B to favor him, whereby he escapes, this makes him accessory." Judge Dixon notes that in some states statutes have been enacted enlarging the scope of the offense; but he says: "The reason of the thing accords better with the common law, for it cannot be held that the public is injured by the refusal of a private person to present or prosecute a charge of crime, if in fact no crime has been perpetrated." In *Swope v. Jefferson F. Ins. Co.* 93 Pa. 251, it is said: "The guilt of the party accused and an agreement not to prosecute are essential ingredients in the compounding of a felony." *Watt v. State*, 97 Ala. 72, 11 So. 901. In *State v. Henning*, 33 Ind. 189, an indictment for compounding a crime was held bad, because it did not charge that the defendant had knowledge of the actual commission of the crime alleged to have been compounded. McClain treats the offense in connection with misprision of felony and accessories, as does Sir Mathew Hale; and in offenses of this class it is essential to show that a crime has been committed and that the felon is known to the defendant. *Crim. Law*, § 939. In *Queen v. Burgess*, L. R. 16 Q. B. Div. 141, the indictment charged the commission of the offense compounded, and that defendant, "well knowing the said felony to have been done and committed by the said A. B.," etc. It was held in that case (*Coleridge*, Ch. J.) that the offense could be committed by one other than the owner of the goods. The case of *Frilby v. State*, 42 Ohio St. 205, is cited as holding that in an indictment for compounding a felony it is not necessary to aver or show that crime has been committed. The decision is based upon the language of the statute, which is much more comprehensive in its terms than the definition of the offense at common law. The court treats the case as coming within the language of the statute, and cites no authorities. We cannot regard the decision as controlling us in dealing with the common-law offense. We are not quite sure that we comprehend the import of the language in which the opinion concludes: "It is necessary to aver and prove that the prosecution was for what appeared by the charge to be a crime; but it is not necessary that the actual commission of such crime be either averred or proved." The statute in-

cludes "abandoning, or agreeing to abandon, any prosecution threatened or commenced for any crime or misdemeanor." If the charge was for the commission of the statutory offense, we can easily perceive the meaning of the language quoted.

We conclude, therefore, that the common-law offense, as defined by all of the authorities, involves the charge that a felony had been committed and that the felon is known to the defendant. It would seem clear that, this being an essential ingredient in the offense, it must be alleged in the indictment. In *Leeds's Case*, supra, it is said: "As the preceding crime is essential to the offense of compounding the crime, it should be distinctly averred in the indictment for compounding, and should be set forth with such particularity as will enable the accused to make preparation for rebutting the charge." The precedents are uniform in this respect. 2 *Wharton*, Pl. & Pr. 895; *Chitty*, *Crim. Law*, 221. An examination of the record in *State v. Furr*, supra, shows that the bill is drawn according to the precedents. *People v. Bryon*, 103 Cal. 675, 37 Pac. 754. "There is a class of offenses involving an obstruction of public justice, in which it is held that it is not necessary to charge or prove the commission of the crime the prosecution of which is interfered with. Persuading or inducing a witness not to attend court, whether under subpoena or not, is indictable. Inducing one to absent himself from attending as a witness before a justice, in an examination of a charge for violating the criminal law, is a high-handed offense." 1 *Revisal* 1905, § 3696; *Re Young*, 137 N. C. 552, 50 S. E. 220. In *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450, it was held that it was not necessary to allege or show that the person against whom the witness would have testified was guilty. *State v. Carpenter*, 20 Vt. 9. The form of the indictment for this offense is found in *Chitty*, *Crim. Law*, 235. By Stat. 18 Eliz. it is made a misdemeanor to agree for money to compound or withdraw a suit for a penalty without the consent of the court. Under this statute it is held that it is not necessary to allege or show the commission of the act for which the suit or prosecution is instituted. *Reg. v. Best*, 9 Car. & P. 368. It would seem that this statute is a part of the common law in force in this state. The case of *State v. Carver*, 69 N. H. 216, 39 Atl. 973, is not put upon that statute, although it is referred to in the opinion. In that case the indictment was in accordance with the precedents, except that, after describing the offense in the concluding sentence of the bill, it is charged that defendant forbore to prosecute for "said supposed" offense. This was held sufficient.

A careful examination of every case at our command fails to discover any one in which an indictment is sustained which omits the averment that a crime had been committed. The judgment must be arrested. It is but just to the learned judge who tried the case to say that it does not appear that this objection was raised before him. As we have seen, he correctly instructed the jury. It may be well enough to suggest that the bill does not very clearly allege any agreement to forbear prosecution. It would conform more closely to the precedents to charge clearly the agreement which is the gist of the offense. We also note that the indictment charges that defendant "proposed to said defendants and their friends," etc., whereas the evidence was "that the father of the Yeltons, through his friends, compromised the case," etc. It is not clear that this was not a variance, entitling the defendant to an acquittal on this indictment. For the reasons given, the motion in arrest must be allowed.

Judgment arrested.

ALABAMA SUPREME COURT.

ALABAMA COAL & COKE COMPANY

v.

GULF COAL & COKE COMPANY, Appt.

(— Ala. —, 40 So. 397.)

Bill to quiet title—owner of minerals.

1. The owner of the minerals underlying land is within the protection of a statute permitting one in peaceable possession of "lands" to maintain a bill to quiet title to them against one denying or disputing his title.

Pleading—amendment—departure.

2. No departure in a suit to quiet title to real estate is effected by an amendment seeking to estop defendant from question-

ing plaintiff's title on the ground that a deed in plaintiff's chain of title had never been delivered, for the reason that defendant claiming under the grantor in the undelivered deed had taken no steps to cancel the record of it, although the bill proceeded merely on the statutory grounds for such action.

Bona fide purchaser—undelivered deed.

3. One purchasing real estate in the chain of title to which is an undelivered deed acquires no title, and therefore is not entitled to protection as a bona fide purchaser because he had no notice of the fact of nondelivery.

Estoppel—permitting undelivered deed to remain on record.

4. Failure of successors in title to one whose undelivered deed to real estate has been recorded, to remove it from the record, will not estop them from denying the title of a stranger who purchases the property in reliance on the record.

(February 1, 1906.)

A PPEAL by defendant from a decree of the Chancery Court for Walker County in complainant's favor in a suit to quiet title to real estate. Reversed.

The amendment which complainant filed by leave of court averred, in effect, that James I. Odom was, in December, 1882, the owner of the land in controversy, and that he and his wife made a deed of the land to Thomas Peters, which deed was duly acknowledged and filed for record. That Peters conveyed the property to Samuel Noble by way of mortgage, which was foreclosed and the property purchased by A. L. Tyler and T. G. Bush, trustees. That Tyler and Bush conveyed the property to complainant in satisfaction of stock subscriptions, and that the entire stock of complainant company was sold by the original subscribers for a valuable consideration to the present stockholders of the corporation, who had no notice of any adverse claim to the land;

Case Note.—Permitting undelivered deed, wrongfully recorded by grantee, to remain on record as estoppel of grantor or his successors to deny its delivery as against one who has purchased in reliance on the record:

—While the decision in *ALABAMA COAL & COKE CO. v. GULF COAL & COKE CO.* is formally put upon the ground that the complainant was not a bona fide purchaser, it in effect denies the right of one, under any circumstances, to invoke an estoppel against the owner to deny the delivery of a deed because he has permitted it to remain on the record, since the holding that he was not a bona fide purchaser was based, not upon notice of the actual facts, or lack of consideration, or any of the matters of fact upon which the question as to bona fides usually turns, but upon the broad proposition laid down in the case of *Shook v. 7 L.R.A. (N.S.)*

Southern Bldg. & L. Asso., cited in the opinion, that one who does not acquire title cannot, under any circumstances, become a bona fide purchaser. This decision is against the weight of authority, as is apparent from the cases subsequently cited. It is true that the decisions in these cases were rendered upon the assumption that the person invoking the estoppel was a bona fide purchaser; but in so assuming the courts did not mean to imply that apart from the estoppel, he had acquired any title to the premises, but merely that he had paid value without notice of the real fact of the nondelivery. Upon the contrary, it was clearly assumed that, apart from the estoppel, he had no title, and that was the very reason why he invoked the doctrine of estoppel.

Where an undelivered deed, deposited in

that, after the recording of his deed to Peters, Odom conveyed the same property to Musgrove brothers, whose title defendant holds; and that, prior to the payment of the purchase money under these conveyances, the respective grantees had notice of the record of the prior deed from Odom to Peters; and that they therefore knew that Peters could make sale of the property to bona fide purchasers and obtain the money therefor; and that, with full knowledge of that fact, they permitted the deed to remain on record, and in equity and good faith they were estopped to show the nondelivery of the Peters deed as against complainant.

Further facts appear in the opinion.

Messrs. W. C. Davis and A. F. Fite, for appellant:

The original bill and the proposed amendment could each stand on a different state of facts, and are therefore inconsistent and repugnant to the rules of equity pleading.

Lehman v. Meyer, 67 Ala. 403; Echols v. Hubbard, 90 Ala. 309, 7 So. 817; Jones v. McNealy, 139 Ala. 379, 101 Am. St. Rep. 38, 35 So. 1022; Smith v. Gordon, 136 Ala. 495, 34 So. 838; Micou v. Ashurst, 55 Ala. 607; Rives v. Walthall, 38 Ala. 331; Campbell v. Davis, 85 Ala. 61, 4 So. 140; Code 1896, § 809.

escrow with instructions that it should not be delivered until the grantor's death, was wrongfully obtained by the grantee and placed upon record, the grantor having knowledge thereof and acquiescing therein for three years, it was held, in Pittman v. Sofley, 64 Ill. 155, that the grantor was estopped from alleging the invalidity of the deed as against a purchaser in good faith without notice of the nondelivery of the deed; the court saying: "For years the complainant [grantor] acquiesced in the truth of the record, and silently assented to the goodness of the title evidenced by it. He instituted no suit, and used no effort to prevent imposition. . . . In the absence of sufficient notice to a bona fide purchaser, the grantor must be regarded as having ratified the delivery."

Under a similar state of facts, where the grantor for seven years knew of the wrongful recording of the deed, a similar holding was made, in McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586.

Where the grantor, for three years, knew of the wrongful recording of a deed by the grantee, but made no effort to secure its cancellation, it was held, in Johnson v. Erlandson (N. D.) 105 N. W. 722, a complete estoppel as against a bona fide purchaser from the grantee, relying upon the recorded title and without knowledge of the nondelivery of the deed. Again, in Connell v. Connell, 32 W. Va. 319, 9 S. E. 254, where a grantor attempted to assert the invalidity of a deed, wrongfully recorded by the 7 L.R.A. (N.S.)

In case a deed is not delivered the title remains in the grantor.

Hance v. Swackhamer (N. J. Eq.) 36 Atl. 494; 6 Ballard, Real Prop. § 176; White Star Line S. B. Co. v. Moragne, 91 Ala. 610, 8 So. 867; 6 Am. & Eng. Enc. Law, p. 867; Laws of Escrows, 15 Cent. L. J. 162; 3 Washb. Real Prop. 323; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Shirley v. Ayres, 14 Ohio, 308, 45 Am. Dec. 546; Simpson v. McGlathery, 52 Miss. 723; Campbell v. Larmore, 84 Ala. 499, 4 So. 593.

If the grantor prepares a deed, which is taken out of his possession by theft or fraud and given to the grantee, the deed is not delivered, and no title passes.

9 Am. & Eng. Enc. Law, 2d ed. p. 155; Henry v. Carson, 96 Ind. 412; Cotton v. Gregory, 10 Neb. 125, 4 N. W. 939; Cook v. Brown, 34 N. H. 460; Frisbie v. McCarty, 1 Stew. & P. (Ala.) 56; Wilson v. Wilson, 158 Ill. 567, 49 Am. St. Rep. 176, 41 N. E. 1007; Brown v. Brown, 167 Ill. 631, 47 N. E. 1046; Ashford v. Prewitt, 102 Ala. 264, 48 Am. St. Rep. 37, 14 So. 663; Black v. Shreve, 13 N. J. Eq. 457; Tarwater v. Going, 140 Ala. 275, 37 So. 330; Smith v. South Royalton Bank, 32 Vt. 341, 77 Am. Dec. 179; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Fuller v. Hollis, 57 Ala. 437; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep.

grantee, as against a purchaser in good faith without notice, the court said: "The plaintiff is estopped at this late day from denying the validity of said deed. He had full notice for nearly eighteen years that said deed was upon the public records of the county, and he not only took no action to set it aside, but never questioned its validity until the property passed into the hands of a purchaser from . . . [the grantee]." Upon similar facts, like decisions have been made in Haven v. Kramer, 41 Iowa, 382, and Mays v. Shields, 117 Ga. 814, 45 S. E. 68.

A somewhat similar case is that of Costello v. Meade, 55 How. Pr. 356, where it was held that the holder of a mortgage, who learned of the recording of a forged satisfaction piece, but took no steps to correct the record, suffering it to appear as though the mortgage was actually discharged, was estopped to assert the forgery as against persons who had acquired subsequent rights in reliance upon the truth of the record.

This note is not intended to cover the question as to the effect of recording, or permitting or acquiescing in the record of, a deed, or a delivery thereof in fact or law, by the grantor, but merely the question whether permitting the deed to remain on the record will estop one to deny its delivery.

And also see 22 L.R.A. 256, for a note on Estoppel of landowner by permitting record title to remain in another; but which does not treat the exact point ruled by ALABAMA COAL & COKE CO. v. GULF COAL & COKE CO.

373; *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 5.

Messrs. Smith & Smith for appellee.

Tyson, J., delivered the opinion of the court:

The bill in this cause was filed under §§ 809 et seq. of the Code of 1896 to quiet the title to the coal and other minerals owned by complainant in, under, and upon a certain tract of land. It contains all the necessary statutory averments. The point is made that the owner of coal and minerals in, under, and upon land, with no title to the surface, cannot invoke the remedy afforded by the statute. The language of the statute pertinent to this point is this: "When any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same, and his title thereto or to any part thereof is denied or disputed, . . . such person so in possession may bring and maintain a suit in equity to settle the title to such lands and to clear up all doubts or disputes concerning the same." It is admitted that the coal and other mineral are a part of the land, but the contention seems to proceed upon the theory that, because this interest does not comprise the whole of the land, therefore it is not land within the meaning of the word "lands," employed in the statute. We think this a too narrow and technical construction. The statute is a remedial one and should be liberally construed. Whenever a person acquires such an interest in land as is capable of being possessed peaceably, and it is so possessed, we are of the opinion that the statute affords the owner of such an interest a remedy to have his title quieted.

The right of the owner to maintain such a bill was recognized in the case of *Smith v. Gordon*, 136 Ala. 495, 34 So. 838. If this be not true, the owner of the surface, after parting with the mineral interest, could not bring such a bill because he is not the owner of the whole of the land. And, by analogy, the owner of a life estate in lands would be denied the benefit of the statute because he does not own the whole estate.

The amendment to the bill was clearly not a departure. *Ibid.*; *Bledsoe v. Price*, 132 Ala. 621, 32 So. 325. This amendment seeks to estop the respondent from showing that the deed from Odom to Peters, from whom complainant derives his title by mesne conveyances, was never in fact delivered. It is not averred that the respondent in any wise induced the complainant, or any one of those through whom it claims, to purchase the lands. The ground of the estoppel sought to be enforced is rested solely upon the fact that respondent and its predecessors in title, knowing that Peters could make sale of the

property to bona fide purchasers and obtain the money therefor, and, with full knowledge that the deed to Peters was of record, took no action to have it annulled. If the deed was never delivered by Odom to Peters, then Peters acquired no title or estate in the land whatsoever. *Tarwater v. Going*, 140 Ala. 273, 37 So. 330; *Lyon v. Hardin*, 129 Ala. 643, 646, 29 So. 777; *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 500; *Frisbie v. McCarty*, 1 Stew. & P. (Ala.) 56; *Goodlett v. Kelly*, 74 Ala. 213. Nor did Peters's grantee, or any other person claiming under him, acquire any title. *Fitzpatrick v. Brigman* and *Goodlett v. Kelly*, supra; 1 *Tiedeman*, Real Prop. § 812, and cases cited in note 2.

The fact that complainant, or those through whom it claimed, did not know of the nondelivery of the deed by Odom to Peters is of no moment. They are not bona fide purchasers, and are therefore not entitled to protection on account of their want of knowledge or notice of that fact, having acquired no title or estate under the conveyance to them to the lands. *Shook v. Southern Bldg. & L. Asso.* 140 Ala. 575, 37 So. 409. This being the law, the respondents knew that Peters could not make sale of the property to bona fide purchasers, and therefore the equity upon which the predicate is laid in the amendment to the bill for an estoppel is wanting. And clearly the respondent was under no duty to take any action to have the deed to Peters annulled. If in possession, it may have done so in order to remove it as a cloud upon its title; but it owed the complainant no duty to do so, and, failing in this regard, does not work an estoppel against it and in favor of the complainant to now assert that the deed to Peters was void because never delivered. The demurrer interposed to this phase of the bill, as amended, was improperly overruled.

The decree appealed from will be reversed, and one will be here entered sustaining the demurrer.

Reversed and rendered.

Dowdell, Simpson, and Anderson, JJ., concur.

Petition for rehearing denied April 3, 1906.

ARKANSAS SUPREME COURT.

H. C. TIPTON, Appt.,
v.

R. M. SMYTHE.

(78 Ark. 392, 94 S. W. 678.)

State bonds—limitation of time for payment—validity.

1. A statute limiting the time for pre-

resentation of state bonds which have been overdue for a period of eighteen months, to six months from the time of notice, and which provides for publication of notice in a newspaper published at the capital city of the state, and for filing of copies with the secretaries of various boards of trade, is not unreasonable, and therefore does not impair the constitutional rights of a bondholder, although, by reason of absence from the country, he actually receives no notice of the statute until after the expiration of the limitation period.

Same—obligation of contract—impairment.

2. No impairment of a contract right to use state bonds in payment for state lands is effected by a statute providing for the payment of the bonds in cash, and limiting the time for presentation to six months after publication of notice, after the expira-

tion of which the bonds are not to be recognized as valid for any purpose.

Same—implied repeal.

3. That a statute providing a limitation period for the presentation of overdue state bonds does not in express terms repeal a statute authorizing them to be tendered in payment for state lands, does not leave the rights accorded by such statute in force, where it provides that, after the expiration of the limitation period, the owner shall be debarred from deriving any benefit from them, and that they shall thereafter be void.

(April 16, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in a mandamus proceeding

Case Note. — Reasonableness of period allowed by new statute of limitations in respect of existing causes of action: —

The legislature may shorten the period of time in which actions may be brought, subject to the fundamental restriction that a reasonable time must be provided for the enforcement of existing causes of action before the bar of the statute shall become complete. The purpose of this note is to be reasonable and what unreasonable, within this restriction.

The following periods have been held reasonable for this purpose:

Three years. *Rowson v. Denson*, 74 Ark. 302, 86 S. W. 661; *Korn v. Browne*, 64 Pa. 55; *Clay v. Iseminger*, 187 Pa. 108, 41 Atl. 38, 190 Pa. 580, 42 Atl. 1039, Affirmed in 185 U. S. 55, 46 L. ed. 804, 22 Sup. Ct. Rep. 573; *Terry v. Heisen*, 115 La. 1076, 40 So. 461.

Two years. *Re Warner*, 39 App. Div. 91, 56 N. Y. Supp. 585; *Slocum v. Stoddard*, 7 N. Y. Civ. Proc. Rep. 240; *Kreyling v. O'Reilly*, 97 Mo. App. 384, 71 S. W. 372; *Stephens v. St. Louis Nat. Bank*, 43 Mo. 385; *Rodebaugh v. Philadelphia Traction Co.* 190 Pa. 358, 42 Atl. 953; *Ryhiner v. Frank*, 105 Ill. 326; *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312.

One year. *McMillian v. Werner*, 35 Tex. 419; *Cameron v. Louisville, O. & T. R. Co.* 69 Miss. 78, 10 So. 554; *Adamson v. Davis*, 47 Mo. 268; *Krone v. Krone*, 37 Mich. 308; *People ex rel. Parsons v. Circuit Judge*, 37 Mich. 287; *Burwell v. Tullis*, 12 Minn. 572, Gil. 486; *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Lockhart v. Yeiser*, 2 Bush, 231; *Vandiver v. Hodge*, 4 Bush, 538; *Stern v. Bates*, 9 N. M. 286, 50 Pac. 325; *Call v. Hagger*, 8 Mass. 423; *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521; *Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408; *Michel v. Tenney*, 6 La. Ann. 89; *Wrightman v. Boone County*, 82 Fed. 413.

Eighteen months. *Hedger v. Rennaker*, 3 Met. (Ky.) 255.

Thirteen months. *Merchants' Nat. Bank v. Braithwaite*, 1 N. D. 358, 66 Am. St. Rep. 7 L.R.A. (N.S.)

653, 75 N. W. 244; *State use of Isaac v. Jones*, 21 Md. 432.

Ten months. *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72.

Nine and one-half months. *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Sturges v. Crowninshield*, 4 Wheat, 122, 4 L. ed. 529; *Marsh v. Burroughs*, Fed. Cas. No. 9,111.

Nine months. *Eaton v. Manitowoc County*, 40 Wis. 668.

Eight and one-half months. *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; *Smith v. Packard*, 12 Wis. 372.

Eight months. *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714.

Seven months. *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 Pac. 737.

Six months. *TIPTON v. SMYTHE*; *People v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498, 22 N. E. 1022, 145 N. Y. 451, 40 N. E. 400, Affirmed in 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Wheeler v. Jackson*, 41 Hun, 410, 105 N. Y. 681, 13 N. E. 931, Affirmed in 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; *Saranac Land & Timber Co. v. Roberts*, 83 Fed. 436, Affirmed in 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956; *Russell v. A. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3; *Dabbs v. Rothe*, 25 Tex. Civ. App. 201, 60 S. W. 811; *Smith v. Morrison*, 22 Pick. 430.

Five months. *Bigelow v. Bemis*, 2 Allen, 496.

Four and one-half months. *Stine v. Bennett*, 13 Minn. 153, Gil. 138; *Horbach v. Miller*, 4 Neb. 31.

Three months. *DeMoss v. Newton*, 31 Ind. 219.

But one year has been held to be an unreasonable limitation, as against foreign bondholders. *Pereles v. Watertown*, 6 Bias. 79, Fed. Cas. No. 10,980; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972

to compel defendant to accept a coupon from state bonds in payment for land. Reversed.

The facts are stated in the opinion.

Mr. Robert L. Rogers for appellant.

Messrs. Bradshaw, Rhoton, & Helm for appellee.

McCulloch, J., delivered the opinion of the court:

Appellee, R. M. Smythe, being the owner of a bond numbered 2,034, in the sum of \$1,000 with 55 semiannual interest coupons of \$30 each attached thereto, issued by the state of Arkansas on January 1, 1870, and due thirty years after date, applied to the commissioner of state lands to purchase a certain tract of real-estate bank lands situated in Phillips county at the price of \$240, and tendered to the treasurer of state eight of said interest coupons in payment therefor. The treasurer refused to accept said coupons on the ground that the bonds and coupons attached were barred because not presented within the time required by an act of the general assembly approved May 3, 1901 (Laws 1901, p. 262); and appellee thereupon presented to the circuit court of Pulaski county his petition for writ of mandamus to require the treasurer to accept said coupons in payment for the land. The treasurer appeared and demurred to the petition, the demurrer was overruled, and final judgment was rendered awarding the writ in accordance with the prayer of the petition; and the treasurer has appealed to this court.

Said bond was issued by the state pursuant to the provisions of an act of the general assembly of April 6, 1869 (Laws 1869, p. 115), providing for the funding of the public debt of the state; the particular bond in question being a reissue, under said act, of real-estate bank bonds then outstanding. Section 10 (page 118) of said act of 1869 pledged the faith of the state for the payment of said bonds and interest, and to pro-

vide annually a sinking fund to pay off the principal as the same should become due. Section 11 of the act provides that "the proceeds of all of the mortgages, notes, bills, and other securities in possession of the state, obtained as security for the bonds issued to the real estate and state bank, are hereby set aside as a sinking fund for the payment of the interest and principal of the bonds to be issued in pursuance of this act." The act of May 3, 1901, the validity of which is challenged by appellee, is entitled "An Act to Provide for the Cancellation of Certain State Bonds, and to Fix the Rate of Sinking Fund Tax." It provides (§ 1) that immediately after its passage "the state treasurer shall make a call for all outstanding valid bonds of the state, except those of the issue of 1899;" and (§ 2) that the publication should be made in a daily newspaper published in the city of Little Rock, and certified copies of the call should be filed with the secretaries of the stock exchange of New York, Boston, and St. Louis, six months before the day fixed in the notice for expiration of the time in which the owners of bonds were allowed to present bonds for redemption. Section 3 provides that the call or notice shall warn all holders of bonds to present same for redemption and payment within six months from the first day of said publication, "or that said bonds shall thereafter be null and void and nonpayable out of the treasury." Section 5 provides that all valid bonds presented within the time prescribed shall be redeemed, and paid by the treasurer out of the moneys in his hands to the credit of the sinking fund, and the succeeding section provides for a levy of taxes to raise a sinking fund, out of which the bonds shall be paid. Section 4 of the act is as follows: "All persons who shall hold any of said valid bonds, and shall neglect or refuse to present same to the treasurer of state for redemption within the time prescribed by this act and set out

The following periods have been held unreasonable for this purpose:

Eight months. *Hathaway v. Merchants' Loan & T. Co.* 218 Ill. 580, 75 N. E. 1060.

Six months. *Sherman v. Nason*, 25 Mont. 283, 64 Pac. 768; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400 (action on judgment of sister state).

Three months. *Relyea v. Tomahawk Paper & Pulp Co.* 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412; *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434 (action on judgment of sister state).

Eight weeks. *Parmenter v. State*, 135 N. Y. 154, 31 N. E. 1035.

Thirty days. *Berry v. Ransdall*, 4 Met. (Ky.) 292.

Generally, it is assumed that existing 7 L.R.A. (N.S.)

causes of action are sufficiently protected by the lapse of a reasonable time between the enactment and the taking effect of the new statute; but in *Gilbert v. Ackerman*, 159 N. Y. 118, 45 L.R.A. 118, 53 N. E. 753, and *Price v. Hopkin*, 13 Mich. 318, it was held that a new statute must fix a reasonable period of grace after it goes into effect. The contrary position was expressly taken in *Smith v. Morrison*; *Stine v. Bennett*; *Duncan v. Cobb*; *Eaton v. Manitowac County*; *Hedger v. Rennaker*; and *Wrightman v. Boone County*,—*supra*.

On the broad general question as to the constitutionality of statutes which reduce the period of time allowed by the statute limitations, as affecting existing causes of action, which this note does not attempt to treat, see note to 1 L.R.A. (N.S.) 528.

in said notice, shall thereafter be debarred from deriving any benefit from same; and said bonds shall thereafter be invalid and nonpayable. The treasurer of state shall, upon expiration of the period of presentation and redemption herein fixed, indorse on the record of each of said bonds herein called in but not presented, that same is barred of payment by the provisions of this act, and same shall no longer be carried on the books of the treasurer or auditor as part of the valid indebtedness of this state."

Appellee, in his petition attacks the validity of the act of May 3, 1901, on the following grounds: "(A) Because said act seeks to deprive the owner of this bond of his property, without due process of law, by canceling said bond without payment, in violation of the Constitution of the state of Arkansas, and of the Constitution of the United States. (B) Because said act seeks to call in, or to cancel, without payment, an obligation of the state of Arkansas, under terms and conditions which were not the law, and not therefore a part of the contract, at the time of the issuance of said bond, and thereby impairs the obligation of the contract between the state of Arkansas and the holder of the bond; and said act is in conflict with the Constitution of the State of Arkansas and the Constitution of the United States. (C) Because the time within which to present said bond for payment is too short, and is in violation of public policy. (D) Because said act does not repeal § 4866 of Kirby's Digest, providing for the acceptance of said bonds in payment of the purchase price of real-estate bank lands belonging to the state of Arkansas." A feature of both the first and second contentions of appellee, that the act in question seeks to call in and cancel the bonds of the state without payment thereof, can easily be disposed of by reference to the express terms of the act itself. The express object and purpose of the act is to call in the bonds for payment and redemption, and not for adjudication as to their validity or cancellation without payment. No unreasonable provisions are found in the act requiring the bondholder to submit his bond to the treasurer or any other person or board for final determination as to its validity. It is true that the act authorized the treasurer to pay valid bonds only, and thereby imposed upon him the duty of ascertaining the validity of all bonds presented for payment; but his adverse decision as to the validity of a bond was in no wise binding upon the bondholder, to whom the courts are always open for an adjudication of such questions. In this respect the act in question is entirely different from the statute condemned by this court in *McCracken v. Moody*, 33 Ark. 81, whereby 7 L.R.A.(N.S.)

holders of school-district warrants were required to present them within a fixed time for cancellation and reissue, and to submit them for final determination as to their validity to a board composed of the county judge and county clerk. It is urged against the validity of the statute that it is in violation of the Constitution of this state and of the Constitution of the United States, because the time within which the bonds must have been presented was too short, and the effect was to deprive the holder of his property "without due process of law;" and that it impaired the obligation of the contract between the state and its bondholders, inasmuch as, at the date of the issuance of the bond, no authority existed in the law for peremptorily calling in such obligations. We do not think either contention is sound. The statute merely prescribes a period of limitation within which outstanding past-due bonds of the state might be presented for payment and redemption. That the legislature may prescribe a period of limitation within which rights may be asserted, even though no limitation existed when the right accrued, or may shorten a period of limitation which existed when the right accrued, is too well settled now for controversy. The only restriction upon that power is that the added limitation must be reasonable, and must afford an ample opportunity for the assertion of existing rights; otherwise the effect would be to impair the obligation of a contract, or to deprive a person of property without due process of law.

Chief Justice Waite, in delivering the opinion of the court in *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, said: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. [Citing] *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190; *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 7 L. ed. 679; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529. It is difficult to see why, if the legislature may prescribe a limitation when none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in the particular limitation which has been fixed than they have in an unrestricted right to sue. . . . In all such cases the question is one of reasonableness; and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the govern-

ment unless a palpable error has been committed." The same doctrine has been announced by that court in the following cases: *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; *Re Brown*, 135 U. S. 703, 34 L. ed. 317, 10 Sup. Ct. Rep. 972; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts)* 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; *Wilson v. Iaeminger*, 185 U. S. 57, 46 L. ed. 805, 22 Sup. Ct. Rep. 573. To the same effect, see *Cooley*, Const. Lim. 7th ed. p. 523; 2 *Lewis's Sutherland*, Stat. Constr. § 668; *Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838; *Bigelow v. Bemis*, 2 Allen, 496.

It being therefore clear that the legislature had the power to pass a statute fixing a period within which the state's obligations should be presented for payment and redemption, it only remains for us to determine whether the statute in question prescribed a reasonable limitation upon the right of presentation. Of this the legislature is primarily the judge, as we have already seen. *Koshkonong v. Burton*, supra. "It is essential," says Judge Cooley, "that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Cooley*, Const. Lim. 7th ed. p. 523. In determining whether or not the statute is reasonable, the court must consider the circumstances under which it is made to apply, and also whether the notice provided for is reasonable. "It is evident from this statement of the question that no one rule as to length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." *Re Brown*, supra. However, a reference to cases will illustrate the shortest periods which the courts have approved as reasonable. The shortest statute of limitation of this state which has heretofore been passed upon by this court is the two years' statute as to suits to recover lands held under sales for nonpayment of taxes, and the court has repeatedly upheld the statute. *Ross v. Royal*, 77 Ark. 324, 91 S. W. 178; *Finley v. Hogan*, 60 Ark. 499, 30 S. W. 1045. In *Terry v.* 7 L.R.A.(N.S.)

Anderson, supra, a statute which limited the time for bringing suit to nine and one-half months was held not unreasonable. In *Turner v. New York*, supra, the Supreme Court of the United States, following the decision of the New York court of appeals in *Meigs v. Roberts*, supra, held that a statute of that state providing that deeds from the comptroller of the state of lands in the forest preserve sold for nonpayment of taxes should, after having been recorded for two years and in any action brought more than six months after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, was a statute of limitation and as such was reasonable and valid. This decision was also followed in *Saranac Land & Timber Co. v. Comptroller*, supra, where Mr. Justice McKenna, speaking for the court, said: "The decision [in *Turner v. New York*] establishes the following propositions: (1) That statutes of limitations are within the constitutional power of the legislature of a state to enact. (2) That the limitation of six months was not unreasonable." In *Vance v. Vance*, supra, the same court upheld as reasonable a provision of the Constitution of the state of Louisiana adopted in 1868, and a statute pursuant thereto, passed March 8, 1869, requiring that all "tacit mortgages [in favor of a minor on the property of his tutor] and privileges now existing in this state shall cease to have effect against third persons after the 1st of January, 1870, unless duly recorded." The statute gave only the period from the date of passage March 8, 1869, until January 1, 1870, within which such mortgages might be recorded, and the court held it to be a reasonable provision even against an infant. In *Krone v. Krone*, 37 Mich. 308, the court, by Judge Cooley, upheld a statute shortening the period of limitation to one year on causes of action then existing. In *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. Rep. 516, 81 N. W. 72, a statute under which an existing cause of action could be asserted within nine months after the statute went into effect was upheld as reasonable. In *Bigelow v. Bemis*, supra, the supreme court of Massachusetts held that a statute was reasonable which shortened the period of limitation, and left about five months within which an existing cause of action might be asserted.

Applying the rule illustrated by these cases, we see no grounds upon which the statute under consideration can be held to be unreasonable. It must be remembered that when this statute was passed the bonds were past due about a year and a half. The statute required the notice to be published in a daily newspaper in the capital city of

the state, and certified copies to be filed with the secretaries of the stock exchanges of New York, Boston, and St. Louis, for six months before the expiration of the time for presenting the bonds for payment. It is alleged in the petition that appellee was at the time of the passage of this act and the publication of the notice, without the limits of the United States, and had no information thereof. It is argued that the statute was unreasonable because a bondholder so situated could receive no notice of the terms of the statute. The same argument could be made in favor of a bondholder in foreign lands if the statute had given six years instead of six months for presentation if he had been making no effort to secure payment of his matured demand against the state. The legislature doubtless had in contemplation, when it fixed a short period, that the bonds were past due, and that the holders were accessible and in waiting for payment. It was not unreasonable to anticipate such a condition, and indulge the reasonable presumption that the holders of matured bonds would receive notice given in the manner pointed out by the statute. It is known that such securities are generally handled through the medium of the stock exchanges in the principal cities of the country, and that information concerning their value may be ascertained through those channels. We cannot say that the statute imposed such unreasonable terms, either as to the length of time or adequacy of the notice, that it deprived the bondholder of his property "without due process of law," or impaired the obligation of the contract.

Again, it is argued that the statute in question impairs the obligation of the contract if it be construed to bar the bondholder of using the bond in payment of real-estate bank lands, as provided by statute. Kirby's Digest, § 4866. The statute just cited provides that such bonds shall be receivable in payment of the purchase price of real-estate bank lands, but it was enacted February 26, 1879 (Acts 1879, p. 10), long after the issuance of the bonds, and therefore its provisions did not enter into and become a part of the contract. But, conceding that they did, the contract was in no wise impaired by the act of May 3, 1901, as payment of the bond in money was provided for, and would have been made if it had been presented. The Supreme Court of the United States, in the case of *Re Brown*, 135 U. S. 703, 34 L. ed. 317, 10 Sup. Ct. Rep. 972, where a statute authorizing the issuance of refunding bonds, as an inducement for acceptance of the bonds provided that they should be receivable for taxes, held that a subsequent statute limiting the time within which the same might be so used was

void because it impaired the obligation of the contract. The decision was placed upon the ground that as long as the bonds remained unpaid, the holder had, according to the terms of the original statute authorizing the issuance of the same the right to use them in payment of taxes, and that a restriction of that right impaired the obligation to that extent. No provision was made for payment of the bonds within the limits prescribed by the new statute, and the court found that it would be impracticable for the bondholder to use all the bonds in payment of taxes within the time prescribed. The statute we are now considering is vastly different in its operation. There can be no higher method of discharging a past-due obligation than by payment in money; and, when this method of payment was provided by the statute, the bondholder sustained no impairment of his contract by being deprived of the right to use it in payment for lands.

Lastly, it is contended that the statute does not in express terms repeal the act of 1879, making the bonds receivable in payment of the purchase price of real-estate bank lands, and should be construed not to deprive the holder of that right given by the former statute. The statute in the broadest terms provides that bonds not presented within the time prescribed should thereafter be treated as invalid and barred for all purposes. By no sort of reasoning can the act be construed to leave the bonds in force for the purposes of use in payment for lands purchased from the state.

The Circuit Court erred in awarding the writ of mandamus, and the judgment is reversed, and cause remanded, with directions to sustain the demurrer to the petition.

FLORIDA SUPREME COURT.

STATE OF FLORIDA, Plff. in Err.,

v.

S. PETER HORNE.

(— Fla. —, 42 So. 388.)

Conditional pardon—violation—rearrest.

1. Where a prisoner has accepted a conditional pardon, and has been released from imprisonment by virtue thereof, but has violated or failed to perform the condition, conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and, in case of a condition subsequent,

Headnotes by the COURT.

Note.—The question as to the power to impose upon a pardon conditions extending beyond the term of the sentence is discussed in a case note in 5 L.R.A. (N.S.) 1064.

becomes void; and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or so much thereof as he had not suffered at the time of his release.

Same—reimprisonment.

2. A conditional pardon may, by its express terms, provide that, upon violation of the conditions, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence. Such stipulations upon acceptance of the pardon become binding upon the convict, and authorize his rearrest and recommitment in the manner and by or through the officials authorized as stipulated in the pardon.

Criminal law—duration of sentence—termination.

3. Under a statute which provides that, "in all cases, the court shall award the sentence, and shall fix the punishment or penalty prescribed by law," the power of the court extends to fixing the punishment; that is, the length of time within the given maximum a prisoner should be imprisoned. The law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and end of the period during which the imprisonment shall be suffered. The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. The essential part of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly executed. But an order of the court with reference to the time when the sentence shall be executed is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence.

Conditional pardon—meaning of sentence.

4. Where reference is made in a conditional pardon to the sentence to be affected by the pardon, the sentence is to be taken in its legal and proper aspect, without reference to the words.

Same—remainder of term.

5. Where a conditional pardon contains a provision that, upon the breach of the condition on which the pardon is granted, "it shall be the duty of the sheriff of any county of this state to immediately arrest him and return him to the penitentiary to serve out the remainder of his term," the reference is to the material terms of the sentence, viz., to the length of imprisonment fixed by the sentence, and not to the particular period of time mentioned in the sentence, during which it was to be executed; since the latter is not a material or effective part of the sentence.

Same—validity.

6. Under a constitutional provision that the pardoning power "may, upon such con-

ditions and with such limitations and restrictions as they may deem proper, . . . grant pardon after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons," the pardoning power may, in granting a pardon after conviction, impose any condition, limitation, or restriction that is not illegal, immoral, or impossible of performance, and the acceptance of the pardon binds the person accepting it to all such conditions, limitations, and restrictions contained therein that are legal, moral, and possible of performance.

Same—period of sentence.

7. The condition of a pardon that requires reimprisonment for the original sentence of imprisonment after the expiration of the particular period of time fixed by the court within which the sentence imposed should be executed is not immoral or impossible of performance during the life of the convict; nor is it illegal, since the particular period of time within which the sentence is to be suffered by the convict as specified in the sentence is not a part of the legal sentence, except so far as it fixes the quantum of time that he must suffer such penalty, and the condition imposed is not forbidden by law, and does not increase the punishment imposed by the court in the sentence.

Same—effect of violation.

8. If the condition of a pardon upon which the convict secures his release from imprisonment is violated, the pardon becomes void and the convict may be arrested to undergo so much of the original sentence as he had not suffered at the time of his release. When the conditions of a pardon are violated, the pardon is thereby rendered in law void, and, if the sentence of imprisonment has not been fully executed, the law imposes the obligation to complete the service of imprisonment fixed in the judgment of conviction and sentence of punishment. The pardon may, as one of its restrictions and limitations, designate a time for the observance of its conditions; but when the conditions are violated, the pardon becomes void in law, and the party is subject to the unsatisfied portion of his sentence as though no pardon had been granted.

Same—hearing.

9. When a convict has been released upon a conditional pardon, his rearrest and recommitment cannot be had upon the mere order of the governor alone, unless such a course is provided by a statute or by the express terms of the pardon. Unless a statute or the express terms of the pardon provide otherwise, the convict is entitled to a hearing before a court of general criminal jurisdiction in order that he may show, if he can, that he has performed the conditions of the pardon, or that he has a legal excuse for not having done so, or that he was not the same person who was convicted; and, on such a hearing,

the court may, in its discretion, take the verdict of a jury as to the facts involved. But the convict is not entitled to a jury trial as a matter of right, except upon the question as to whether he is the same person who was convicted.

(November 27, 1906.)

ERROR to the Circuit Court for Gadsden County to review a judgment releasing petitioner in a writ of habeas corpus from custody to which he had been committed for a violation of a conditional pardon. Reversed.

Statement by the Court:

On July 25, 1906, the defendant in error, by counsel, presented to the chief justice of this court a petition for a writ of habeas corpus sworn to by the petitioner, in which it is stated that "the petitioner is unlawfully, as he apprehends, restrained of his liberty by" the sheriff of Leon county, Florida, who "holds petitioner in custody by virtue of a revocation of pardon or commitment, . . ." and does not hold him by virtue of any other writ or process; that on April 15, 1898, in the circuit court for Gadsden county petitioner was convicted of the offense of assault with intent to murder, and on April 22, 1898, was sentenced to five years' imprisonment from the date of the sentence; that on January 5, 1901, he was granted a conditional pardon by the pardoning board of Florida, and was thereby restored to his liberty, and he returned to Leon county; that on July 18, 1906, "long after the term of years of his original sentence had expired, and without giving him an opportunity to be heard by himself or counsel," the governor of the state of Florida, without authority of law, revoked the pardon granted to petitioner, and ordered that he be recommitted to the state prison; that, by reason thereof, the sheriff of Leon county is detaining the petitioner in the county jail at Tallahassee, Florida, for the purpose of surrendering him to the state-prison authorities. The verdict and sentence of conviction, the conditional pardon, the executive order for reimprisonment, and the return of the sheriff thereon are as follows:

State of Florida v. Peter Horne.

Assault with intent to murder.

State of Florida, Gadsden county,

April 15th, 1898.

We the jury find the defendant guilty, so say we all. E. F. Shepard, Foreman.

It is considered by the court that you, Peter Horne, for your said offense of assault with intent to murder of which you now
7 L.R.A. (N.S.)

stand convicted, be imprisoned by confinement in the state prison at hard labor for the period of five years, to begin and run from this day, and that you do pay the costs of this prosecution.

April 22, 1898.

State of Florida:

Whereas, at a meeting this day held at the capitol in the city of Tallahassee, at which were present His Excellency William D. Bloxham, Governor of said state, John L. Crawford, Secretary of State, William H. Reynolds, Comptroller, ———, Commissioner of Agriculture, and William B. Lamar, Attorney General of said state, who, under the Constitution of said state, have full power to remit fines and forfeitures, commute punishments and grant pardons after convictions, it was determined that Peter Horne, who was convicted at the spring term, A. D. 1898, of the circuit court of Gadsden county, Fla., of an assault with attempt to murder, and was sentenced therefor to imprisonment at hard labor in the penitentiary for the term of five years, should now, upon petitions signed by numerous citizens of Gadsden and Wakulla counties, members of the legislature and other prominent citizens, be granted a pardon conditioned upon his abstaining hereafter from all intoxicating liquors and other beverages, and shall lead a peaceable, law-abiding life; failing in which it shall be the duty of any sheriff of this state to at once arrest him and return him to complete his term.

Therefore, be it known, that the said Peter Horne is hereby granted a conditional pardon, it being a condition of this pardon that if the said Horne shall break the peace, take a drink of intoxicating liquor or other beverage, or become intoxicated, then this conditional pardon shall be null and void, and it shall be the duty of the sheriff of any county of this state to immediately arrest him and return him to the penitentiary to serve out the remainder of his term.

In testimony whereof, we have at the capitol in Tallahassee, hereunto set our hands this fifth day of January, A. D. 1901.

William D. Bloxham, Governor.

John L. Crawford, Secretary of State.

William B. Lamar, Attorney General.

William H. Reynolds, Comptroller.

———, Commissioner of Agriculture.

State of Florida. Executive Department.
Tallahassee, Florida, July 18th, 1906.

Whereas, it appears that on the 5th day of January, A. D. 1901, the state board of pardons granted to one Peter Horne, who was convicted at the spring term, A. D. 1898, of the circuit court in and for Gadsden

county, Florida, of the crime of assault with intent to murder, and was sentenced therefor to imprisonment of hard labor in the penitentiary for the term of five years, a conditional pardon upon the conditions that he the said Peter Horne shall abstain thereafter from the use of all intoxicating liquors and other beverages, and should lead a peaceable, law-abiding life, failing in which it should become the duty of any sheriff of this state to at once arrest him and return him to the penitentiary to complete his term of imprisonment: and,

Whereas, it now appears that said Peter Horne has not kept and observed the conditions and obligations of the said conditional pardon granted him, but complaint has been made that he has not abstained from the use of all intoxicating liquors and other beverages, but has become and is in a state of complete intoxication, and that he is now under arrest, and in the city jail of Tallahassee, Florida, under a charge of drunkenness and disorderly conduct, as shown by the affidavit of William Langston, chief of police of the city of Tallahassee, now on file in the executive office:

Now, therefore, it is ordered, that the said Peter Horne be immediately arrested by the sheriff or constable of any county of the state of Florida, and immediately delivered to the state-prison authorities, to complete the remainder of the original sentence imposed on him by said court.

In testimony whereof, I have hereunto set my hand at Tallahassee, the capitol, this 18th day of July, A. D. 1906, and caused the same to be attested by the great seal of the state.

[Signed] N. B. Broward, Governor.

By the Governor, attest:

[Signed] John L. Crawford,
Secretary of State.

State of Florida, Leon County.

The revocation of the pardon of S. Peter Horne, with direction to recommit him to the state prison of Florida, came to hand July 18th, 1906, and on the same day the said S. Peter Horne was taken in custody by me and committed to the county jail of Leon county, Florida, where he now is, to await transportation to the state prison of the state of Florida. This July 22, 1906.

C. Hopkins, Sheriff.

By J. B. Hopkins,

Deputy Sheriff.

Under authority of § 5, art. 5, of the Constitution, the chief justice issued a writ of habeas corpus upon the petition, returnable before the judge of the second judicial circuit, in which both Leon and Gadsden counties are situated. The return of the

sheriff was that he held the petitioner "by virtue of a revocation of pardon or commitment issued by the governor of Florida . . . to recommit [him] to the state prison in accordance with such order." Upon motion to quash the return and discharge the petitioner, the court made an order that the authority under which the petitioner is held is "insufficient in law, in that it appears that the term of sentence of the said S. Peter Horne had expired prior to the alleged breaches of the conditions of his pardon; therefore, it is considered by the court that the said S. Peter Horne be discharged from custody and go hence without day."

Under the provisions of chapter 4920, Acts of 1901 (Laws 1901, p. 52), the judge hearing the cause granted to the state of Florida a writ of error herein returnable today in the present term of this court. The order of the circuit court is assigned as error.

Mr. W. H. Ellis, Attorney General, for plaintiff in error:

The petitioner should not have been discharged from custody unless the conditional pardon was absolute by reason of void conditions.

Com. v. Fowler, 4 Call (Va.) 35; Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563; People v. Potter, 1 Park. Crim. Rep. 59; 1 Bishop, New Crim. Law, 556; Re Executive Communication, 14 Fla. 318; Ex parte Garland, 4 Wall. 380, 20 L. ed. 370; Whitcomb v. State, 14 Ohio, 282; People v. Moore, 62 Mich. 497, 29 N. W. 80.

A conditional pardon is a contract between the state and the convict.

State v. Smith, 1 Bail. L. 283, 19 Am. Dec. 679; People v. Potter, 1 Park. Crim. Rep. 47.

Any conditions may be prescribed by the pardoning power that are not illegal, immoral, or impossible of performance.

Lee v. Murphy and People v. Potter, supra; Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395; Ex parte Wells, 18 How. 307, 15 L. ed. 421; State v. Barnes, 32 S. C. 14, 6 L.R.A. 743, 17 Am. St. Rep. 832, 10 S. E. 611; Fuller v. State, 122 Ala. 32, 45 L.R.A. 502, 82 Am. St. Rep. 17, 26 So. 146; 4 Bl. Com. 401; Flavell's Case, 8 Watts & S. 197; Ex parte Hawkins, 61 Ark. 321, 30 L.R.A. 736, 54 Am. St. Rep. 209, 33 S. W. 106; State v. Addington, 2 Bail. L. 516, 23 Am. Dec. 150.

Conditions which are to be performed after the term for which the convict was sentenced have expired are valid, and a violation of the conditions works a forfeiture of the pardon.

State v. Barnes and Fuller v. State, supra;

State ex rel. Atty. Gen. v. Peters, 43 Ohio St. 629, 4 N. E. 81; Ex parte Garland, supra; Jones v. Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385.

When the pardoned person violates the conditions of his pardon, he is left in the exact situation in which he was when the pardon was granted; and the original sentence may be enforced against him.

Ex parte Wells, 18 How. 307, 15 L. ed. 421; Ex parte Hawkins, supra; Kenney's Case, 135 Mass. 48; State v. Smith and State v. Barnes, supra; King v. Madan, 1 Leach, C. C. 223; Ex parte Marks, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395.

Expiration of time without imprisonment is in no sense an execution of the sentence.

Dolan's Case, 101 Mass. 219; State v. Cockerham, 24 N. C. (2 Ired. L.) 204.

Messrs. T. L. Clarke and W. C. Hodges for defendant in error.

Per Curiam:

Where a prisoner has accepted a conditional pardon, and has been released from imprisonment by virtue thereof, but has violated or failed to perform the condition, conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and, in case of a condition subsequent, becomes void; and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or so much thereof as he had not suffered at the time of his release.

Sometimes conditional pardons expressly provide that, upon violation of the condition, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence. Such stipulations upon acceptance of the pardon become binding upon the convict, and authorize his rearrest and recommitment in the manner and by or through the official authority as stipulated in the pardon. *Alvarez v. State*, 50 Fla. 24, 111 Am. St. Rep. 102, 39 So. 481; 24 Am. & Eng. Enc. Law, 2d ed. p. 595; 6 Current Law, 876.

The questions presented by counsel are whether the conditional pardon provides for the arrest and reimprisonment of the petitioner after the expiration of the period of time mentioned in the sentence of imprisonment, and, if it does so provide, whether such a provision is legal and enforceable.

Section 2403 of the Revised Statutes of 1892 provides that "whoever commits an assault on another with intent to commit any felony punishable with death or imprisonment for life shall be punished by imprisonment in the state prison not exceeding twenty years." The commission of murder

in the first degree is punishable by death, or by imprisonment for life upon a recommendation of a majority of the trial jury in their verdict; the commission of murder in the second degree is punishable by imprisonment for life; and the commission of murder in the third degree is punishable by imprisonment not exceeding twenty years. Rev. Stat. 1892, §§ 2380, 2924.

Section 2923 of the Revised Statutes provides that "in all cases the court shall award the sentence, and shall fix the punishment or penalty prescribed by law." Section 2939, Rev. Stat., provides that, "when punishment by imprisonment in the state prison is awarded against any convict, the form of the sentence shall be that he be imprisoned by confinement at hard labor." The judgment and sentence of the court pronounced against the petitioner on April 22, 1898, was as follows: "It is considered by the court that you, Peter Horne, for your said offense of assault with intent to murder, of which you now stand convicted, be imprisoned in the state prison at hard labor for the period of five years to begin and run from this day."

Under the statute above quoted that in all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law, the effective part of the sentence awarded and punishment fixed in the sentence set out above is that the petitioner "be imprisoned in the state prison at hard labor for the period of five years." The period or cycle of time during which he would be required to be imprisoned for the length of time fixed by the court is to be determined by law. The power of the court extends to fixing the punishment; that is, the length of time within the given maximum the petitioner should be imprisoned. The law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and ending of the period during which the imprisonment shall be suffered. The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly executed. But the order of the court with reference to the time when the sentence shall be executed is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence. *Hollon v. Hopkins*, 21 Kan. 638; *Dolan's Case*, 101 Mass. 219; *State v. Cockerham*,

24 N. C. (2 Ired. L.) 204; *Ex parte Bell*, 56 Miss. 282; *Re Edwards*, 43 N. J. L. 555, 38 Am. Rep. 653, note. While, as a general rule, the imprisonment begins with the sentence, and the sentence is subject to existing valid laws, the imprisonment may be suspended by appellate or other judicial proceedings or by reprieve or otherwise; and the period during which the imprisonment may be suffered may be interrupted by escape or be changed by the pardoning power so long as the change does not increase the penalty imposed by the sentence, or is not otherwise illegal. See *Fite v. State*, 114 Tenn. 646, 1 L.R.A. (N.S.) 520, 88 S. W. 941.

The condition contained in the pardon refers to the sentence to be affected by it in its legal and proper aspect, without reference to its words.

The terms of the pardon provide "that if the said Horne shall break the peace, take a drink of intoxicating liquor or other beverage, or become intoxicated, then this conditional pardon shall be null and void; and it shall be the duty of the sheriff of any county of this state to immediately arrest him and return him to the penitentiary to serve out the remainder of his term." This provision should be considered with the previous portion of the pardon in which the word "hereafter" is used in expressing the conditions on which the pardon was asked, and, so considered, the observance of the condition is not limited to the term of the sentence, as in *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395. The provision authorizing any sheriff of the state to "arrest him and return him to the penitentiary to serve out the remainder of his term," has reference to the material terms of the sentence of the court, *viz.*, to the length of imprisonment fixed by the sentence, and not to the particular period of time mentioned in the sentence during which the sentence was to be executed; which latter we have seen is immaterial and not really an effective part of the sentence.

With these principles in view, the pardon granted by the pardoning power and accepted by the petitioner, under which he secured his release, clearly contemplates that the breach of the conditions thereof at any time would render the pardon void, and subject the petitioner to reimprisonment during the remainder of the time he had not been actually imprisoned under the sentence, without reference to the expiration of the particular period of time mentioned in the sentence. This being ascertained to be the purport and effect of the terms of the conditional pardon, it must now be determined if the condition is binding upon the petitioner after the expiration of five

years from the date of his sentence to five years' imprisonment.

Section 12 of article 4 of the Constitution, as amended in 1895 (Laws 1895, p. 366), reads as follows: "The governor, secretary of state, comptroller, attorney general, and commissioner of agriculture, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment, and grant pardon after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons." All the authorities agree that, under a constitutional provision like this, the pardoning power may, in granting a pardon after conviction, impose any condition, limitation, or restriction that is not illegal, immoral, or impossible of performance, and that the acceptance of the pardon binds the person accepting it to all such conditions, limitations, and restrictions contained therein that are legal, moral, and possible of performance. *Ex parte Hawkins*, 61 Ark. 321, 30 L.R.A. 736, 54 Am. St. Rep. 209, 33 S. W. 106; *State v. Smith*, 1 Bail. L. 283, 19 Am. Dec. 679; *Arthur v. Craig*, *supra*; *People v. Potter*, 1 Park. Crim. Rep. 47, 1 Edm. Sel. Cas. 235; *Flavell's Case*, 8 Watts & S. 197; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Re Convicts*, 73 Vt. 414, 56 L.R.A. 658, 51 Atl. 10.

The condition of the pardon in this case that requires reimprisonment for the remainder of the original sentence of imprisonment, after the expiration of the particular period of time fixed by the court within which the sentence imposed should be executed, cannot be said to be immoral, or to be impossible of performance during the life of the petitioner; nor can it be illegal, since the particular period of time within which the sentence is to be suffered by the convict as specified in the sentence is not a part of the legal sentence, except so far as it fixes the quantum of time that he must suffer such penalty, and the condition imposed is not forbidden by law, and does not increase the punishment imposed by the court in its sentence. The case of *State ex rel. Davis v. Hunter*, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510, does not conflict with this rule, as in that case a condition imposed was held to be illegal. 4 Current Law, 872.

If the particular period of time fixed by the court within which the execution of the sentence of imprisonment was to be fully performed or suffered is extended, or held in abeyance, or postponed, the time or dura-

tion of imprisonment is not thereby increased, and the interruption of the execution of the sentence during the time the petitioner enjoyed his liberty under the conditional pardon was secured by him by his acceptance of the conditional pardon, and the petitioner cannot complain of it.

If the condition of the pardon upon which the petitioner secured his release from imprisonment has been violated by him, the pardon is void, and the petitioner may be arrested and compelled to undergo so much of the original sentence as he had not suffered at the time of his release. *Alvarez v. State*, 50 Fla. 24, 111 Am. St. Rep. 102, 39 So. 481; *State v. Barnes*, 32 S. C. 14, 6 L.R.A. 743, 17 Am. St. Rep. 832, 10 S. E. 611; 12 Cyc. Law & Proc. p. 968; *People v. Potter*, 1 Park. Crim. Rep. 47; *Re Convicts and Arthur v. Craig*, supra; *Fuller v. State*, 122 Ala. 32, 45 L.R.A. 502, 82 Am. St. Rep. 17, 26 So. 146; *State v. Chancellor*, 1 Strobb. L. 347, 47 Am. Dec. 557; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109.

There is undoubted wisdom in the policy of conferring upon responsible constitutional officers the power to grant conditional pardons by which persons convicted of crime may be encouraged and prompted to again become useful citizens. Should the opportunity thereby afforded a convict to reform be not appreciated, and the restraining and salutary conditions of the pardon be violated at any time during the convict's life, or during the time fixed by the pardon for their observance, the pardon becomes void, and there is both punishment for the lapse of conduct and protection to society in the exercise of the power given by law to enforce the unsatisfied portion of the original sentence.

The defendant in error accepted the conditional pardon, thereby securing his release from imprisonment; and he is bound by its legal conditions and limitations. The provisions of the pardon are, in effect, that if, at any time during his life, the defendant in error shall fail to observe its conditions, the pardon shall be null and void, and he shall be arrested to serve out the remainder of his sentence of imprisonment that he has not already actually suffered. The violation at any time of the conditions of the pardon renders it by its terms null and void, and the status of the defendant in error is as though he had never received the conditional pardon. If, when the conditions of the pardon are violated, a portion of the quantum of imprisonment fixed by the sentence has not been suffered or served, the party should be returned to serve the remainder

of his time of imprisonment, as stipulated in the terms of the pardon; and, besides this, the pardon, by the breach of its conditions, is rendered in law void; and, if the sentence of imprisonment has not been fully executed, the law imposes the obligation to complete the service of imprisonment fixed in the judgment of conviction and sentence of punishment. The pardon may, as one of its restrictions and limitations, designate the time for the observance of its conditions; but, when the conditions are violated, the pardon becomes void in law, and the party is subject to the unsatisfied portion of the sentence as though no pardon had been granted.

When a convict has been released upon a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the governor alone, unless such a course is provided by statute, or by the express terms of the pardon. The petitioner (in the absence of statute or of express provisions in the pardon to the contrary) is entitled to a hearing before the court having jurisdiction of the writ under which he is held, in order that he may show that he has performed the condition of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted; and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the petitioner is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted. If it be found upon such investigation that there has not been a violation of, or non-compliance with, the condition or conditions of the pardon; or if the petitioner shall show to the satisfaction of the court some valid reason or excuse for such violation or noncompliance,—he should be discharged from custody; but, if the violation of, or noncompliance with, the condition or conditions of the pardon be shown to the satisfaction of the court, without any legal reason or excuse therefor, the petitioner should be remanded to custody and ordered to have the original sentence imposed upon him duly executed, or so much thereof as has not been already suffered. The conditional pardon granted to the defendant in error in express terms authorizes any sheriff of the state to arrest him upon his violating the conditions of the pardon. It became the duty, then, of the sheriff to arrest the defendant in error upon it being made known to him from any responsible source that he had violated or was violating the conditions of his pardon, and to detain him

in custody until such alleged violation could be inquired into and determined in the proper manner by the proper authority, and to bring such alleged violation promptly to the attention of some court of general criminal jurisdiction to be disposed of. It having been brought to the attention of the sheriff in this case by the executive order that the defendant in error had violated the conditions of his pardon, the sheriff acted within his authority in arresting and detaining him in custody, notwithstanding the fact that the executive order expressly ordering the arrest was, of itself, a nullity, because such order was not authorized by the pardon or by the statute. The terms and stipulations of the pardon itself, by which the defendant in error was completely bound, expressly authorized such arrest and detention though they did not authorize the executive order. *Alvarez v. State*, supra.

It appearing that the arrest of the defendant in error was warranted under the conditions of the pardon by which he secured his release from imprisonment, and that the order of the court discharging him from custody is erroneous, it is ordered that the judgment of the court below in this cause be and the same is hereby reversed at the cost of the defendant in error, and the cause is remanded with directions that in the habeas corpus proceedings the court do make inquiry into the truth of the alleged violation by the defendant in error of the conditions of his pardon in the manner herein pointed out, and, if such alleged violation of the conditions of such pardon shall be therein established to his satisfaction, that then the defendant in error be remanded to custody, and that the remainder of the original sentence imposed upon him, but not suffered, shall be fully executed; but, if the alleged violations of the conditions of such pardon shall not be established, or if there be shown any satisfactory legal excuse for such violation, he shall be discharged from further custody; and it is further ordered that the state attorney for the second judicial circuit shall be notified by the judge of said circuit of the time and place when and where he will hear and determine the matter, and that he be given an opportunity to produce witnesses to establish, if he can, the truth of the alleged violation of the conditions of the pardon, and that the defendant in error be accorded the like privilege of producing witnesses to refute such alleged violation if he can. *Alvarez v. State*, supra.

An order will be entered accordingly.

Shackleford, Ch. J., and Taylor, Cockrell, Hocker, Whitfield, and Parkhill, JJ., concur. 7 L.R.A. (N.S.)

INDIANA SUPREME COURT.

FOWLER UTILITIES COMPANY, Appt.,
v.
GEORGE H. GRAY.

(— Ind. —, 79 N. E. 897.)

Contract—enforcement—want of mutuality.

Want of mutuality will prevent a court of equity from enjoining violation of a contract by a heating company, after installing a system in a building, to furnish heat at a certain sum per annum, where the use of heat from its plant rests in the discretion of the consumer.

(January 18, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Benton County in plaintiff's favor in a suit to enjoin violation of a contract. Reversed.

The facts are stated in the opinion.

Mr. Charles M. Snyder, for appellant:

A promise made by one party without a corresponding obligation by the other is void.

Corbitt v. Salem Gaslight Co. 6 Or. 405, 25 Am. Rep. 541; *Woolsey v. Ryan*, 59 Kan. 601, 56 Pac. 664; *Utica & S. R. Co. v. Brinekerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Rafolovitz v. American Tobacco Co.* 73 Hun, 87, 25 N. Y. Supp. 1036; *Hoffman v. Maffioli*, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L.R.A. 357, 53 N. W. 625.

An accepted offer to sell or deliver articles at a specified price during a limited time, in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration, and is void, because the acceptor is not bound to want, desire, or take any of the articles mentioned.

Bailey v. Austrian, 19 Minn. 535, Gil. 465; *Tarbox v. Gotzian*, 20 Minn. 139, Gil. 122; *Missouri, K. & T. R. Co. v. Bagley and American Cotton Oil Co. v. Kirk*, supra; *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869; *Jordan v. Indianapolis Water Co.* (Ind. App.) 61 N. E. 12; *Livesley v. Johnston*, 45 Or. 30, 65 L.R.A. 786, 106 Am. St. Rep.

Note.—The mutuality of obligation as a condition of the right to specific performance of a continuing contract is treated in the case of *Solomon v. Wilmington Sewerage Co.* 6 L.R.A. (N.S.) 391, and the case not appended thereto.

647, 76 Pac. 13, 946; Henry School Twp. v. Meredith, 32 Ind. App. 607, 70 N. E. 393.

Messrs. Fraser & Isham, B. B. Berry, and Dawson Smith, for appellee:

The contract alleged in the complaint is binding on both parties, even though no time is fixed in which appellee is bound to take the heat.

Carnig v. Carr, 167 Mass. 544, 35 L.R.A. 514, 57 Am. St. Rep. 488, 46 N. E. 117; Warner v. Texas & P. R. Co. 164 U. S. 418, 41 L. ed. 495, 17 Sup. Ct. Rep. 147; Pennsylvania Co. v. Dolan, 6 Ind. App. 118, 51 Am. St. Rep. 289, 32 N. E. 802.

Montgomery, Ch. J., delivered the opinion of the court:

It is a suit for an injunction to prevent the violation of an oral agreement made about September 1, 1902, wherein appellant promised to install a heating plant in appellee's building with sufficient capacity to heat the same to 78 degrees Fahrenheit, and to connect the same with a central hot-water heating plant, in consideration of the sum of \$200 payable upon the installation of such plant, and \$50 per year payable as long as appellee desired heat to be so supplied; and appellant was operating its central plant under a franchise granted by the board of trustees of the town of Fowler. The annual payments were to be made in two instalments—\$25 on January 1st, and \$25 on October 1st, of each year; and no greater charge for heating the building to be made so long as appellee desired the same to be so heated. The complaint further alleged that the plant had been completed and heat thereby supplied as agreed, and that appellee had paid said sum of \$200, and all other payments as they accrued under said agreement, but that appellant is now demanding an increased price for heating said building, and threatening to cut off the hot-water supply from the same unless said increased demand is paid. A demurrer to the complaint was overruled, and appellant answered (1) by denial, and (2) affirmatively setting up the statute of frauds; and to the latter answer appellee replied in denial. A trial resulted in a finding and decree in favor of appellee, enjoining appellant from doing any act tending to violate or terminate the agreement to furnish heat for appellee's building at the rate of \$50 per year so long as he may desire such heat supplied, and be able and willing to pay therefor, within the term of appellant's franchise.

The assignment of errors properly challenges the sufficiency of the complaint. The right to a future supply of hot-water heat at a special price, which appellee claims and is seeking to enforce by this suit, rests whol-

ly upon contract. The theory of the suit, as clearly manifest from the record, is that appellant is bound to supply such heat for an indefinite time, to be determined solely by the arbitrary discretion and will of appellee. It is admitted that appellee is not bound to accept such heat for any particular period, and his only obligation is an implied promise to pay at the stipulated rate for such time as he may suffer the heat to be supplied. The general rule is that an injunction will not be granted to restrain a breach of contract by a defendant when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have been already performed. 22 Cyc. Law & Proc. p. 850. This rule is founded upon a want of mutuality. The term "contract" implies mutual obligation, and in general contracts, other than options, are not enforceable unless both parties thereto are bound, so that an action could be maintained by each against the other for a breach. Bishop, Contr. enlarged ed. § 78; Lawson, Contr. § 97; Henry School Twp. v. Meredith, 32 Ind. App. 607, 612, 70 N. E. 393. There are many unilateral contracts which constitute an exception to this rule, including the right to exercise certain options; but the contract in suit has been executed in part, and does not belong to that class. The principle applicable to the contract under consideration is stated in the following paragraph, quoted from the case of Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. ed. 955, 962: "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

This is not an action for specific performance, but the contract is to be enforced negatively by an injunction prohibiting its breach, and the general rule governing such actions applies. In the case of Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449, involving a contract determinable at will, the court said: "We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press

despatches to anyone else than the complainant, as prayed for, and leave the complainant free to terminate the contract at its will without limitation of time or circumstance, or to perform its duties as correspondent as negligently or diligently as discretion may dictate. . . . The first decree suggested would be entirely opposed to all equity precedents and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced. *Bromley v. Jefferies*, 2 Vern. 415; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422, and cases cited on page 486." The application of the rule to cases of this class is concisely stated by Judge Sanborn in *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L.R.A. 696, 699, 52 C. C. A. 25, 114 Fed. 77, as follows: "A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties." See also *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27; *Welty v. Jacobs*, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; *American Base Ball & A. Exhibition Co. v. Harper*, 54 Cent. L. J. 449; *Hoffman v. Maffioli*, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Houston & T. C. R. Co. v. Mitchell*, 38 Tex. 85; *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct. 57; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L.R.A. 357, 53 N. W. 625. In the case last cited above, the supreme court of Michigan said: "When a party agrees to sell articles of merchandise or deliver the productions of his labor to another at a certain price as long as he can make it pay, everyone must clearly understand that the term is dependent on conditions over which the promisee has no control, and, in so far as anyone has the power to make the term effective, it is lodged solely in the promisor, who, by judicious purchases, or skilful manipulations of labor, may be able to make a transaction pay, when a more careless, negligent, or improvident person would be unable to do so. This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous, because he cannot make it pay. Contracts cannot arise where there is no mutuality, nor can they arise from the action of one party alone, where the other has no power to prevent his action." It was held, in the Phila-

delphia Ball Club Case, that an agreement, whereby one engaged to play baseball for a period of time which at the option of the club might equal the term of the player's life, and which reserved to the club the right to discharge the player on ten days' notice without cause, was not enforceable by an injunction against its violation by the player, for the reason that the agreement was too unfair and wanting in mutuality.

When a party comes into equity, it should be very plain that his claim is an equitable one. The application is in a measure addressed to the judicial discretion of the court. The court will not exercise its extraordinary power to restrain an apprehended injury resulting from a breach of contract, unless the petitioner is without adequate remedy at law, and the contract itself be free from doubt, and not uncertain or vague in its terms or provisions. *Loy v. Madison & H. Gas Co.* 156 Ind. 332, 58 N. E. 844. In the case of *Rust v. Conrad*, supra, a bill in equity founded upon a contract determinable at the will of one of the parties was dismissed as not of equitable cognizance; the principal ground, as stated by Judge Cooley, being as follows: "But the court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense, of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. . . . All contracts where the party has reserved to himself, or where the law gives him, the authority to render nugatory any decree that ought to be rendered in their enforcement, rest upon the same principle. This was recognized in *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. ed. 955, 962; and more distinctly asserted and decided in *Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 191, 25 L. ed. 319. In this last case the very strong assertion is made that 'a court of equity never interferes where the power of revocation exists.'"

It is admitted that the supply of hot-water heat bargained for in the contract under consideration could be terminated at the will of appellee, without liability for damages, and it must follow that its continuance was dependent upon the pleasure of both parties. The decree entered by the trial court may, for aught we know, have been virtually an-

nulled before this time at the instance of appellee in the exercise of his discretion. The agreement relied upon, so far as it remains executory, is not binding for want of mutuality, and its performance cannot be enforced in equity at the suit of either party.

Other objections to the complaint have been urged, but the conclusion reached renders their consideration unnecessary.

The judgment is reversed, with directions to sustain appellant's demurrer to the complaint.

Gillett, J., absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HARRIET F. KUHLEN

v.

BOSTON & NORTHERN STREET RAILWAY COMPANY.

(— Mass. —, 79 N. E. 815.)

Carrier—crush at car—negligence.

1. Where it appears that there is usually a large crowd at a particular station to take a particular train, and that there has

been on many occasions surging and struggling to get upon the cars, the jury may find the carrier negligent in failing to anticipate such occurrences and take precautions to protect intending passengers from injury therefrom.

Same—extra men.

2. The jury must determine whether or not a carrier is bound to provide extra men at certain hours of the day to prevent injury to intending passengers on its platforms, the crowding of which at such times is unavoidable.

Same—negligence of passenger.

3. An intending passenger is not negligent, as matter of law, in entering a crowd attempting to board a train, by the fact that she narrowly escaped injury at the same place by doing so on former occasions.

Evidence—lease—effect on liability.

4. Since the fact that a carrier is operating under a lease of tracks and station facilities which makes it subject to the rules and regulations of the lessor does not of itself absolve it from liability for failure to exercise supervision over persons coming to the station to take its trains, necessary to prevent injury by crowding into the cars, it is not error to exclude from evidence the lease, in an action against the carrier for injury caused by such a crowd.

(January 1, 1907.)

Case Note.—Injury by crush in entering car at elevated or subway station: —

While it is not negligence, as matter of law, for a street surface railway company to permit its cars to become overcrowded, as shown by case note in 4 L.R.A.(N.S.) 399, a higher degree of care seems to be exacted of elevated and subway companies, which control the means of access to their trains, and are able to regulate the number of persons who shall be admitted, than is exacted in the case of ordinary street surface railways. One of the earliest cases in which the question of the liability of an elevated railroad company for injury to a passenger about to take a train, caused by overcrowding, arose, was *McGearty v. Manhattan R. Co.* 15 App. Div. 2, 43 N. Y. Supp. 1088, which held that, where an elevated railroad company permitted the platform from which passengers entered its trains to become so overcrowded that a passenger was pushed off into the street by the surging of the crowd, it was liable for the resulting injuries. The court said in this case: "It is easy to see that, as there was a constant accumulation of passengers upon the platform, unless they were removed by the trains, the platform of the station would become overcrowded, and that such overcrowding might render the place unsafe. That was shown to be the condition in this case. The trains did not remove the passengers as fast as they accumulated, and the defendant continued to sell tickets and admit passengers to the platform. When the plaintiff entered upon the platform, it

was a safe place, and he had the right to assume that no part of it would be rendered unsafe by any act of the defendant. . . . The defendant must be assumed to have known the capacity of its platform, and when it had admitted passengers to the extent of such capacity. If, when having done this, the passengers were not removed by its trains, it became its duty to permit no more to enter. It had no more right to accumulate a crowd at the rear, which, pressing forward, would precipitate those at the edge of the platform into the street, than it would have the right to go upon the platform and push them off by physical force."

A similar case is *Dawson v. New York & B. Bridge*, 31 App. Div. 537, 52 N. Y. Supp. 133, in which it was held that, where an elevated railroad company permitted a mass of persons desiring to board a train to crowd upon the car platform so rapidly and with such force that a passenger was unable to control his own movements, and was thrust hither and thither against his will, until one of his legs sank into the space between the third and fourth cars, whereby he was injured, the jury might well conclude that a reasonable degree of foresight on the part of the carrier would have anticipated the danger to passengers which might thus arise from overcrowding, and that, if they had exercised due care to protect the passenger against that danger, he would not have been injured. The theory upon which the decision is based is shown by the following language of the court: "The defendants in the case at bar

7 L.R.A.(N.S.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused to plaintiff, an intending passenger, on defendant's car, by a crush at the station. Overruled.

The facts upon which the case depended sufficiently appear in the opinion. The instructions requested by defendant and refused by the court, which are referred to, but not set out in the opinion, are as follows:

"(1) On all the evidence, the plaintiff is not entitled to recover.

"(2) The plaintiff was not in the exercise of due care.

"(3) There is no evidence of negligence of the defendant, its servants, or agents.

"(4) The plaintiff assumed the risk of being jostled, and all danger and inconvenience incident thereto, when she entered into the crowd endeavoring to get upon the car.

"(5) In choosing to travel on a street car when the same was crowded, the plaintiff assumed the risk of injury incident to such crowding.

"(7) If it is not practicable for the defendant to carry on its business without the crowding of its platforms and cars at certain hours of the day, it is not negligence on the part of the defendant to fail to employ a large force of men at those hours to

prevent jostling and crowding at the entrance to the cars."

Messrs. Starr Parsons and H. Ashley Bowen for defendant.

Messrs. Frank D. Allen and Lyman K. Clark, for plaintiff:

The common law makes the occupant of an estate liable to third persons for defects therein.

Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775.

The defendant was bound to guard against accidents from the pressure of great numbers of people, and to prevent them from occupying positions which might be attended with danger to others as well as to themselves, or which might disturb the proper working of the trains.

Treat v. Boston & L. R. Corp. 131 Mass. 371; Simmons v. New Bedford, V. & N. S. R. Co. 97 Mass. 367, 93 Am. Dec. 99; Le Barron v. East Boston Ferry Co. 11 Allen, 312, 87 Am. Dec. 717; Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Nichols v. Lynn & B. R. Co. 168 Mass. 528, 47 N. E. 427; Dodge v. Boston & B. S. S. Co. 148 Mass. 218, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373; Gray v. Boston & M. R. Co. 168 Mass. 20, 46 N. E. 397; Brooks v. Old Colony R.

exercised complete control over the avenues of access to the train upon which the plaintiff took passage. It was within their power to limit the number of passengers who should be permitted to be upon the station platform at that particular time and the number who should go or remain together upon the car platform; and it was their duty to exercise that power so far as they could reasonably foresee that a failure to exercise it would result in injury to incoming passengers."

Both these cases are cited with approval in Dittmar v. Brooklyn Heights R. Co. 91 App. Div. 378, 86 N. Y. Supp. 878, in which the plaintiff, having ascended to the platform of the carrier to take a train, was pushed by the crowd with considerable force against the side of the car, where she was held for a moment or two, and then thrown by the crowd violently into the car, sustaining the injuries on which she based her action. It was admitted that the passengers were required to pay their fare before being admitted to the platform, and that the carrier had the means of keeping people from going on the platform when there was no way of carrying them from it. The court said it was established beyond dispute that, if the plaintiff sustained injuries, they were due to the act of the defendant in selling tickets and accumulating passengers upon the platform in such numbers as to render their movements un-

controllable, and that the natural rush of the crowd for the train when it ultimately came along was so forcible and violent as to be sufficient to inflict upon her the bodily injury of which she complained. A judgment in favor of the plaintiff was therefore affirmed.

In Viemeister v. Brooklyn Heights R. Co. 91 App. Div. 510, 87 N. Y. Supp. 162, which was an action by a passenger on an elevated train for an injury to his knee received in entering the car as a result of the overcrowding, there was some evidence that the overcrowding of the car was not only due to the natural and voluntary rush of passengers from the platform, but that the guard, against the remonstrance of those who were in the car, pushed and forced others into the car with considerable violence. The court instructed the jury that, if the plaintiff was injured by the rush of people who wanted to get on the car, without the intervention or assistance of the guard, he could not recover, since this was a risk which every man takes in a crowded city in trying to get home at the same time that everybody else wants to get home; that he could recover only in case the injury was inflicted by the guard pushing more people into the car than it would safely hold. But on appeal this instruction was held to be erroneous, and to require the reversal of the judgment in favor of the defendant, and the court said, in criticiz-

Co. 168 Mass. 164, 46 N. E. 506; *Cazneau v. Fitchburg R. Co.* 161 Mass. 355, 37 N. E. 311; *Jordan v. New York, N. H. & H. R. Co.* 165 Mass. 347, 32 L.R.A. 101, 52 Am. St. Rep. 522, 43 N. E. 111.

Defendant was under an obligation to the plaintiff to take reasonable measures to protect her from injury from her fellow passengers at the subway.

United R. & Electric Co. v. State, 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923; *McGearty v. Manhattan R. Co.* 15 App. Div. 2, 43 N. Y. Supp. 1086; *Simmons v. New Bedford. V. & N. S. B. Co.* 97 Mass. 361; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Vinton v. Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747; *Cobb v. Boston Elev. R. Co.* 179 Mass. 212, 60 N. E. 476.

Sheldon, J., delivered the opinion of the court:

It is the duty of the defendant, as a carrier of passengers for hire, to use the highest degree of care consistent with the nature and extent of its business, not only to provide safe and suitable vehicles for their carriage, but to maintain all such reasonable arrangements for control and supervision both of the passengers and of its own servants as prudence would dictate to guard

its passengers, while they occupy that relation, against all dangers that are naturally and according to the usual course of things to be expected. It is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it ought reasonably to have anticipated. This is the unvarying doctrine of our own decisions. *Treat v. Boston & L. R. Corp.* 131 Mass. 373; *Com. v. Coburn*, 132 Mass. 555; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Dodge v. Boston & B. S. S. Co.* 148 Mass. 210, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373. And its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants. *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Nichols v. Lynn & B. R. Co.* 168 Mass. 528, 47 N. E. 427. "There is no doubt of the duty of a railroad company to use all such means and precautions as are reasonably practicable for the protection and safety of its passengers, not only from the negligence or misconduct of its own agents and servants, but also of other passengers and of other

ing the judge's charge: "Assuming that the jury could have found from the evidence that the plaintiff was injured by the natural, voluntary, and unrestrained movements incident to the overcrowding of passengers, and without the physical aid of the guard exerted in pushing them against each other, a basis would have been clearly established under the law for a finding that [it] . . . was negligent. The conditions were created by the defendant, and, if they were dangerous, it was certainly responsible for them. The remarks of the learned trial court may perhaps be conceded to be sound when applied to a road which is operated upon the surface of a public highway, but have no application to a road built upon private property to which the company controls access, and where a crowd cannot congregate in dangerous numbers unless the individuals composing it pay fares to the company in advance;" quoting with approval the language of the court in *Dawson v. New York & B. Bridge*, *supra*.

The theory upon which the liability of the carrier is sustained in this class of cases is further illustrated by the case of *Wagner v. Brooklyn Heights R. Co.* 95 App. Div. 219, 88 N. Y. Supp. 791, in which the liability of the carrier was denied, where it appeared that it operated a railroad over the Brooklyn bridge, and had the privilege of maintaining a booth for the sale of tickets and ticket-chopping boxes, but had no

control of the bridge itself, which was open to the public and under the police control of the city of New York, and on the day of the accident there was a blockade on the defendant's road, and, for the purpose of preventing the crowd from passing up the stairway from the bridge to the car platform, the defendant had stretched a chain across the passage at the foot of the stairway, but the crowd pressed through the barrier and pushed over one of the ticket-chopping boxes, and the plaintiff, who had been pushed forward by the crowd, stumbled over it and was injured. The court distinguished the class of cases discussed above, on the ground that in those cases the carrier, having control of the premises, was responsible for the overcrowding of such premises, while in the present case the evidence was undisputed that the carrier was not in a position to control the assembling of the crowd, and was actually engaged in an effort to prevent the overcrowding of the platform above, which was in its control, at the time when the crowd overrode its barriers and crushed down the box.

Cases as to the liability for injury because of crowding, to a passenger during the course of the transportation or at its termination, are not included in this note.

As to the general question of the duty of carrier permitting cars to become overcrowded, see note in 24 L.R.A. 710.

persons who are not passengers." *Allen, J., in Brooks v. Old Colony R. Co.* 188 Mass. 104, 185, 46 N. E. 566. In *United R. & Electric Co. v. State*, 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, it was held in an elaborate opinion that a passenger on a street-railway car could hold the railway company liable for an assault committed upon him by a drunken and disorderly passenger who had once been put off the car, but afterwards had been allowed to get on again and ride without hindrance; and this upon the general ground that, when the servants of a carrier know, or have the means of knowing, that a disorderly passenger is likely to commit an assault, it is their duty to eject him, as in *Vinton v. Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; and their employer is liable for their neglect of this duty if it results in injury to another passenger. *McSherry, Ch. J.*, said in this case: "It is just as incumbent on the carrier to protect all his passengers from assault by a fellow passenger when his servants have knowledge, or the means of knowing, that an assault on someone is imminent, and when they have time and means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation." The same general doctrine has been maintained in other jurisdictions, so far as we are aware, without exceptions. *Muhlhaue v. Monongahela Street R. Co.* 201 Pa. 237, 50 Atl. 937; *Pittsburg & C. R. Co. v. Pillow*, 70 Pa. 510, 18 Am. Rep. 424; *McGearty v. Manhattan R. Co.* 15 App. Div. 2, 43 N. Y. Supp. 1086; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554, 6 Blatchf. 158, Fed. Cas. No. 4,873, 7 Blatchf. 536, Fed. Cas. No. 4,874, 13 Wall. 3, 20 L. ed. 556; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Other cases bearing on the same subject are cited by *Loring, J.*, in *Jacobs v. West End Street R. Co.* 178 Mass. 116, 118, 59 N. E. 639. The cases of *Thomson v. Manhattan R. Co.* 75 Hun, 548, 27 N. Y. Supp. 608; *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Ellinger v. Philadelphia, W. & B. R. Co.* 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132; *Graeff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107; and *Cornman v. Eastern Counties R. Co.* 4 Hurlst. & N. 781, relied upon by the defendant,—either turn upon the proposition that, as a common carrier can be held liable for injury done by one passenger to another only upon proof that it has failed to discharge its duty of using the utmost vigi-

lance to maintain order and guard against violence, so it must be shown that the circumstances which called for special action either were known, or, in the exercise of proper care, ought to have been known, to the defendant or its servants, or else lay down the rule (perhaps sometimes carried too far) that the carrier is not to be held liable for a mere breach of courtesy from one passenger to another.

There was evidence that there was usually a large crowd in the subway station at this time of the day; that there had been on many previous occasions the same surging and struggling to get upon the car as occurred at this time; and the jury had a right to find, as under the careful instructions of the court they must have found, that the defendant and its servants ought to have anticipated just what actually did take place, and ought, in the exercise of the necessary care, to have taken reasonable precautions to guard against such injuries as were caused to the plaintiff; and that they were negligent in failing to take such precautions and to give to the plaintiff that degree of protection which she had a right to expect from them. It follows that the defendant's third request for instructions was rightly refused.

Nor could its seventh request have been given. It was for the jury to say whether or not, if the crowding of its platforms and cars at certain hours of the day was unavoidable in carrying on its business, that the high degree of care which it was bound to exercise called for the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as would involve danger to passengers, and whether or not it was reasonable, in view of the nature and extent of the defendant's business, to require this precaution to be taken.

It could not have been said, as a matter of law, that the plaintiff herself was not in the exercise of due care, or that she had assumed the risk of the injury that was done to her. She had been in similar crowds before, had seen the same pushing and struggling and the same failure on the part of the defendant to control the assemblage; and she had formerly so narrowly escaped injury that she said in testifying: "Many a night I have almost got killed." With the knowledge gained by this experience, however, she joined in the general rush to get into the car. All these circumstances were important to be considered by the jury in passing upon the question of her due care; and their attention was called to these circumstances by the presiding judge in his

charge. But they are not conclusive against her as matter of law. The jury might say that, in spite of the failure of the defendant's servants and agents to control the crowd on previous occasions, she might depend somewhat on the hope that they would not continue to fall short of their duty. And it is hard to see how the same circumstances which simply require the question of the defendant's negligence to be left to the jury can be conclusive, as against the plaintiff, to show either that she was negligent, or that she assumed the risk. We think that these questions also were for the jury. *Treat v. Boston & L. R. Corp.* 131 Mass. 371; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 367, 93 Am. Dec. 99; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96. Accordingly the defendant's first, second, fourth, and fifth requests could not have been given.

The subway and this station were built by the Boston Transit Commission, which alone had the power to make or authorize any change therein, and were the property of the city of Boston. The defendant's occupation thereof was either under a lease or merely permissive. Stat. 1894, chap. 548, §§ 23 et seq. p. 769; Stat. 1897, chap. 500, §§ 5, 12, pp. 501, 506. See *Falkins v. Boston Elev. R. Co.* 188 Mass. 153, 74 N. E. 338; *Hilborn v. Boston & N. Street R. Co.* 191 Mass. 14, 77 N. E. 646. For the purpose of showing the conditions of its occupation of the subway, the defendant offered in evidence a written agreement between the Boston Elevated Railway Company, the lessee of the subway, and the Lynn & Boston Railroad Company, to whose rights the defendant has succeeded; and the only remaining question arises upon the defendant's exception to the exclusion of this agreement, a copy of which is annexed to the bill of exceptions. The defendant refers to the fact that in the case last cited it appeared by the agreement of the parties "that the subway and the stations in it were constructed by the Boston Transit Commission, and are owned by the city of Boston; that the platform at this station is now of the same width and in the same condition as constructed by the Transit Commission; that the Boston Elevated Railway Company operates its cars in the subway under a lease of the subway; and that the defendant operates its cars therein under permission of said elevated company, authorized by the legislature; that the elevated company has the entire management, charge, and control of the subway, the stations and platforms, except that it can make alterations therein only by the permission of the Boston L.R.A. (N.S.)

ton Transit Commission." *Hilborn v. Boston & N. Street R. Co.* 191 Mass. 14, 16, 17, 77 N. E. 646. The defendant contends that this agreement, if it had been admitted, would have proved in the case at bar the same facts which were agreed upon in that case, and claims that it had no control or management of the station, and could not have limited the number of persons admitted thereto.

The main purpose of this agreement appears to have been to determine the amount of money to be paid by the defendant for its use of the subway, and to regulate the other pecuniary relations between the parties. The thirteenth clause, however, provides "that the cars of said Lynn & Boston Company while on the tracks of, or leased to, the elevated company, either within the subway or without, shall be subject to the rules and regularities [sic] of said elevated company and the reasonable direction of its officials." There was no offer to show what "reasonable directions," if any, had been given to the defendant, or what rules, if any, had been established by the elevated company. Nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds of passengers; and, if the defendant had such power, it could be held liable under the circumstances of this case. In view of the fact, which appears to have been conceded at the trial, that the defendant held this out as the proper place for its passengers to come to for the purpose of taking its cars, so that its passengers had a right to regard themselves as having come thither by its invitation, we do not see that the defendant was injured by the exclusion of this agreement. The general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for his own benefit, and for his own purposes invites another to enter it, may, if the other elements of liability concur, be held responsible to the latter for an injury caused by the defect or danger. *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216, 218; *Cotant v. Boone Suburban R. Co.* 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115. The details of this agreement do not appear to have been at all material to the issues raised at the trial. The effect of admitting the agreement might have been to distract the attention of the jury from the real issues of the case. We find no error at the trial.

Exceptions overruled.

NEW YORK COURT OF APPEALS.

CHARLES JAMES PHALEN, Appt.,
v.UNITED STATES TRUST COMPANY,
Trustee, etc., of James Phalen, Deceased,
et al., Resp'ts.

(186 N. Y. 178, 78 N. E. 943.)

Marriage settlement—equitable enforcement.

1. An antenuptial marriage settlement by which the groom's father undertakes to make no discrimination among his children in his will is enforceable in equity so as to prevent the enforcement of a provision in the will giving the groom only a life estate, while the portions of testator's other children are made absolute.

Same—equitable discretion.

2. Equity may exercise a judicial discretion in refusing specifically to enforce the provisions of a contract made in contemplation of marriage by which the groom is to secure an absolute estate, if, when suit is brought, his habits are such that enforcement would endanger the estate, or defeat the object of the contract.

Case Note.—Specific performance of agreement on part of third person to make provision for parties to contemplated marriage:

—Although contracts between parties contemplating marriage, in relation to their respective rights in and to the property of one another, are not infrequent in this country, instances where provision has been made by a third party in consideration of the marriage seem to have seldom been before the courts. Such agreements are, however, generally regarded, in the face of various objections, as valid and enforceable.

That the provision agreed to be made was testamentary in character, as in the case in hand, seems to be considered immaterial. As was said in *King v. Molloy*, 61 Kan. 683, 60 Pac. 731, 61 Pac. 686, in which, however, the settlement under consideration was made between the parties to the marriage: "Marriage settlements controlling the division and affecting the descent of property, which are intelligently made, and are just and equitable in their provisions, are sanctioned by the courts."

In *De Pierres v. Thorn*, 4 Bosw. 266, specific performance was decreed of a marriage settlement made in France, whereby the parents of the future wife agreed, in consideration of the projected marriage, to secure by mortgage upon their property the payment, on their demise, of a certain sum to the future husband and wife by way of dowry; and it was held that the daughter, who was to have a separate estate in the property, had a right and interest which would entitle her to maintain the action.

In *Chichester v. Vass*, 1 Munf. 98, 4 Am. Dec. 531, it was held that a husband might enforce a promise made before marriage by his wife's father, that he would endeavor 7 L.R.A. (N.S.)

Same—probate of will.

3. Neglect to interpose objections to the probate of a will will not prevent the enforcement of a contract made in anticipation of marriage, the provisions of which are antagonistic to the will.

Same—enforcement—party plaintiff.

4. A son who is a party to the contract may enforce the provision in marriage articles entered into by his father in contemplation of the son's marriage, which is subsequently consummated, to make no discrimination against him by will in favor of the other children.

(O'Brien, Haight, and Vann, JJ., dissent.)

(October 9, 1906.)

APPPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County which overruled a demurrer to a complaint filed to enforce specific performance of a marriage-settlement contract. Reversed.

Statement by Werner, J.:

This action was brought by the plaintiff,

to do his daughters equal justice as fast as it was in his power with convenience; the judge writing the principal opinion saying: "The following principles appear to me to require no comment or illustration: (1) That a promise made by a father to a person who seeks an alliance with his daughter is a promise made in consideration of marriage, if the marriage be afterwards had with his consent. (2) That, although such promise may literally import a provision to be made for the daughter, yet, being made to the intended husband, it must be construed to be one which shall inure to the benefit of both, unless there be some special reservation to the contrary, manifesting a clear intention to preclude him from participating in the benefit thereof."

In *Bell v. Sappington*, 111 Ga. 391, 36 S. E. 780, it was held that an agreement on the part of a mother, in contemplation of the marriage, that, if her son-in-law would build a house upon a vacant lot belonging to her, she would convey the lot to her daughter, was supported by a valid consideration, the court, however, seeming to place more stress upon the relation of parent and child and the fact that valuable improvements had been placed upon the premises than on the fact that the marriage had taken place.

In *Stoddert v. Tuck*, 5 Md. 18, specific performance was denied at the suit of the married couple and the bride's father, of an agreement between the fathers of the parties contemplating marriage to make certain gifts to give the young couple a start, the principal questions in the case being the existence of the contract and the effect of part performance to take it out of the statute of frauds.

Charles James Phalen, to enforce specific performance of formal marriage articles, entered into in the city of Paris, France, on August 7, 1873, in contemplation of the plaintiff's marriage to Julia de Zakrevsky, the daughter of a Russian nobleman. The parties to such articles were the plaintiff, his father and mother, his intended bride, and her father. His father, the testator, James Phalen, covenanted and agreed in such articles, so far as material to the questions presented on this appeal, to make no distinction between his children in the distribution of his estate by will. The marriage contemplated by the articles took place a few days after their execution. The plaintiff's father died in 1887. He left a will, dated May 15, 1882, whereby he carried out his agreements contained in the marriage articles. He subsequently executed various codicils thereto, none of which conflicted with the provisions of the articles, except the seventh and last. By that codicil the testator directed that the portion of his residuary estate which he had bequeathed to the plaintiff absolutely should be held in trust, the income thereof to be paid to him during his life, and upon his death the principal was to go to his heirs at law. The testator had, however, given corresponding portions of his residuary estate to his other children absolutely. The will and codicil were thereafter admitted to probate. An accounting was had by the executors, upon which the plaintiff duly appeared, interposed objections, but subsequently withdrew them. A final decree was thereafter entered distributing the estate in accordance with the directions contained in the will and codicils, and not according to the marriage articles. The foregoing are, substantially, the material facts set forth in the complaint. The defendant trust company, as trustee under the will of the testator, interposed a demurrer to the complaint upon the ground, among others, that it did not set forth facts sufficient to constitute a cause of action. The demurrer was overruled at the special term, but sustained by the appellate division.

Mr. Alexander R. Gulick, with Mr. Frederick S. Woodruff, for appellant:

A person may make a valid agreement with another, by which he binds himself to make a certain testamentary disposition of his property.

Colby v. Colby, 81 Hun, 221, 30 N. Y. Supp. 677; Winne v. Winne, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; Kine v. Farrell, 71 App. Div. 219, 75 N. Y. Supp. 542; Parsell v. Stryker, 41 N. Y. 480; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Shakespeare v. Markham, 10 Hun, 311; Healy v. Healy, 55 App. Div. 315, 66 N. Y. 7 L.R.A. (N.S.)

Supp. 927; Gates v. Gates, 34 App. Div. 608, 54 N. Y. Supp. 454; Godine v. Kidd, 64 Hun, 585, 19 N. Y. Supp. 335.

The plaintiff is entitled to the equitable relief demanded in the complaint.

Winne v. Winne, *supra*.

Mr. Edward W. Sheldon, for respondents:

No case for specific performance or other equitable interference is presented.

Argus Co. v. Manning, 138 N. Y. 557, 34 N. E. 388.

The plaintiff had a complete remedy at law.

Andrews v. Brewster, 124 N. Y. 433, 26 N. E. 1024; Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Leahy v. Campbell, 70 App. Div. 127, 75 N. Y. Supp. 72; Gall v. Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Henning v. Miller, 83 Hun, 403, 31 N. Y. Supp. 878; Bonesteel v. Van Etten, 20 Hun, 468; Taylor v. Welsh, 92 Hun, 272, 36 N. Y. Supp. 952.

Werner, J., delivered the opinion of the court:

We think the complaint sets forth a good cause of action in equity. To hold otherwise we would have to overturn principles of law and equity that have been recognized and established for centuries. Antenuptial contracts, whereby the parents of the parties about to marry have agreed to settle property upon one or both of the spouses, either upon the performance of the marriage ceremony or by testamentary devise or bequest, are of such frequent occurrence, especially in England, that they form a distinct class in the body of our law. For the purposes of this discussion we may assume that this action could not be maintained at law, although there is very respectable authority to the contrary in England, where actions at law have been maintained even upon informal agreements of this nature. Shadwell v. Shadwell, 30 L. J. C. P. N. S. 145, 9 C. B. N. S. 159; Douglas v. Vincent, 2 Vern. 201. One of the very purposes of equity is to aid where the law fails. In the determination of this appeal it should be borne in mind that a court of equity will take into consideration the facts and circumstances appearing when the case is tried. If it should then appear that the plaintiff's habits are such as to endanger the safety of the fund which he claims, and that its transmission to him might deprive his wife and children of proper means of support, or if for any other good reason a court of equity might deem it unfair, inequitable, or unjust that specific performance of the contract in suit should be decreed, a wise judicial discretion would, of course, be interposed to withhold a decree, the effect of which would

be to defeat the very object for which the contract was made. A court of equity can always mold its decrees so as to measure out justice to all concerned, and the question whether specific performance will or will not be decreed in a given case is always addressed, in the first instance, to the sound judicial discretion of the court whose aid is invoked. *Seymour v. De Lancey*, 6 Johns. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414; *Conger v. New York, W. S. & B. R. Co.* 120 N. Y. 29, 23 N. E. 983; *Stokes v. Stokes*, 155 N. Y. 590, 50 N. E. 342. And it is usually a question that must be decided in the light of the facts and circumstances existing at the time of the trial, so that it can rarely be disposed of upon a demurrer to a complaint.

It is suggested that, if we should give effect to the antenuptial contract formally drawn up and signed by the plaintiff and all other parties in interest, we would be treating it as a testamentary instrument which the plaintiff is, in some unexplained way, precluded from enforcing because he interposed no objections to the probate of his father's will. We think there is no force in this contention. Such agreements have been upheld for hundreds of years, although their ultimate effect is usually to change the current of attempted testamentary disposition of estates. The direct, and, indeed, the only, purpose of this agreement, plainly expressed, was to secure to the plaintiff an equal share with his sisters in the distribution of his father's estate. That was the end in view, and equity, if no good reason intervenes, will give effect to the expressed intention. The principle upon which such agreements are sustained was stated by Lord Camden as early as the year 1769, in *Durour v. Perraro*, *Hargrave's Judicial Arguments*, 304, and it was not then new. That was a case of mutual wills, in which the learned jurist said (page 309): "Though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement. A covenant to leave so much to his wife or daughter, etc. . . . These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will, but makes the devisee, heir, or executor a trustee to perform the contract. . . . No man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him. This court is never deceived by the form of 7 L.R.A.(N.S.)

instruments. The actions of men here are stripped of their legal clothing, and appear in their first and naked simplicity. Good faith and conscience are the rules by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established where one man has ever been released from his engagement after the other has performed his part."

We deem it unnecessary to discuss the intermediate cases which have fully and firmly established the principle that a man's representatives shall be trustees of a resulting trust for the benefit of those to whom he has bound his estate by such a contract as is here involved, for we consider the comparatively modern case of *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753, decisive of this whole controversy. In that case the husband, by an antenuptial contract, had provided that in case of his death without issue all his property should belong to the lady whom he was about to marry. The parties intermarried, and the husband predeceased the wife, intestate and without issue. This court held that, by virtue of the contract, the husband's estate went to the heirs of the wife, and, speaking through Ruger, Ch. J., said: "It has been the constant practice of the courts of this country, as well as of England, to enforce antenuptial agreements according to their terms, whether they relate to existing or after-acquired property, and to decree a specific or substituted performance of them according to the nature of the case [citing authorities]. . . . The suggestion that such contracts may be invalid, as being of a testamentary character and as contravening the statutes regulating the execution of wills, is of no force in view of the fact that for many centuries they have been sanctioned and protected by the courts, and their validity in this state has been expressly ratified and approved by statutory provisions. *Laws 1848*, chap. 200, § 4, p. 308; *Laws 1849*, chap. 375, § 3, p. 529." To the same effect are numerous other cases in this state, and they are all based upon the principle that, although a contract may contain covenants to leave property by will, that is no reason why it should not be performed. The facts of those cases are too voluminous and various for repetition here, and a few of them are cited merely to show how firmly the principle is established. *Parcell v. Stryker*, 41 N. Y. 480; *Stanton v. Miller*, 58 N. Y. 192; *Shakespeare v. Markham*, 72 N. Y. 400; *Winne v. Winne*, 166 N. Y. 283, 82 Am. St. Rep. 647, 59 N. E. 832; *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332; *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454.

Neither do we subscribe to the proposi-

tion that this complaint does not state a good cause of action, because the contract which it sets forth may be one which would not support an action at law. There are many contracts upon which an action at law cannot be maintained that are enforceable in equity. "There are agreements which the common law, by virtue of its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy, but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance." Pom. Spec. Perf. § 31. In *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000, this principle was applied to take a case out of the operation of the statute of frauds, and to the same effect is *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259. Many more cases might be cited to illustrate the rule that equity decrees performance of just contracts which are not enforceable at law, but this axiomatic fact needs no further demonstration.

We now pass to that phase of the discussion in which it is argued that there was no consideration as between father and son which enables the latter to maintain an action to enforce the agreement. In support of this position, there are cited some recent cases in this court, founded upon oral agreements to devise or convey estates in consideration of services rendered to, or benefits actually received by, the promisors, who died without having carried out their respective parts of the several agreements. Such contracts have been held at least open to suspicion, and courts are very reluctant to enforce them. *Gall v. Gall*, 138 N. Y. 675, 34 N. E. 515; *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903; *Ide v. Brown*, 178 N. Y. 26, 70 N. E. 101. But there is a very wide distinction between those cases and the case at bar. This action is founded upon what are known as formal marriage articles, whereby certain property is settled, or agreed to be settled, upon either one or both of the spouses about to be married. Instead of being frowned upon, such agreements are favored by the courts, and have been upheld and enforced in equity whenever the contingency provided by the contract arose. *Johnston v. Spicer*, supra. "They usually proceed from the prudence and foresight of friends or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated." 2 Kent, Com. *165. It may be conceded that when the elder Phalen made his will he complied

with the terms of the contract, in so far as it related to a testamentary provision for the wife and children of the plaintiff; but he did not perform his agreement to give to the plaintiff the same share as his two sisters, and the facts thus far disclosed suggest no reason why a court of equity should not compel complete performance at the suit of the son. He was a party to the agreement and performed his part by the marriage with his wife. He had a legal interest in the complete execution of the contract, and, under principles now well settled, he can compel performance unless some good reason is made to appear why he should not be permitted to do so.

It is the rule, both in law and equity, as was held in *Borland v. Welch*, 162 N. Y. 104, 56 N. E. 556, that such agreements cannot be enforced by mere volunteers or strangers to the consideration. In that case collateral relatives of the wife sought to claim under a marriage settlement made between the husband and wife and trustees, and it was held that they were mere volunteers. But there Judge Cullen referred to the rule, subscribed to by this court, that even a person not a party to such a contract may compel performance if it has been made for his benefit. In one case it was held that the relation of parent and child (*Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20), and in another husband and wife (*Buchanan v. Tilden*, 158 N. Y. 109, 44 L.R.A. 170, 70 Am. St. Rep. 454, 52 N. E. 724), was sufficient consideration to support the action. It is not necessary to go so far in this case. Here the principle was not only within the "influence of the consideration," as it was called, but was actually a party to the contract. In *Borland v. Welch*, supra, Judge Cullen quotes with approval the general rule laid down in *Atherly on Marriage Settlements* (page 110 of 162 N. Y. page 557 of 56 N. E.): "Equity will execute marriage articles [and other family settlements] at the instance of all persons who are within the influence of the marriage consideration, for all these rest their claims on the ground of a valuable consideration." This statement of the rule was concurred in by all the members of this court then sitting, and we regard it as entirely sound in principle. The strict legal definition of consideration need not here be discussed, since marriage settlements have always been regarded as exceptions to the general rule upon this question. "Articles for settlements in most cases stipulate for benefits to persons other than the parties to them. The frequent use of such stipulations during the past two centuries, and the number of cases in which the benefits stipulated for have been secured by the courts to those for whom they were

intended, show that both conveyancers and judges have relied on and assumed their validity generally. Yet they are obnoxious to a general rule of law and equity, and depend for their efficacy on exceptions from that rule made in favor of some of them, and upon a doctrine of equity the scope of which has hardly yet been accurately determined." 1 Vaizey, Settlements, p. 140.

The question as to what persons are within the consideration of the agreement in this class of cases has frequently arisen; but it has never been doubted that the parties whose marriage forms the occasion of the agreement are within the consideration and entitled to enforce the contract. Even the issue of such marriage may enforce such an agreement, although they may not be born at the time it is made. *Gale v. Gale*, L. R. 6 Ch. Div. 144, 148. "The promise of a third party may be for the wife's benefit, or it may be for the mutual benefit of the married parties, and enforceable accordingly." *Schouler*, Dom. Rel. § 178. Actions at law have even been sustained upon mere letters to the party about to marry and at his suit, although the only consideration was the marriage. In *Shadwell v. Shadwell* (1860) 30 L. J. C. P. N. S. 145, 9 C. B. N. S. 159, the defendant's testator wrote to his nephew, the plaintiff, as follows: "My dear Lancey: I am glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require." In an action by the nephew to recover, after his marriage with the lady named, the arrears of the annuity promised, he was permitted to recover at law. In the case of *Coverdale v. Eastwood*, L. R. 15 Eq. 121, after proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V. being my only child, of course she will come into the possession of what belongs to me at my decease." In other letters he made statements evidencing the same intention. The father, being then a widower, subsequently remarried. Upon his death he left a will bequeathing part of his estate to his widow and creating certain annuities. Upon a bill filed by the daughter for the enforcement of this contract, it was held, notwithstanding the manifest equities of the widow, that the daughter was entitled to the whole estate. This, as Mr. Schouler says, is a harsh case. Similar informal agreements have been enforced many times in England. *Douglas v. Vincent*, 2 Vern. 201; *Wankford* 7 L.R.A. (N.S.)

v. Fotherly, 2 Vern. 322; *Moore v. Hart*, 1 Vern. 201.

The foregoing principles and authorities seem to completely dispose of this case, and the discussion might well close at this point; but there are a few authorities which need only to be cited to show that covenants in marriage settlements, such as the one here in question, binding the parent to leave to a child all or an aliquot part of his property at death, are most usual in such settlements, and have always been sustained. *Laver v. Fielder*, 32 Beav. 1, presented the same general features as those in the case at bar, except that the agreement was informal and the plaintiff was not a party thereto. It was contained in a letter by the father to the prospective son-in-law in which he promised that "at my decease she (the daughter) shall be entitled to her share of whatever property I may die seised." The father, in making his will, failed to comply with his agreement, and, after a suit by the widow and a son to settle the estate, the daughter was permitted to maintain an action for the enforcement of the agreement, and judgment was decreed in her favor. In *Jones v. Martin*, 3 Anstr. 822, more fully reported in 5 Ves. Jr. 266, note, the father covenanted, on his daughter's marriage, to leave her at his death an equal share of personalty with his son. The father in his lifetime transferred certain property to his son, which was more than the latter's proportion as fixed by the marriage settlement. In an action brought after the parent's death by the daughter and her husband for an accounting and an enforcement of the agreement, judgment was rendered for the relief asked. It was held in the House of Lords that "this covenant was stated by the counsel for the respondent to be vague, and idle, unmeaning, and insecure. It is not, however, an unusual covenant in settlements. Many marriages are entered into on such covenants, and they are not inexpedient. They are entitled to favorable consideration. . . . But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects, or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child before another." In *Bennett v. Houldsworth*, L. R. 6 Ch. Div. 671, the father, by a settlement prior to the marriage of his daughter, covenanted that he would, by his will, divide his estate into as many equal parts as he had children, one of such parts for the benefit of his daughter and her husband, remainder to their issue. He failed to carry out the provision for this settlement. In an action by the trustees of the

settlement, the agreement was held binding. In that case the vice chancellor said: "The settlement is, in my opinion, in very plain terms. It does entitle the parties under the settlement to have one equal fourth part of the whole of the testator's estate applied upon the terms of the settlement; but it is only upon the terms of the settlement. The representative of the trustees of the settlement, who asks by this suit to have the trusts of that deed carried into execution, does not ask for the payment of any debt, but asks that the fourth part may be ascertained, and that it may be paid to him in satisfaction of the obligation contained in the settlement. In my opinion, that is a claim which cannot be resisted." To the same effect is *McCarogher v. Whieldon*, L. R. 3 Eq. 236. Again, in *Willis v. Black*, 4 Russ. Ch. 170, the father covenanted upon the marriage of his daughter to settle upon her and her husband, among other things, as great a share of his property as he should by his will or otherwise provide for any of his younger children. That agreement was enforced after the father's death at the suit of the trustees of the settlement. *Romaine v. Onslow*, 24 Week. Rep. 899. In *Keays v. Gilmore*, Ir. Rep. 8 Eq. 296, the father, in a letter to a cousin, promised, upon the marriage of his son, to give to his son upon the father's death a child's portion of his estate. An action was maintained by the son's wife as his executrix for a construction of the agreement, and its validity was sustained, and within the past year the Irish court of chancery (*Doyle v. Crean* [1905] Ir. K. B. 252) gave effect to a contract almost exactly similar in its terms. The father, by a settlement made upon the marriage of his daughter, agreed to distribute his estate equally among his children. An action was maintained by the trustees of the settlement on behalf of the daughter, without question as to the daughter's right to insist upon the performance of the agreement. Other cases illustrating the general principle are *Eardley v. Owen*, 10 Beav. 572, and *Re Brookman*, L. R. 5 Ch. 182. These cases disclose how uniformly such agreements have been sustained by the courts.

Since the demurrer was not taken on the ground that the plaintiff's wife was a necessary party, that question is not now before us. It may be that, if the case should come to trial, she ought to be brought in as a party so that the rights of all persons in interest may be properly presented and disposed of. Specific performance ought not to be decreed unless all proper parties are before the court. *Miller v. Bear*, 3 Paige, 466.

The order of the Appellate Division sustaining the demurrer should be reversed, and 7 L.R.A. (N.S.)

the interlocutory judgment of the Special Term overruling the demurrer affirmed, with costs in all courts, with leave to defendant to withdraw demurrer and serve answer within twenty days upon payment of costs.

Cullen, Ch. J., and Willard Bartlett and Hiscock, JJ., concur.

O'Brien, J., dissenting:

This is an action for specific performance of an alleged contract claimed to have been made between the plaintiff and his father. The father was a citizen of New York, but for many years prior to his death he resided with his family in Paris. He died in that city on the 20th of January, 1887, leaving a will executed there, to which were attached seven codicils; the last or seventh of the codicils having been executed on the 17th of January, 1887, a few days prior to his death. By this will and the codicils attached the testator disposed of a large estate, both real and personal, to his widow and children. The will and codicils were admitted to probate in this state; the plaintiff being a party to the proceedings for that purpose before the surrogate. By the last codicil the testator disposed of that portion of his property which had been left by the prior provisions of the will to the plaintiff in trust to the defendant to pay the income thereof annually or at convenient intervals in each year to or for the use and support of the plaintiff during his life; and at his death the said trust should cease, and the principal and any unpaid portion of the income of the fund was to go and be divided among his heirs at law. By the prior provision of the will and codicils, after providing for the widow, the testator devised the remainder of his estate in substantially equal shares to his children, and thus by the last codicil these provisions as to the plaintiff were changed into a life estate with remainder to the plaintiff's heirs. The estate was distributed by the executors in conformity with the provisions of this testamentary instrument. An intermediate accounting was had, and a final judicial accounting and settlement subsequently, in which full distribution was made according to the terms of the will, and the executors were discharged from their trust.

The controversy in this case does not arise from any defect in the will, but from the transactions which took place many years prior to its execution and to the death of the testator. On the 11th of August, 1873, the plaintiff became engaged to be married to a lady who resided and was domiciled at Baden-Baden. The marriage was preceded by the execution of an antenuptial contract

or settlement made by the plaintiff and his father and mother of the first part, and the intended wife, with her father and mother, of the second part. By this instrument the testator made some gifts of property to the plaintiff, including a house in Paris; but the main provisions of the instrument were obviously intended for the benefit of the wife. The only provision of the instrument that is of any importance in the present controversy is the following: "And the said James Phalen and Catherine S., his wife, do further respectively covenant and agree that they will make no distinction between their children as regards the proportion of their estates coming to each under their respective wills; account, however, being taken of any advance which may have been made to either during the lifetime of their said parents, the amount of which advance is in all cases to be deducted from the share to which such child would otherwise have been entitled." The theory of this action is that, inasmuch as the testator left the plaintiff's equal share not absolutely to him, but in trust as before stated, the provision of the marriage settlement was violated, and hence conferred upon the plaintiff a right of action for specific performance. The complaint sets out the will and codicil and the other writing referred to, and demands judgment for the following relief: (1) That the trust under the seventh codicil in the fund held for the plaintiff be declared to be created in violation of plaintiff's rights under his contract, and the plaintiff is entitled to the principal of his said fund held by the United States Trust Company; (2) that the trust under the seventh codicil be abrogated, and that the remainders in said fund given by the seventh codicil to the heirs of the plaintiff be extinguished, and that the plaintiff's two sisters, Florence and Catherine, and all other persons who may ever be his heirs at law, be barred therefrom, and that it be declared that the United States Trust Company holds that fund under the will as modified by the first six codicils; and (3) that the trust company be directed to turn over all of said fund, with the increment thereto and the accumulation thereof, to the plaintiff. There are some other statements and exceptions in the prayer, but they have no bearing upon the case. The trust company was the only defendant that appeared in the action, and it demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, but that judgment was reversed by the appellate division, and the plaintiff has appealed to this court.

The first question that is naturally presented is the legal effect and nature of that 7 L.R.A. (N.S.)

provision of the antenuptial agreement which has already been quoted. It is impossible, I think, to classify it among any of the recognized methods for the devolution of property or the creation of any particular obligation. It is not a testamentary instrument of any kind, since it was not executed according to the laws that provide for the distribution of property to take effect after death. It was not a conveyance of any property whatever. It created no lien upon any of the testator's estate. It was neither an executed nor an executory contract. It will be seen that fourteen years had elapsed from the time that the marriage agreement was made until the testator executed the seventh codicil of his will, which it is claimed constituted a breach of contract, and is clearly the sole reason for this action. If this theory of the case be correct, it must follow that, had the plaintiff, the son, developed in the meantime habits of extravagance, or become otherwise improvident and incapable of taking care of a large estate, a contingency that actually happened, the testator had disabled himself from so changing his will as to make what might seem to him a proper disposition of the plaintiff's share under all the circumstances. It is argued that the testator, fourteen years before he executed the codicil, had so bound himself hand and foot that he was not at liberty to make what he thought to be a wise disposition of his property, simply because of his promise in the marriage agreement to make no distinction between his children. This proposition would seem to be so plainly contrary to good sense and to all our notions of law that the mere statement of it is sufficient to show its absurdity. Indeed, it is not attempted to sustain this action upon any principle of law or equity, or by arguments founded upon any rule of law or equity. What is claimed is simply this: That there are to be found among the adjudicated cases remarks to that effect by learned judges in the discussion of cases, but where, it will be seen, the question now before us was not involved. It is perfectly safe to say that in no case has it yet been decided that a man who made a promise such as that contained in this case has disabled himself forever from making such a disposition of his property by will as seemed to him to be wise and judicious. A brief review of the cases cited in support of the complaint in this action will, I think, show that when they are fairly considered and analyzed they decide nothing that sustains the plaintiff in this case. The discussion in the opinions may be omitted. It will be sufficient to point out the questions that were actually involved and decided in the particular case.

The leading case cited and relied upon by

the learned counsel for the plaintiff is that of *Parsell v. Stryker*, 41 N. Y. 480. In that case a person let a farm to his grandson for the life of the former. The tenant was bound to occupy the place and do all the work, and was to have two thirds of the produce, and the farm was to belong to the grandson on the death of the grandfather. It was subsequently agreed that the grandfather should make a will devising the farm to the grandson. It was held that an action for specific performance would lie for the performance of this agreement. Here the grandson went into possession and occupancy of the farm under a promise that it should belong to him at the death of the grandfather. The court decreed specific performance and the conveyance to the grandson by the defendants in the action, to whom it had been subsequently conveyed by the grandfather in violation of the agreement. That case has little, if any, bearing upon the case at bar. The fact that the grandson, on the faith of the promise, went into possession and occupancy of the farm and worked it, yielding a portion of the products to the lessor, was sufficient to confer upon a court of equity jurisdiction to decree specific performance. The promise to leave the farm to the grandson by will was of no consequence. A verbal agreement to give it upon the death of the owner would be sufficient when accompanied by possession. In fact, that is just what was decided in the case of *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657. In a court of equity the grandson's case was just as strong without any promise to make a will as it was with a promise. That was a circumstance wholly immaterial to the right of action. It was the possession and occupancy of the farm by the grandson under a promise that his grandfather would give it to him that constituted the equitable claim of the plaintiff; and so it will be seen that the case decides nothing that can aid the plaintiff here. *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, cited in behalf of the plaintiff, was a controversy arising out of an alleged agreement between sisters to make mutual wills. On the trial the complaint was dismissed, and the judgment was affirmed in this court. The case decides nothing that bears upon the nature or legal effect of the promise, which is the foundation of this action. In *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832, there was an agreement between the mother of a boy and the deceased. The deceased was to have, and the mother of the plaintiff was to surrender to her, the custody and control of the plaintiff. The deceased was to maintain him as her own child, and at her death give him all her property and make him her sole heir, and his

mother was to have nothing more to do with him. This agreement was completely carried out and executed, but the deceased died intestate, and the boy, or his representatives, claimed the property owned by the deceased at her death. The latter left no father, mother, child, nor descendant, and no child was born to her after such contract was made. The court decreed specific performance so far as to declare that the property belonged to the plaintiff. This court, however, was careful to add at the end of the opinion this paragraph: "While we are of opinion that specific performance of this contract was properly awarded, this decision is based solely upon the findings of the trial court and the particular facts and circumstances of this case. Yet it must not be regarded as an authority for maintaining such an action under different circumstances or upon other proof, as the granting or denial of such relief always rests in the sound discretion of the court, and should be denied unless the agreement is fair and just, and its enforcement equitable." It is hardly necessary to add that in the case at bar it is sought to maintain the action under very different circumstances; and, under the language of the opinion just quoted, it can have no application to this case.

These are the cases cited in behalf of the plaintiff from this court. There are numerous cases cited from the supreme court which call for a brief review. *Shakespeare v. Markham*, 10 Hun, 311, assumed the form of an accounting before the surrogate to recover from the estate of a deceased person a large sum of money claimed to be due the contestant for services rendered, and for taking care of and for supporting, the testator in his old age, under an expectation of receiving a legacy from him. The testator died without having made any testamentary provision in favor of the contestant. In the surrogate's court the claim was allowed, but the determination was subsequently reversed upon appeal, and the reversal was affirmed in this court. *Shakespeare v. Markham*, 72 N. Y. 400. Just why that case is supposed to be an authority in favor of the plaintiff in the case at bar it is quite difficult to see. *Colby v. Colby*, 81 Hun, 221, 30 N. Y. Supp. 677, was a case where there was a mutual promise of marriage between the parties, and the learned trial judge held that it was an authority in support of this action. It is stated in the case that the deceased made a proposition of marriage, which she accepted, and that thereupon an agreement in writing was made and subscribed by the parties, by the terms of which it was mutually agreed that the two should be presently married, and that the plaintiff should live with the defendant at

his residence and be a faithful and loving wife to him as long as he should live, and if the plaintiff should survive him she should have the said premises as her own in fee simple absolute; and that, in pursuance of the terms of said contract, and in part performance of said agreement, the said Colby executed and published his will in due form of law, by which he devised to the plaintiff, her heirs and assigns, forever, the whole of said premises; and he agreed that he would not revoke or alter the will. The marriage took place according to this agreement, and the parties lived together as husband and wife until the death of the husband on the 10th day of March, 1894. Now, here was an agreement in the nature of an antenuptial settlement between husband and wife, whereby the wife was to have, in case she survived her husband, certain specific real estate. It appeared that the husband, before his death, executed and published another and different will, whereby he undertook to revoke the one made prior to the marriage. It appeared that the widow was in possession of the premises, claiming to be the owner under the contract, and demanded specific performance. It was held that she had a good cause of action; but it is obvious that the promise not to revoke the will had little, if anything, to do with her rights. The antenuptial agreement, followed by the marriage, and the possession by the wife after her husband's death, gave her an equitable claim to the property, which a court of equity would, of course, enforce. Suppose the husband had not revoked the will at all, but it had been set aside by reason of some defect in the execution, or of undue influence, or incapacity, or other cause; this would not affect the rights of the wife in the slightest particular. She would still, in virtue of the marriage contract and the marriage and her possession, have good title in a court of equity. So that we see that the promise not to revoke the will was in legal effect wholly immaterial. The case furnishes no support for the present action.

Other cases cited upon the brief of the plaintiff's counsel are equally wide of the mark. None of them decide anything that tends to sustain the plaintiff in this case. It is said, for instance, that the case of *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753, sustains the plaintiff's contention. I am unable to see that it has any application whatever. The proposition decided in that case was this: Antenuptial contracts, intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts, and will be enforced in equity according to the intention of the parties.

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No one disputes that proposition. But there is no question in this case between the parties to the marriage. There is no question here with respect to any property as between the husband and wife. The sole question here is whether there was a valid contract between the father and the son whereby the father bound himself not to make the codicil in question, whether there was a breach of the contract, and, if there was, whether the plaintiff's remedy is by action for damages or suit for specific performance.

On the other hand, there are three or four quite recent cases in this court that seem to me to be squarely against the plaintiff's contention. In *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332, a deceased person had promised that, if the plaintiff, then residing in California, would go to live with him in New York, he would make a will in his favor. The deceased did make the will, but afterwards he married again and had issue. The action in that case, as in this, was for specific performance, and it was held that it could not be maintained, and that judgment was affirmed in this court. *Gall v. Gall*, 138 N. Y. 675, 34 N. E. 515; *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903, was a case that in its main features cannot be distinguished from the one at bar. It was an action by a grandchild against the representatives of her grandfather to compel the specific performance of an agreement that, if the girl would make her grandfather's home her home and assume the duties of a daughter, the deceased would give to her a child's share of his property upon his death, to wit, a one-fourth interest. The courts below sustained the action, but it was reversed in this court upon an opinion which seems to me to answer the argument of the learned counsel for the plaintiff in this case. *Ide v. Brown*, 178 N. Y. 26, 70 N. E. 101, is to the same effect. In that case the plaintiff, a young girl, whose father and mother had died, brought an action to enforce specific performance of an agreement on the part of the deceased to make a will in her favor vesting her with the title to a large amount of real and personal property. It was held that the action could not be maintained. Thus, it will be seen that, instead of judicial authority to support this action, the decisions of the courts are against it. It can, I think, be safely asserted that there is no case in this state that decides that a promise such as the plaintiff relies upon in this case can be made the subject of specific performance in a court of equity, or even of an action at law.

But perhaps the most conclusive argument and authority against the plaintiff's contention is to be found in the history of this very case. It seems that after the probate

of the will and codicil the plaintiff filed a petition with the surrogate of New York to revoke the last codicil on the ground of fraud and undue influence. The question of the validity of this codicil was tried at great length before the surrogate, and he held that the codicil was valid, and dismissed the petition. On appeal to the supreme court, the question was again fully argued and heard, and that court unanimously affirmed the decree of the surrogate. An appeal was taken to this court, and the decision of the courts below was unanimously affirmed on the opinion below. *Re Phalen*, 47 N. Y. S. R. 44, 19 N. Y. Supp. 358, Affirmed in 140 N. Y. 659, 35 N. E. 893. The court found, as will be seen from the opinion, that the plaintiff had separated from his wife and was incompetent to manage property by reason of bad habits. All this took place nearly fifteen years ago, and several years after the father's death. Now, if it be true, as asserted upon this appeal, that the father had bound himself by a valid contract between himself and the plaintiff not to make the codicil in question, and it was made in violation of the rights of the son, it was, as between the son and the estate, simply invalid and void, and should have been canceled and revoked. The legal effect of the decision is that the testator had the right and the power to make the codicil which constitutes the sole complaint of the plaintiff, and the testamentary power and capacity of the father was in no wise restricted in law by anything contained in the so-called contract upon which the present action was based. It cannot be supposed that this court and the court below would declare valid a testamentary instrument made in violation of a binding contract. The question then before the court is the same question now presented, namely, the right of the father to alter his will and make such disposition of his property as he thought best; and it cannot be doubted that he acted wisely in thus protecting the son from the result of his own improvidence. It would, in our judgment, be very unwise to reopen the controversy now, fifteen years after it had been settled by the court, and after the estate had been distributed and the executors discharged. The case in its general aspects does not seem to be so meritorious as to warrant such a result, and I venture to say that not a single case can be found in this state where such an action was sustained. If the testator had, by his promise in the marriage contract, disabled himself from changing his will, then why, it may be asked, did this court hold the last codicil valid?

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Passing from the question of the nature and validity of the promise in question, there are two other points that should be stated. If the promise set out in the complaint is a contract or binding obligation, it certainly must be supported by a sufficient consideration. It was a promise, in substance, that, if the deceased made a will at all, it should be in a particular form, based upon the principle of equality between his children. Now, what consideration was there for the promise moving from the son to the father? It is said that marriage is a good consideration; and so it is between the parties; but it does not follow that it is a consideration for the promise of third parties. What did the son give the father that would constitute a consideration for the promise? Nothing whatever. It is true that he afterwards married; but his father never requested him to marry, and he never promised his father that he would. That was the plaintiff's own voluntary act. Did the plaintiff suffer any detriment in consequence of his father's promise? Certainly not, unless we are prepared to hold that it is a detriment to a young man to marry, sufficient in the eye of the law to form a consideration for a promise on the part of another. I assume that that proposition will meet with no favor from any direction. The deceased secured no benefit, pecuniary or otherwise, from the promise on his part; and the question returns again, What was the consideration moving from the son to the father that supports this promise which is called a contract? If the son had refused to marry, and the father had sued him for specific performance, of course such an action would be absurd; and yet a court of equity will not enforce a promise unless it is mutual. Both parties must be bound, and, if both are not bound, neither is bound. Consideration is the important element of a contract, and must not be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. It is the price or matter of inducement to the contract, whether it be the compensation that is paid or the inconvenience that is suffered by the party from whom it proceeds. *Bouvier, Law Dict.* 401. Chancellor Kent thus defined "consideration:" "There must be something given in exchange, something that is mutual, or something which is an inducement to the contract; and it must be a thing which is lawful and competent in value to sustain the assumption." 2 Kent,

Com. 463. So that the promise in this case is not supported by any consideration, and hence the deceased had the right at any time before his death to make such a disposition by will of his property as he thought best.

This is an action in equity. The character of the action is stamped by the relief demanded, and that has already been stated. Unless the complaint states facts sufficient to invoke the jurisdiction of equity, then it does not contain a good cause of action. The rule in such cases is this: "In case a plaintiff has the right to maintain an action at law or a suit in equity, and he elects to bring a suit in equity, demanding only equitable relief, but fails to state sufficient facts in his complaint to constitute an equitable cause of action, and the defendant demurs on the ground 'that the said complaint does not state facts sufficient to constitute a cause of action,' the demurrer will be sustained, though the facts alleged are sufficient to constitute a legal cause of action; and so, in case he elects to bring an action at law, demanding only legal relief, but fails to state sufficient facts in his complaint to constitute a legal cause of action, and the defendant demurs on the ground 'that the complaint does not state facts sufficient to constitute a cause of action,' the demurrer will be sustained, though the facts alleged are sufficient to constitute an equitable cause of action." *Wisner v. Consolidated Fruit Jar Co.* 25 App. Div. 362, 49 N. Y. Supp. 500; *Edson v. Girvan*, 29 Hun, 422; *Swart v. Boughton*, 35 Hun, 281; *Willis v. Fairchild*, 19 Jones & S. 405; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371. This must be the true rule in such cases, since, by § 1207 of the Code, where the defendant does not answer, the plaintiff can have no judgment except that demanded in the complaint. The facts stated in the complaint in this case relate exclusively to the breach of an alleged contract between the plaintiff and his father. If, therefore, the plaintiff has any cause of action whatever, it is an action at law to recover damages for the breach. There are no facts stated that bring the case within the jurisdiction of any recognized department of equity. So that, in whatever aspect the case is considered, it must be held that the demurrer was well taken, and that the judgment should be affirmed, with costs.

Haight and Vann, JJ., concur in result of dissenting opinion.
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VIRGINIA SUPREME COURT OF APPEALS.

FIRST NATIONAL BANK OF RICHMOND,
Plff. in Err.,

v.

RICHMOND ELECTRIC COMPANY.

(— Va. —, 56 S. E. 152.)

Bank—examination of returned vouchers.

1. Whether or not a depositor exercises reasonable care and diligence in examining his pass book and returned vouchers, and in supervising the conduct of his agent if the latter is permitted to make the examination, is a question for the jury, where there is evidence tending to show that he has not done so.

Same—dishonest agent—knowledge of depositor.

2. A bank depositor who intrusts the examination of the pass books and returned vouchers to an agent, who has been guilty of raising its checks, is charged with such knowledge as he has in making the examination.

(January 17, 1907.)

ERROR to the Circuit Court for the City of Richmond to review a judgment in

Case Note.—Depositor's right to recover amount of forged or raised checks paid by bank as affected by the fact that he intrusted the examination of vouchers to the employee, who was guilty of the original fraud: — It is clear that a depositor is not in the first instance, and apart from any subsequent fraud or breach of duty on the part of the employee, chargeable with the latter's knowledge of his own fraud in forging or raising checks paid by the bank. *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. This is assumed by all of the cases subsequently cited, including those that hold that the depositor becomes chargeable with such knowledge by intrusting the examination of the vouchers to the dishonest employee.

If, therefore, the right of the depositor to recover from the bank the amount of the forged or raised checks may, under any circumstances, be affected by the employee's knowledge of his own fraud, it must be because of some subsequent breach of duty intrusted to him with respect to the verification of the account and the examination of the vouchers returned by the bank.

Again, it is obvious that any proposition to the effect that the knowledge of his own forgeries, by the employee to whom the verification of the account and the examination of the vouchers are intrusted, will preclude a recovery against the bank by the depositor, presupposes and rests upon the assumption that the latter owes to the bank a duty to verify the account and examine the vouchers. That the depositor does owe such a duty to the bank is now established

favor of plaintiff in an action brought to recover the amount alleged to be due on a bank-deposit account against which the bank claimed to set off certain raised checks of the depositor. Reversed.

The facts are stated in the opinion.

Messrs. George Bryan and A. W. Patterson, for plaintiff in error:

When a bank depositor sends his pass book to the bank to be written up, it is his duty, upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

by the great weight of authority. See note 27 L.R.A. 426. There was formerly, however, a conflict of authority upon the point; some cases holding that the depositor owed no such duty to the bank, and that the observance of such precautions was merely for the depositor's own protection. The discussion of that general question does not fall within the scope of this note; but it is to be noted, in this connection, that the cases of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, and *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576, holding that the fact that the examination of the vouchers was intrusted by the depositor to the employee who forged the checks did not prevent a recovery by the depositor of the amount of such checks from the bank which paid the same, are of but little value upon the point discussed in this note, for the reason that the decisions were rendered upon the express holding and assumption that the depositor owed no duty of examination to the bank, and that the examination was merely for his own protection. Of course, upon that assumption, the depositor would not be prejudiced, so far as his rights against the bank were concerned, by the fact that the examination of the vouchers for any reason failed to disclose the forgeries.

So, the case of *Welsh v. German American Bank*, 73 N. Y. 425, 29 Am. Rep. 175, holding that the depositor could recover from the bank the amount paid by it on forged indorsements of his checks, notwithstanding that the examination of the vouchers returned by the bank was intrusted to the employee who forged the indorsements, is of little value on the point covered in this note, for the reason that the case was decided upon the assumption that the depositor owed no duty to the bank to examine the vouchers with a view to the detection of forgeries in the indorsements.

Assuming that the depositor owes to the bank, and not merely to himself, the duty of verifying the account and examining the vouchers returned by the bank, there are a number of different views, having more or less support from the case, affecting the

If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and, where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent.

Dana v. National Bank, 132 Mass. 156; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380; *Hardy v. Chesapeake Bank*, 51 Md. 585, 34 Am. Rep. 325; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Weinstein v. National Bank*, 69

ultimate question whether the depositor is estopped as against the bank by intrusting that duty to the dishonest employee. These views may be formulated as follows:

(1) That, while the depositor is not in the first instance chargeable with the dishonest employee's knowledge of his own fraud in raising or forging the check, yet, by intrusting the verification of the account and the examination of the vouchers to that employee, he becomes chargeable with the latter's antecedent knowledge. It is apparent that in this view, assuming the existence of the other conditions essential to an estoppel, *e. g.*, prejudice to the bank and freedom from negligence on its part, the estoppel of the depositor and his inability to recover against the bank follow—inevitably and irrespective of any negligence on his own part, or any question as to whether the examination, if made by an honest and competent person with due care, would have disclosed the fraud—from the fact of intrusting to the dishonest employee the duty of verification and examination which he owed to the bank.

(2) That the effect of intrusting the verification of the account and the examination of the vouchers to the dishonest employee is the same as if no verification or examination had been made at all. This view works out practically the same results as the first; in other words, the estoppel of the depositor and his inability to recover from the bank necessarily follow from intrusting the duty of verification and examination to the dishonest employee, assuming, as before, the existence of the other conditions essential to an estoppel.

(3) That the duty resting upon the depositor to verify the account and examine the vouchers is not a personal one, but may be delegated to a competent employee; and that the fraud, negligence, or omission of such employee is not imputable to the depositor. In this view, the depositor is exonerated if he had good reason to believe, and did believe, that the employee in question was honest and competent. This view, if it could be maintained without qualification, would be the most favorable to depositor,

Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; *McKeen v. Boatmen's Bank*, 74 Mo. App. 282; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 957, 1 N. Y. Supp. 139; *Garrard v. Had-dan*, 67 Pa. 82, 5 Am. Rep. 412.

Messrs. W. Brydon Tennant and Leake & Carter, for defendant in error:

If the banker pays money belonging to the customer upon an order which is not genuine, he must suffer, and, to justify the payment, he must show that the order is genuine, not in signature only, but in every respect.

National Bank v. Nolting, 94 Va. 263, 26 S. E. 826; *Morse, Banks & Banking*, § 480; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501; *Critten v. Chemi-*

cal Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576; *Leath-er Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

No duty rests upon the depositor to carry on the examination of the account as shown by the pass book when written up, in such a manner as necessarily to lead to a discovery of the forgery.

Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72.

Harrison, J., delivered the opinion of the court:

The electric company, plaintiff, kept an active account with the defendant bank, and this action is to recover a balance of de-

since it would protect him even if an examination by an honest and competent person would have disclosed the fraud.

(4) That the depositor who intrusts the verification of the account and the examination of the vouchers to the fraudulent employee, if in no worse, is at least in no better, position than if such duty had been intrusted to an honest and competent employee. This view assumes that the negligence or omission of such an employee would be imputable to the depositor; in other words, that the duty which the depositor owes to the bank cannot be delegated to an employee so as to absolve the former from responsibility for the latter's negligence. In this view, it is apparent that the rights of the parties are made to turn upon the question whether an honest and competent employee, not having previous knowledge of the forgeries or other fraud, would, by the exercise of reasonable care, have discovered the same by his examination of the vouchers. This presents a question of fact, or a mixed question of law and fact, which in general is for the jury, or the court sitting as the jury, but which may, of course, under some circumstances, be disposed of by the court as a matter of law, upon the ground that the evidence upon the point is uncontradicted, and is fairly susceptible of but one conclusion.

(5) The fifth view varies but slightly from the fourth, and in practical cases it is with difficulty to be distinguished therefrom. It, however, makes the rights of the respective parties turn, not, as in the fourth view, upon the question whether an examination of the vouchers by an honest and competent employee would have disclosed the fraud, but upon the question whether a reasonable supervision by the depositor over the fraudulent employee in the discharge of the duty of examining the vouchers would have disclosed the forgeries. It is perhaps, for practical purposes, an over-refinement to attempt to distinguish between the fourth and fifth views. It is apparent, however, that, under conceivable circumstances, there might be a practical as well as a theoretical difference between 7 L.R.A. (N.S.)

them, since forgeries which might be apparent upon an examination of the vouchers by an honest and competent employee might not be apparent upon a reasonable supervision by the depositor of the conduct of the fraudulent employee in the examination of such vouchers.

Coming now to the cases which support these respective views: It will be observed that the first view is presented by the statement in the opinion in *FIRST NAT. BANK v. RICHMOND ELECTRIC CO.*, that, "if the depositor assigns the duty of examining such vouchers and account to this same clerk who has had an opportunity of committing a fraud and has done so, then such employee, in the discharge of this duty, is the agent of the depositor, and such depositor is chargeable with his agent's knowledge of the fraud." This proposition goes farther than the exigencies of the case required, since it is apparent from the facts in the case that an independent examination of the vouchers by the depositor himself, or by an honest employee without the intervention of the dishonest employee, would have disclosed the forgeries. It would seem, therefore, that the case upon its facts might have been brought within the fourth, or possibly the fifth, view above referred to.

Some portions of the opinion in *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335, also lend color to the first view. Thus, the court in denying the right of a depositor to recover from the bank the amount of checks forged by his bookkeeper and paid by the bank, it appearing that the bookkeeper assisted in the verification of the account and the examination of the vouchers, said: "Our opinion is that, under the circumstances, the plaintiff [the depositor] was chargeable with the facts within the knowledge of his agent and clerk at the time of the examination of the pass book and vouchers, and which should have been communicated to the principal or the bank." In this case, also, it appeared that the forgeries would have been disclosed by an examination made by the depositor himself, or by an honest and competent employee without the intervention of

posit alleged to be due it from the bank. This alleged balance was brought about by the bank having paid a number of checks, the amount of which had been raised after being signed by the plaintiff.

It appears that the plaintiff had in its employ a clerk named Woodall. Once a week the electric company issued its check for a sum sufficient to cover its weekly pay roll, payable "to the order of pay roll." Its clerk and cashier, Woodall, presented these checks to the bank for payment. In July, 1903, the plaintiff discovered that Woodall had, since December, 1901, a period of about eighteen months, been defrauding it by raising 26 of these pay-roll checks by the sum of \$100 each. Upon this discovery Woodall became a fugitive from justice and

has not since been apprehended. The bank resisted a demand upon it for the amount of these fraudulent alterations, upon the ground that the account of the electric company with it had been settled monthly during the eighteen months, its pass book written up, and the fraudulently altered checks returned with the book, and no report of the fraud had ever been made to the bank. Inquiry developed the fact that, after being returned, Woodall had destroyed all of the altered checks except two, which had not been returned by the bank at the time of his flight. It further appears that Woodall, in order to conceal his fraud, would make false additions of the checks given, on the stubs of the plaintiff's check book, thereby making the aggregate there

the dishonest employee. It would seem, therefore, that this case, also, upon its facts, might have been brought within the fourth view; and it is to be noted, in this connection, that the court relied in part upon the case of *Dana v. National Bank*, 132 Mass. 156, *infra*, which does sustain the latter view.

The first view was repudiated by the court in *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002, as is apparent from its approval of an instruction to the effect that the depositor is not chargeable with the knowledge gained by his bookkeeper in the commission of the forgeries of the checks, or in handling the bank book and vouchers returned by the bank.

The second view is supported by the case of *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956, 1 N. Y. Supp. 139, which denied a recovery by the depositors of the amount of their checks paid upon indorsements forged by their bookkeeper, who drew, but did not sign, the checks, and to whom the duty of examining the vouchers was intrusted. The court said: "The knowledge of Fischel [the bookkeeper who forged the indorsements] was the knowledge of the plaintiffs [the depositors] in respect to the existence of these fraudulent checks; and the same rule is to be applied as though the checks had been returned to the plaintiffs personally, and they had negligently omitted to examine the account." It would seem from the facts in this case, however, that the plaintiffs' right to recover might have been denied, even under the fourth or fifth view above stated.

The second view was presented by counsel for the bank in the case of *Kenneth Invest. Co. v. National Bank*, *supra*, in the form of a request to charge that if, at the time of the examination of the pass book by the employee who forged the checks, it contained any of his forged checks, the depositor was in no better position than if it had made no examination whatever, and for that reason could not recover from the bank. The trial court refused so to declare, and its refusal seems to have been approved by the appellate court. At all events, the judgment in favor of the depositor was affirmed.

The third view receives at least implied support from the decision in *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501, holding that a depositor could recover from the bank the amount of checks forged by his bookkeeper, who abstracted the forged vouchers, and by false balances and readings deceived the depositor and prevented him from ascertaining the forgeries by means of the examination of the vouchers. As the court held, in effect, that the depositor owed to the bank the duty of making a reasonable examination of the vouchers with a view to the discovery of forgeries; and as it is expressly stated in the opinion that it was only because the bookkeeper who assisted the depositor in the examination of the vouchers was the criminal that the examination did not disclose the forgeries,—it would seem that the decision must have rested upon the theory that the negligence, fraud, or omission of an employee to whom the duty in whole or in part of examining the vouchers is intrusted is not imputable to the depositor.

The third view is also sustained by *Kenneth Invest. Co. v. National Bank*, *supra*, holding that the depositor could recover the amount of checks forged by his bookkeeper and paid by the bank, notwithstanding that the examination of the pass book and the vouchers was intrusted to the bookkeeper. That this decision involves the third view is apparent from the court's approval of instructions to the effect that the depositor (a corporation) was not wanting in proper care in the examination of its accounts if it intrusted to some competent person the duty of making that examination for it; and that if, in selecting its bookkeeper to have charge of its pass book, check book, and returned checks, it used ordinary care, it was not guilty of negligence; nor was it required, after imposing such duty upon him, to go further and make a personal inspection through its officers of such books and checks. These instructions seem plainly to imply that the duty to verify the account and examine the vouchers is one

shown correspond with the pass book. Such examination of its pass book as was made by the plaintiff consisted of the president of the company, together with Woodall, comparing at times the pass book with the stubs of the check book. In doing this Woodall would sometimes hold the pass book and sometimes the check book, while the president would hold the other, thus enabling Woodall to call out, in either case, from the book held by him the figures so as to make the amount correspond with the book held by the president. In this way, every time the examination took place, the pass book as balanced and the check book were made to agree. It further appears that the fraud could have been instantly discovered by verifying the additions made

by Woodall on the stubs of the check book, or by the president looking at both the pass book and the check book on any one of the occasions when the examination was made by Woodall and himself together.

That banks, in their relations with depositors, are held to a rigid responsibility, is a proposition established by practically an unbroken current of authority. *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826. Some of the earlier cases seemed to go to the extent of holding that a depositor was under no duty to the bank to examine periodical statements of his account, with the vouchers, and give notice to the bank within a reasonable time of errors discovered therein. Modern adjudications, however, of the highest authority, do not

which the depositor may delegate to an employee selected with due care, and thus absolve himself from all responsibility for the fraud, negligence, or omission of the latter in the performance of that duty.

The third view is also sustained by *Wachsmann v. Columbia Bank*, 8 Misc. 280, 28 N. Y. Supp. 711, holding that a depositor was not estopped by intrusting the examination of the vouchers to the clerk who committed the forgeries. In support of its decision, the court said that, if the depositor, in the ordinary course of business, committed the examination of the bank account and vouchers to a clerk, who was the criminal and failed to disclose the forged checks, the duty of the depositor to the bank was discharged, although, if he had made the examination personally, he would have detected them; that the duty of the depositor, at most, is to exercise ordinary care, and this was performed when, in the ordinary course, he intrusted the duty of examination to the usual agent.

As sustaining the third view, the case of *Clark v. National Shoe & Leather Bank*, 32 App. Div. 316, 52 N. Y. Supp. 1064, Affirmed in 164 N. Y. 504, 58 N. E. 659, may also be referred to, although in that case the duty of examining the vouchers was not intrusted to the bookkeeper who committed the forgeries, but to an expert employed to examine the account. The court, however, after stating that, if the depositor shall negligently omit to make any examination of the account and vouchers, and such an examination would have disclosed the forgery, he would be estopped to question the accounts and vouchers, said: "This duty, however, to examine accounts and vouchers returned by the bank calls for no more than the exercise of ordinary care. There is no duty resting upon the depositor to personally examine the vouchers and accounts; he may intrust the matter to employees who have proved themselves competent and trustworthy, and it may be to the person who has committed the forgery, if there exists no knowledge of his wrongdoing, and the depositor is justified in reposing confidence in him. . . . And when the

plaintiff [the depositor] had taken steps, by the employment of competent persons, to apprise him of the true state of his business and accounts, we do not think that he can be charged with negligence or the omission of ordinary care, even though the examination by the employee was not carried as far as it might have been." This, however, was *obiter*, as the examination in this case was made with all due care, though it failed to disclose the forgery.

The fourth, and, as it seems to the annotator, the correct, view, is clearly presented by the opinion in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969. In that case it appeared that the verification of canceled checks returned as vouchers by the bank was intrusted by the depositor to the clerk who had altered some of the checks by raising the amount and making them payable to "cash" instead of the payees originally named. The court, after stating that it was clear that at all times a comparison of the returned checks with the stubs in the check book would have disclosed the alterations, said: "Of course, the knowledge of the forgeries that [the clerk] . . . possessed from the fact that he himself was the forger was in no respect to be attributed to the . . . [depositors]. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to . . . [the clerk], instead of to a third person; but they can be no better off on that account. It they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of . . . [the fraudulent clerk] so far as the examination itself would have disclosed the facts." The court accordingly held that the finding of the referee that the depositors were not negligent in the examination of the pass book and vouchers could not be sustained.

sanction this broad proposition. *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Dana v. National Bank*, 132 Mass. 156; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 390. The facts in most of the cases cited are very similar to those in the case at bar, in some of them almost identical.

Mr. Justice Harlan, delivering the opinion of the Supreme Court in *Leather Mfrs. Nat. Bank v. Morgan*, supra, says: "The court below, as shown by its opinion, proceeded upon the ground that Cooper was

under no duty whatever to the bank to examine his pass book and the vouchers returned with it, in order to ascertain whether his account was correctly kept. For this reason, it is contended, the bank, even if without fault itself, has no legal cause of complaint, although it may have been misled to its prejudice by the failure of the depositor to give timely notice of the fact—which, by ordinary diligence, he might have discovered on the occasion of the several balancings of the account—that the checks in question had been fraudulently altered. This view of his obligations does not seem to the court to be consistent with the relations of the parties, or with principles of justice." This learned jurist further says: "While it is true that the relation of a

The court added: "If any duty rested on the . . . [depositors], we do not see why the ordinary rule of principal and agent, or master and servant, that the principal or master is liable for the fault of his servant or agent in the master's business, did not apply."

The fourth view is also sustained by the case of *Dana v. National Bank*, 132 Mass. 156. In that case the depositors' clerk erased the name of the payee upon a check drawn by the former, and obtained the money thereon from the bank. On the first day of the following month the check was returned with others to the depositors with a monthly statement which included the check as paid. The court said that there was evidence that the depositors examined the statements and checks returned by the bank so far as to see that the checks returned corresponded with the amounts in the stub of the check book, and that they were affected with the knowledge that such examination would give them, though it was in fact made by the clerk who altered the check, he being their agent for that purpose. Again, the court said: "If the examination made by . . . [the fraudulent clerk] as agent for the . . . [depositors], and the information which came to him within the scope of his agency, were sufficient to have given him notice of the forgery of the check of November 20, it does not lie in the mouth of the plaintiffs to say that he did not acquire that knowledge as their agent so as to affect them with it. If such examinations would have given them notice if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent who had fraudulent knowledge of the fact." Under the facts of this case it was held, in effect, that the question whether an examination by an honest agent of the statements and vouchers returned by the bank would have disclosed facts which would have called for a further examination and led to the discovery of the fraud should have been submitted to the jury.

The fourth view is also supported by *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 7 L.R.A. (N.S.)

Am. St. Rep. 672, 44 Atl. 280, holding that, while the depositor was not chargeable with the knowledge of his clerk that the latter had forged a check, he was responsible for the acts and omissions of the clerk in the course of the duties with which he was intrusted; viz., to receive the checks from the bank, take them to his employer's office, and compare the amount thereof with the amounts in the bank book. It appeared by the uncontradicted evidence in this case that if, at the time of each settlement with the bank, the forged checks had been examined by the depositor; or if the number and amount of the checks had been compared with the number and amount of the checks separately entered in the bank book; or if the checks had been compared with the stubs of the check book; or if the additions of the deposits and checks on the check book had been examined,—the forgery would have been disclosed; but that neither of these things was done, for the reason that the clerk who was guilty of the forgeries, and who was deputed by the depositor to receive the checks from the bank, and take them to the office and compare the amounts with the bank book, abstracted and destroyed the forged checks, and failed to call his employer's attention to the discrepancies, which, as the court said, would undoubtedly have been disclosed by a proper comparison and examination. In view of this uncontradicted evidence, the court held that it plainly appeared that the depositor had failed to perform the duty which he owed to the bank, and that there was no question for submission to the jury; and accordingly the judgment in favor of the bank was affirmed.

The fifth view which, as already said, is but a slight variation from the fourth, is sustained by the opinion and decision of the United States Supreme Court in *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657. In that case the clerk who committed the forgeries was intrusted with the duty of examining the pass book and vouchers. The court said: "Nor do we mean to hold that the depositor

bank and its depositor is one simply of debtor and creditor, . . . and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudi-

ate it. . . . The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it, or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book."

In *Dana v. National Bank*, 132 Mass. 158, the supreme court of Massachusetts says: "The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized, and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty, and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to cor-

is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination,—without at least showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter." In this case it was held error to direct a verdict for the plaintiff, it appearing from the testimony of the depositor's agent, who finally discovered the forgery, that if, on any of the several balancings, he had personally made such an examination of the check book and pass book as was done on the occasion of the discovery of the fraud, he would have "easily discovered" that the account had been charged with altered checks.

The fifth view seems to be supported, also, by *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325. It appeared in that case that a confidential clerk intrusted to make the entry of all checks in his employers' bank book made fraudulent entries of checks forged by him. In an action by the depositors against the bank to recover the

amount of the forged checks which had been paid by the bank, it was insisted that, as the clerk was intrusted with the duty of making the entry of all checks in the bank book, and did make the entries of the forged check as well as all others, he acted as the agent of the depositors, and his acts and knowledge in respect to those entries were to be taken as the acts and knowledge of the depositors themselves. The court, however, said that, it being conceded that the clerk did not act as agent in drawing the checks, it was unable to perceive upon what principle they could be bound or made liable in respect to the fraudulent entry of those checks in the bank book; that the clerk was not an agent for any such purpose. The court therefore concluded that the jury should have been required to find either that the depositors had knowledge in fact that the forgeries had been committed, or that from carelessness and indifference to the rights of others they failed to inform themselves from sources of information readily accessible to them, and which, by the exercise of ordinary diligence as business men, would have disclosed to them the fact that the forgeries had been committed.

It is obvious, of course, that the practical application of the fourth view will often involve the question, which is beyond the scope of this note, as to the nature and extent of the examination which the depositor must make or have made in order to perform his duty to the bank. So assuming that there has been a breach of that duty, the ultimate liability may be affected by the questions, likewise beyond the scope of this note, as to the bank's negligence in paying the forged or altered checks, or as to whether it was prejudiced by the delay in discovering the fraud.

rect a mistake to its injury, from which it might have protected itself but for the negligence."

The other cases cited are equally conclusive upon the proposition that the depositor is under obligations to the bank to examine within a reasonable time and with ordinary care the account rendered in the pass book and the vouchers returned by the bank to the depositor, and to report any errors discovered, without unreasonable delay. Upon this point the conclusion reached by these cases is, in our judgment, both reasonable and just, and the principle announced should be applied in determining the rights of the parties in the present controversy.

"In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors. We must not be understood as holding that the examination, by the depositor, of his account, must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circum-

stances of the particular case, including the relations of the parties and the established or known usages of banking business." *Leather Mfrs. Nat. Bank v. Morgan*, supra.

"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account." *Ibid*.

In the case at bar there was evidence tending to show that the plaintiff did not examine its pass book and the vouchers returned therewith with reasonable care and diligence, and did not exercise reasonable care and diligence in supervising the conduct of its agent while the latter was examining such pass book and vouchers. Whether he did so exercise reasonable care and diligence was, under proper instructions, a question to be determined by the jury.

We are of opinion that the circuit court erred in refusing the following instruction asked for by the defendant:

"No. 3. The jury are instructed that the plaintiff is charged with such knowledge as Woodall had in making the examination of its bank book and the inspection of returned checks and comparison of the same with the stubs of plaintiff's check book."

As already seen, such examination of its pass book as was made by the plaintiff was together with Woodall as its agent. Woodall had, at the time these examinations were made, full knowledge of the forgeries, as he had himself been guilty of the wrongdoing.

In the commission of a forgery the employee is not the agent of his principal, and his knowledge cannot be imputed to the principal. But, after the forged checks have been paid and returned to the depositor as vouchers, with the bank account written up and balanced according to the usual business methods, if the depositor assigns the duty of examining such vouchers and account to this same clerk who has had an opportunity of committing a fraud and has done so, then such employee, in the discharge of this duty is the agent of the depositor, and such depositor is chargeable with his agent's knowledge of the fraud. *Dana v. National Bank*, supra; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

In *First Nat. Bank v. Allen*, supra, it is

said: "The evidence shows that on each occasion after the return of the pass book and checks, the plaintiff, with the assistance of his clerk, Tomlin, the forger, examined the account as rendered and the checks or vouchers. We may conclude the evidence shows that the plaintiff himself personally was without fault in this respect, and but for the fact that his clerk, Tomlin, was the forger, the false checks would have been discovered by the examinations which were in fact made. The evidence shows that in these examinations Tomlin either called from the pass book and the plaintiff the checks, or *vice versa*, and Tomlin, knowing when a forged entry or check was reached, answered in such a way as to deceive the plaintiff. Tomlin, the clerk and forger, had knowledge of the forged checks. Was such knowledge of the agent chargeable to his principal? The case in 132 Mass., *supra*, holds that the principal is chargeable with notice under such circumstances; and we are of opinion the conclusion is supported by reason and sound principles of law."

In *Critten v. Chemical Nat. Bank, supra*, it is said: "Of course, the knowledge of the forgeries that Davis possessed, from the fact that he was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis, instead of to a third person, but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts."

In the case of *Myers v. Southwestern Nat. Bank, supra*, it is said: "While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted; *viz.*, to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank book, and check book," etc.

In the case at bar the instruction under consideration was supported by the evidence, and the authorities cited show that it correctly stated the law.

We are inclined to think there was no error in the action of the circuit court with respect to other instructions; but, as its 7 L.R.A. (N.S.)

judgment must be reversed for the error pointed out in refusing instruction No. 3, asked for by the defendant, we will not comment upon the other instructions objected to, but will leave the court, upon the evidence adduced at another trial, to give such instructions as to it may seem proper in the light of the principles herein announced.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings not in conflict with the views herein expressed.

ILLINOIS SUPREME COURT.

MERCHANTS' NATIONAL BANK OF PEORIA, Appt.,
v.

NICHOLS & SHEPARD COMPANY.

(223 Ill. 41, 79 N. E. 38.)

Agent—power to borrow money.

1. Placing one in charge of a sales agency of a manufacturing concern with supervision of sales and local agents does not confer the implied power to borrow money for the concern; and it is immaterial that the principal is a corporation.

Bank—overdraft—agent—failure to examine pass book.

2. A bank which has paid an overdraft of a local agent upon the bank account of his principal, who resides in another state, without ascertaining the authority of the agent, cannot assert failure of the principal to examine the pass book and returned vouchers after the balancing of the account, as an estoppel upon the principal to deny liability for the overdraft.

Same—notice.

3. Knowledge by one in charge of the sales agency of another, who resides in another state, that he is overdrawing the bank account of the agency, is not notice to the principal.

Same—acceptance of benefit.

4. That the proceeds of overdrafts drawn by an agent without authority upon his principal's bank account went to pay expenses of the principal's business does not entitle the bank to charge them against the account, if the proceeds were used merely to replace money which had been misappropriated by the agent.

(October 23, 1906.)

Note.—The effect upon the depositor's right, as against the bank, of intrusting the verification of the bank account and the examination of vouchers to the employee, by whose fraud the bank was induced to make right, as against the bank, of intrusting the case note to *First Nat. Bank v. Richmond Electric Co. ante*, 744.

A PPEAL by plaintiff from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Peoria County in defendant's favor in an action brought to hold defendant liable for the amount of overdrafts upon its bank account. Affirmed.

The facts are stated in the opinion.

Messrs. Page, Wead, & Hunter for appellant.

Messrs. John T. Nichols and Francis H. Tichenor, for appellee:

A party dealing with an agent is bound, at his peril, to ascertain the scope and extent of such agent's authority.

Mechem, Agency, ed. 1889, §§ 76, 85, 88, 273, 706; 1 *Clark & S. Agency*, §§ 210 et seq.; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136; *Blackmer v. Summit Coal & Min. Co.* 187 Ill. 32, 58 N. E. 289; *Bissell v. Terry*, 69 Ill. 184; *Reynolds v. Ferree*, 86 Ill. 570; *Theile v. Chicago Brick Co.* 60 Ill. App. 559; *Schneider v. Lebanon Dairy & Creamery Co.* 73 Ill. App. 612; *Davidson v. Porter*, 57 Ill. 300.

Authority of an agent to borrow money or pledge the credit of his principal can be implied only where the agent is unable to perform the duties of the agency without the exercise of such authority.

1 *Parsons, Contr.* 6th ed. 62; *Mechem, Agency*, §§ 389, 392; *Clark & S. Agency*, § 283; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, supra; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.* 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Heath v. Paul*, 81 Wis. 532, 51 N. W. 876.

One dealing with an agent has no right to rely upon the statements, representations, or acts of such agent, or upon his apparent good faith and integrity in matters pertaining to the agency.

Mechem, Agency, § 716; *Clark & S. Agency*, § 210; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640.

A principal is under no obligation, without notice of some act or acts of a character to put him on inquiry, to inquire or investigate to ascertain whether or not the agent is undertaking to create obligations without authority.

22 Am. & Eng. Enc. Law, 2d ed. p. 1280; *Hinchman v. Whetstone*, 23 Ill. 185; *Munn v. Burges*, 70 Ill. 604; *Aldrich v. Goddell*, 75 Ill. 452.

Appellee owed to appellant no duty of checking Harte's business transactions with appellant for the purpose of ascertaining the condition of that account.

7 L.R.A. (N.S.)

Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69, 16 Am. Rep. 576.

Cartwright, J., delivered the opinion of the court:

Appellant brought this suit in the circuit court of Peoria county against appellee, a corporation of Battle Creek, Michigan, engaged in the manufacture and sale of threshing machinery at that place, to recover \$1,023.60, the aggregate of 24 checks, which created an overdraft of that amount in appellee's bank account. The declaration was in the common counts with an itemized account showing the amount of each check, and the plea was the general issue. The cause was tried by the court without a jury, and there was a finding and judgment for the appellee, which was affirmed by the appellate court for the second district. From the judgment of the appellate court this appeal was prosecuted.

The checks which created the overdraft were signed with the name of the defendant, "by W. H. Harte, Manager," and Harte was defendant's agent at Peoria. At the trial the plaintiff presented to the court propositions to be held as the law, to the effect: First, that the agency was of such a nature that the agent had lawful authority to borrow from the plaintiff the money in question by drawing the checks in the name of the defendant; second, that the defendant was estopped to deny its liability for the amount of the overdraft on account of its failure to perform an alleged duty to the plaintiff to examine its account as shown by the pass book, which had been written up and balanced monthly while the account was running, and to examine the returned checks and to give notice to plaintiff that overdrafts were not authorized; third, that plaintiff was entitled to recover on the ground that the defendant had the benefit of the overdraft. The propositions were refused, and consistent propositions requested by the defendant were held to be the law.

The facts were not in dispute, and were as follows: The defendant sold its threshing machinery and threshing outfits through 11 agencies, established in various states, for different districts. One of these agencies for Illinois and a part of Missouri was located at Bloomington and afterward at Peoria. Harte was placed in charge of the agency at Bloomington in 1900, and remained there until January, 1902, when the agency was transferred to Peoria, and Harte then opened a banking account with the plaintiff, with defendant's knowledge, in its name. The account continued until the discharge of Harte, in June, 1904. Harte had entire charge of the agency at

Peoria, rented a building for the business, employed assistants, fixed and paid their salaries, had charge of about 15 traveling salesmen and 100 local agents for the sale of machinery, paid the bills for all expenses incurred in the business in his district, and made sales, collections, and settlements therein. He was authorized to collect any money due the defendant in his territory, and he received checks and drafts from customers payable to defendant, which he inclosed in its name and deposited the proceeds in plaintiff's bank. The funds with which he carried on the business were received from sales and settlements, or were sent to him by defendant from Battle Creek. Written contracts for sale of threshing outfits were made by him in defendant's name and were to be submitted to the defendant for approval. They were generally so submitted and were always approved, but sometimes sales were made without submitting them, and no objection was made. He made remittances from time to time to the defendant by checks drawn on its account payable to its order. He kept books showing the sales of machinery and repairs, and notes and collections. He signed the checks the same as the checks in controversy in this case, and each month the bank wrote up the account on the pass book and returned the book, with the canceled checks, to him. He kept it in his office at Peoria, and it was never sent to Battle Creek nor seen by any officer of the defendant. In May, 1902, he overdraw the account, and the passbook, when balanced on June 30th, showed a charge of 30 cents for interest. Overdrafts occurred several times thereafter, and in each case there was a small charge for interest. There was no other indication of an overdraft in the pass book, and it showed balances to defendant's credit from time to time. The overdrafts were all covered by deposits, except the last one, created by the 24 checks, which were paid in July, 1904. During his agency Harte made monthly reports to the defendant showing the cash received and paid out in each month, and these statements always showed a cash balance on hand. The statements were generally false, and Harte had appropriated money of the defendant from time to time so that he did not have the cash balance shown by his statements, either in plaintiff's bank or elsewhere. Plaintiff never gave any notice to the defendant of any overdraft, and the defendant never knew of any. On June 30, 1904, Harte reported in his monthly account a cash balance of \$926.72 which had no existence, and he drew on defendant for money to pay current expenses. This led to an investigation, and he reported his shortage to the defendant, the total amount 7 L.R.A. (N. S.)

of which, excluding the overdraft, was \$2,225.57. The 24 checks were drawn by Harte in the ordinary course of the business, and the proceeds were paid for the expenses of the defendant in the business, except four checks, aggregating \$95.52, which Harte received personally.

The payment of the checks when there were no funds of the defendant in the bank constituted a loan of the money paid, and defendant never gave Harte any authority to borrow money on its account by that method or any other. He was supplied by the defendant with the necessary funds to execute the duties imposed upon him, and the only occasion for overdrawing the account was his appropriation of defendant's money. There is no claim that the power was expressly given, but the argument is that the power arose out of the nature of the agency, and that plaintiff had a right to assume that the power existed. It is to be remembered that persons dealing with an assumed agent are bound, at their peril, to ascertain, not only the fact of the agency, but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his act comes within the power and is such as to bind his principal. *Mechem, Agency*, § 276; *Reynolds v. Ferree*, 86 Ill. 570; 1 Am. & Eng. Enc. Law, 2d ed. p. 987. An agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing either what he said or did. *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640. The source of authority is the principal, and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged principal. In this case there was no evidence tending to prove that the power to borrow money was an incident of the agency. For such an act as that an agent must have express authority, or some power must be expressly conferred upon him which cannot be otherwise executed. The fact that the defendant carried on the sale of its products through the medium of agencies distributed over the country would be no ground for a conclusion that the various agents for making sales of machinery and collecting the proceeds were clothed with authority to borrow money. We held, in the case of *Jackson Paper Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, that proof that an agent was the superintendent and manager of a mill, hav-

ing charge of buying material, hiring men, and manufacturing and selling paper, did not justify an inference that he had authority to indorse checks; and surely the same facts or the facts in this case would not justify an inference that Harte had the more unusual power to borrow money and pledge the credit of the defendant.

It is argued, however, that Harte would be presumed to have the power which he exercised for the reason that he was agent of a corporation, and corporations act through agents. Under the same circumstances and in like business, an individual would necessarily act through agents; and we do not understand that the presumptions are any different in the case of a corporation than an individual. When an act pertaining to the business of a corporation, which is not foreign to the corporate powers, is done by an officer within his department, it will be presumed to have been done with the consent of the corporation. *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251. But that is the extent of the doctrine. A principal may be bound to the extent of the apparent authority which he has conferred upon his agent, but that is because he has held the agent out to the public as possessing the power which the agent exercises. In such a case the principal may bind himself by causing others to believe the powers of the agent to be greater than those actually conferred (*Maxey v. Heckethorn*, 44 Ill. 437), but the acts which amount to such representation of the agent's authority must be known to the party setting them up, if he intends to avail himself of them. *Rawson v. Curtiss*, 19 Ill. 456. A party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent. If he has no knowledge of such facts, he does not act in reliance upon them, and is in no position to claim anything on account of them. In this case the defendant never knew, nor had any reason to suspect, that Harte was overdrawing the account, and it never led plaintiff to suppose that he had authority to do so. There is no ground upon which it can be said that the power existed.

It is next contended that the defendant was estopped to deny its liability to plaintiff by its failure to examine the pass book, canceled checks, and check stubs in the hands of Harte at Peoria. The pass book was balanced monthly and showed several small items of interest; and it is said that an examination would have led to information that Harte was overdrawing the account at times, and, if defendant had given timely notice that overdrafts were

unauthorized, the overdraft for which this suit was brought would not have been permitted. In support of that argument a number of cases are cited where there were successive forgeries of checks which were paid, and it was held that where there was no negligence on the part of the bank, and the depositor was negligent in failing to examine his account and returned checks, thereby enabling the forger to repeat his fraud, or depriving the bank of an opportunity to obtain restitution, the depositor should be held responsible for the damages caused by his want of ordinary care. In the case of *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576, the principal had given a clerk, who was bookkeeper and cashier, a power of attorney authorizing him to draw checks on the bank for fifteen days, and this power of attorney was lodged with the bank. After the expiration of that time the clerk continued to draw occasional checks, and appropriated the proceeds, with the exception of a part which were used in paying debts of the firm. There was judgment for the amount of the checks drawn, less the sum applied to such debts, for which the firm gave the bank credit. The pass book had been several times written up, and the paid checks returned, and this had been attended to by the same clerk; the principal not making any personal examination of the account. The bank had notice of the extent of the authority, and it was held guilty of great negligence in paying the unauthorized checks, and not to have been excused for its negligence by a failure of the depositor to examine the checks which had been returned. The court approved of the decision in *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, that the balancing of a pass book and the return of the checks are for the protection of the depositor, and not for that of the bank; and that the failure of the depositor to examine the checks is not such negligence on his part as to exonerate the bank from liability for checks improperly drawn. Those decisions are not necessarily inconsistent with the doctrine that a bank which has been guilty of no negligence may hold a depositor responsible for damages caused by a want of ordinary care under all the circumstances of a particular case. This is clearly shown by the cases relied upon as sustaining that doctrine. In the case of *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 906, the court of appeals of New York said that the authority of *Weisser v. Denison* had stood for nearly fifty years, and they would not feel justified in overruling it; and furthermore, if the question were an open one in that state, they would not deem the rule of

estoppel and ratification a just one. That was a case of forged checks, and in such a case a bank may be unable to detect the forgery and be guilty of no negligence. It was held that a depositor who fails to use ordinary care may become liable for the consequences of his negligence to a bank which has been guilty of no negligence; but the bank was held to have been negligent in the payment of one of the checks, and on that account not entitled to claim anything, as to that check, on account of the depositor's negligence. By these authorities the claim of a bank on account of the depositor's negligence is defeated by its own contributory negligence. In the case of *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, upon which great reliance is placed, it was held that a depositor's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case; that, if a bank has been guilty of negligence in paying forged checks, the doctrine of ratification and estoppel does not apply; and that, if the bank, before paying such checks, could, by proper care and skill have detected the forgery, it could not receive a credit for the amount of the checks, even if the depositor omitted all examination of his account. It is not necessary that a depositor should personally examine his account unless ordinary prudence on his part demands it; and he may be guilty of no negligence in committing the examination of his bank account or checks, in the ordinary course of business, to clerks or agents. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. Even if the plaintiff in this case had not been negligent, the defendant performed any supposed duty to the bank if it did not omit anything which ordinary prudence required. The conclusive answer, however, to the claim of the plaintiff, was that it was itself negligent in not ascertaining the authority of Harte and in paying the checks. The overdraft was not permitted because the plaintiff relied upon an examination of the account by the defendant. There was no reason to suppose that the pass book would be sent to Battle Creek, or that it or the paid checks would come under the inspection of defendant's officers. The defendant knew nothing about the account in the pass book, and notice to Harte was not notice to the defendant of what he was doing. To the general rule that notice to the agent is notice to the principal, there is a well-defined exception that notice will not be imputed to the principal where the facts authorize the inference that the agent will conceal the information. That is the presumption where it would be detrimental to the agent's

interests to disclose the facts. *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Mechem, Agency*, § 723; *Critten v. Chemical Nat. Bank*, supra.

The last proposition of law contended for is that the defendant is liable because the checks which created the overdraft were given in the business of the defendant, with the exception of \$95.52, which went to Harte. In the case of *First Nat. Bank v. Oberne*, 121 Ill. 25, 7 N. E. 85, the principal was permitted to deny the authority of the agent to execute a guaranty, but only upon restoring the money received as the result of the agent's act; but in this case the defendant was the loser to the amount of Harte's defalcation after crediting the proceeds of the checks. While most of the checks creating the overdraft were given by him for expenses, they were, in fact, to replace money which he had misappropriated. He was short in his account to the amount of \$2,225.57, and we do not think that justice required the defendant to add to its loss the amount sued for.

The rulings of the trial court on the propositions submitted to it were in substantial accord with what we have said, and the appellate court did not err in affirming the judgment.

The judgment of the Appellate Court is affirmed.

Farmer and Vickers, JJ., took no part in the decision of this case.

WISCONSIN SUPREME COURT.

JOHN TOPOLEWSKI, Plff. in Err.,

v.

STATE OF WISCONSIN.

(— Wis. —, 109 N. W. 1037.)

Appeal—improper evidence—reversal.

1. A conviction in a case tried without a jury will not be reversed on appeal for admission of improper evidence, unless the court can see that the accused was prejudiced by the error.

Larceny—consent.

2. The trespass necessary to constitute larceny is absent where a property owner, upon being informed of a design to steal

Case Note.—Larceny; effect of owner's conduct in intentionally facilitating the taking: — In *Lowe v. State*, 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956, it was held that, where the criminal design to steal originates with the accused, and the owner of the property does not in person, or by his agent or servant, suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that

his property, places it upon a platform where the intending thief is planning to get it, with instructions to his servant in charge of the platform to deliver it to the one who will call for it, so that when the intended thief arrives he is treated as having a right to the property,—especially where another agent of the owner, sent to arrange for the taking of the property, has agreed to the place proposed by the thief under circumstances which involve a promise of assistance in carrying out the plan.

(December 4, 1906.)

ERROR to the Municipal Court of Milwaukee County to review a judgment convicting defendant of larceny. Reversed.

such owner, suspecting that the accused intends to steal his property, in person, or through his agent or servant, exposes it, or neglects to protect it, or furnishes facilities for the execution of the criminal design under the expectation that the accused will take the property, or avail himself of the facilities furnished, will not, in law, amount to a consent to the taking, even though the agent or servant of such owner, by his instructions, appears to cooperate in the execution of the crime.

In *Alexander v. State*, 12 Tex. 540. it appeared that a slave owner, having discovered the defendant's intention to steal a slave, interposed no obstacle, and perhaps directed the slave to encourage the theft. The owner having no intention that the theft should be consummated, it was held that, so long as he did not induce the original intent in the mind of the thief, but only provided for its discovery after it was formed, the criminality of the thief was not destroyed by the owner's directing the slave to appear to encourage the thief's design, and lead him on until the offense was complete.

In *State v. Duncan*, 8 Rob. (La.) 562, it was held that if, when the prisoner took the horse, he thought he was stealing him, he was guilty of larceny, though the owner had permitted his servant to take the horse and place him where the prisoner could, with greater facility, steal him.

In *McAdams v. State*, 8 Lea, 456, it was held that, if the owner directs his servant to deliver property to a supposed thief, who has not formed the design to steal it, and the latter takes it, there is no larceny, even if the taking is with felonious intent; but he does not so consent to the taking as to excuse the crime where the design originates with the thief, and upon learning of it, he merely directs his servant to appear to encourage and lead the thief on until the offense is complete.

In *Varner v. State*, 72 Ga. 745, defendant was held properly convicted of an attempt to commit larceny where the owner, upon being informed that accused had applied to another for a wagon to be used in hauling

Statement by **Marshall, J.:**

The accused was charged with having stolen three barrels of meat, the property of the Plankinton Packing Company, of the value of \$55.20, and was found guilty. The cause was appealed to and tried in the municipal court of Milwaukee county on evidence taken in the lower court, a jury being waived. The accused was again convicted and sentenced as before to pay a fine of \$100, and \$42.84, costs of prosecution, and to be committed to the house of correction of Milwaukee county, until such payment should be made. There was a motion to set aside the conviction and for a new trial, and also a motion in arrest of judgment.

the cotton which he intended to steal, instructed the other to let the accused have it, and to go with him so that he could catch him; and with the wagon, so procured, the accused drove up to the gin house, and was arrested when he placed his hands on the cotton.

In *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425, it was held that the prosecutor, by feigning drunkenness, staggering around the streets, lying down in an alley, pretending to be in a drunken stupor, and, though perfectly conscious, permitting the defendant to approach him and take money from his pocket without resistance, and without previous suspicion of the defendant, did not consent to the taking.

In *People v. Mills*, 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786, it was held that, if an individual owner voluntarily delivers his property to one who wishes to steal it, there is no trespass; but, when the property of the state is delivered by anyone, under any circumstances, to any person for the purpose of having him steal it, and he takes it into his possession with intent to steal it, there is a trespass, and the attempt is a crime. It appeared in this case that the district attorney, under permission of a judge of the court, removed certain indictments from the files and placed them in the custody of a public officer, who was instructed to, and actually did, hand them over to the defendant. Conviction was affirmed on the ground that the records were the property of the state, and its officers could not lawfully give them away, or permit them to be taken by the defendant.

In *Dodge v. Brittain*, Meigs, 84, it was held not larceny to receive goods from a servant with the owner's consent, it being of the essence of the offense that the goods be taken against the will of the owner. The court said: "A man may direct a servant to appear to encourage the design of the thieves, and lead them on until the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed; that a servant, by the desire of his master may

Both motions were denied. The fine and costs were paid under protest, to avoid the consequences as to imprisonment.

The evidence was to this effect: The Plankinton Packing Company suspected the accused of having by criminal means possessed himself of some of its property and of having a purpose to make further efforts to that end. A short time before the 14th day of October, 1906, one Mat Dolan, who was indebted to the accused in the sum of upwards of \$100, was discharged from the company's employ. Shortly theretofore the accused pressed Dolan for payment of the aforesaid indebtedness, and, the latter being unable to respond, the former conceived

the idea of solving the difficulty by obtaining some of the company's meat products through Dolan's aid and by criminal means, Dolan to participate in the benefits of the transaction by having the value of the property credited upon his indebtedness. A plan was accordingly laid by the two to that end, which Dolan disclosed to the company. Such plan was abandoned. Thereafter various methods were discussed of carrying out the idea of the accused, Dolan participating with the knowledge and sanction of the company. Finally a meeting was arranged between Dolan and the accused to consider the subject, the packing company requesting the former to bring it about, and with

show thieves breaking into the house for plunder where the plate is kept, and, if they remove it, they are guilty of larceny; and that, if a man is suspected of an intent to steal, and another, to try him, leaves property in his way, which he takes, he is guilty of larceny. In all these cases the possession of the property remains with the owner, and a trespass is committed in the taking, by the thief. But such would not be the case if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept."

In *State v. Adams*, 115 N. C. 775, 20 S. E. 722, the owner of cotton, being informed that defendant designed stealing it from his cotton house, employed an agent to do whatever he might think was necessary to catch the thief. After watching the house two nights, and defendant not coming, the agent, on the third night, filled two sacks with cotton and sent one to the defendant's house by a servant, who told defendant where he could get the other sack. Defendant then went to the cotton house and took and carried away the other sack of cotton. It was held error to tell the jury that, if there was the previous intent to steal, the defendant would be guilty notwithstanding the owner's agent had told a servant to go to the defendant's house and persuade him to come and steal the sack.

In *Pigg v. State*, 43 Tex. 108, it was held proper, under the facts, to charge the jury that, if the owner, or someone acting for him, induced the original intent, and acted as one of the parties throughout,—that is, in the original intent to steal and in the acts resulting in theft,—the want of the owner's consent would not be established, and the defendant should be acquitted.

In *Dodd v. Hamilton*, 4 N. C. (Term Rep.) 31, where a slave was sent with money in a bag to a place where the owner of the money and others were lying in wait, and the slave was approached by a third person, who was seized by the owner, and the money was found lying on the ground, without any evidence to show that such person intended to take it, it was held that, even if the money had been found in the possession of the third person, it would not have been larceny because

the owner had consented to its passing into his possession.

In *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, it was held that where the owner consents, or, by his agent, assists, in a taking contrived by himself it is not larceny.

In *Connor v. People*, 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159, it was held that persons cannot be convicted of conspiracy to commit larceny if they merely adopt a scheme which is suggested to them by a detective and which has received the approval of the owner of the property.

If they know, or reasonably believe, that the detective who induced them to join in the taking has the express or implied consent of the owner, they are not guilty. *McGee v. State* (Tex. Crim. App.) 66 S. W. 562.

In *Reg. v. Williams*, 1 Car. & K. 105, a conviction of larceny was held right where it appeared that the prisoner tried to induce a bartender to join him in a plan to steal money from the barkeeper. The bartender refused and reported the matter to his master, who, some two months later, directed him to request the prisoner to call at the barroom, whereupon he called, bought gin, put down a shilling, and the bartender, by his master's direction, gave the prisoner four marked shillings, which he immediately took from the counter and put in his pocket. The only apparent distinction between this case and *TOPOLEWSKI v. STATE* seems to lie in the fact that in the latter the servant, who was directed to stand by and permit the taking, was ignorant of the plan of entrapment and of the thief's guilty intent, while in the former he had knowledge of them. The fact that the ignorant servant also assisted in arranging the wagon after the asportation was complete has no bearing, for it could not operate to excuse the crime already committed.

Williams v. State and *King v. Egginton*, cases in point, are sufficiently set out in *TOPOLEWSKI v. STATE*.

Upon the general subject of instigation or consent to crime for the purpose of detecting criminal as a defense to prosecution, see 25 L.R.A. 341.

knowledge of Dolan causing one of its employees to be in hiding where he could overhear whatever might be said, the arrangement being made on the part of the company by Mr. Layer the person in charge of its wholesale department. At such interview the accused proposed that Dolan should procure some packages of the company's meat to be placed on their loading platform, as was customary in delivering meat to customers, and that he should drive to such platform, ostensibly as a customer, and remove such packages. Dolan agreed to the proposition, and it was decided that the same should be consummated early the next morning, all of which was reported to Mr. Layer. He thereupon caused four barrels of meat to be packed and put in the accustomed condition for delivery to customers and placed on the platform in readiness for the accused to take them. He set a watch over the property and notified the person in charge of the platform, who was ignorant of the reason for so placing the barrels, upon his inquiring what they were placed there for, to let them go; that they were for a man who would call for them. About the time appointed for the accused to appear he drove to the platform and commenced putting the barrels in his wagon. The platform boss supposing, as the fact was, that the accused was the man Mr. Layer said was to come for the property, assumed the attitude of consenting to the taking. He did not actually help load the barrels onto the wagon, but he was by, consented by his manner, and when the accused was ready to go, helped him arrange his wagon and inquired what was to be done with the fourth barrel. The accused replied that he wanted it marked and sent up to him with a bill. He told the platform boss that he ordered the stuff the night before through Dolan. He took full possession of the three barrels of meat with intent to deprive the owner permanently thereof and without compensating it therefor, wholly in ignorance, however, of the fact that Dolan had acted in the matter on behalf of such owner and that it had knowingly aided in carrying out the plan for obtaining the meat.

Messrs. Lenicheck, Fairchild, & Boesel, with Messrs. Blenski & Cordes, for plaintiff in error:

Where the owner, by his agent or otherwise, solicits a person suspected of an intention of stealing to come forward and commit the criminal act, the taking is with the consent of the owner, and therefore does not constitute larceny.

18 Am. & Eng. Enc. Law, 2d ed. p. 472; Love v. People, 160 Ill. 501, 32 L.R.A. 139, 7 L.R.A. (N.S.)

43 N. E. 710; Connor v. People, 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159; Com. v. Hollister, 157 Pa. 13, 25 L.R.A. 349, 27 Atl. 386; State v. Adams, 115 N. C. 775, 20 S. E. 722; Saunders v. People, 38 Mich. 220; People v. McCord, 76 Mich. 200, 42 N. W. 1106.

Messrs. L. M. Sturdevant, Attorney General, and A. C. Titus, for defendant in error:

Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent.

1 Wharton, Crim. Law, § 862.

Setting out the meats upon the platform merely to facilitate a plan the defendant had previously devised for getting hold of the property did not amount to a consent to the taking of them.

People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425; Dodge v. Brittain, Meigs, 84; Varner v. State, 72 Ga. 745; King v. Egginton, 2 Leach. C. L. 913, 2 East, P. C. 494; Reg. v. Williams, 1 Car. & K. 195; Norden's Case, 2 East, P. C. 666; King v. Whittingham, 2 Leach, C. L. 912; Com. v. Nott, 135 Mass. 269; State v. Jansen, 22 Kan. 498; Pigg v. State, 43 Tex. 108; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364.

Marshall, J., delivered the opinion of the court:

Evidence was allowed of a hearsay character, that the accused, prior to the occurrence in question, had been a party to criminally appropriating property of the packing company. Mr. Layer was permitted to testify that the accused at one time conspired with Peter Juston to so obtain some of its property, and succeeded in that regard as said Juston informed the witness, and as was indicated by the books kept by Juston and papers manipulated by the latter. Juston was permitted to testify to such unlawful appropriation of property so far as the purpose of the accused had to do with the transaction. Mere hearsay evidence, subject to some exceptions not important here, is never allowable, and the admission of it is presumed to be prejudicial, unless the contrary clearly appears. Again, on the trial of a person for a particular offense, evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial. Albright v. State, 6 Wis. 74; Fossdahl v. State, 89 Wis. 482, 62 N. W. 185; Boldt v. State, 72 Wis. 7, 38 N. W. 177; Paulson v. State, 118 Wis. 89-98, 94 N. W. 771; Barton v. Bruley, 119 Wis. 326, 96 N. W. 15; Holmes v. State, 124 Wis. 133, 102 N. W. 321.

When a person is charged with being guilty of a particular offense he has a right, which should not be trespassed upon at all, to have the evidence in support of such charge confined to that particular offense. That, of course, has nothing to do with the rule allowing evidence of a former conviction as bearing on the subject of credibility of the accused in case of his offering himself as a witness, nor the rule permitting proof of other offenses so intimately connected with the one charged as to be evidentiary of the intent essential. Cases of the latter character too often lead to the improper admission of evidence contrary to the general rule above stated.

Notwithstanding the foregoing, the admission of the improper evidence does not give cause for a reversal here. In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different. *Harrigan v. Gilchrist*, 121 Wis. 314, 99 N. W. 909. We are unable to see any clear indication that the plaintiff in error was prejudiced by the error in this case. If the judgment is fatally tainted with error the fault lies in a misconception of the law as regards trespass being essential to the crime of larceny, or as to under what circumstances, in regard to the conduct of the owner of the subject of the larceny, such element does not exist.

It was frankly conceded on the oral argument by the learned attorney general that, if the plaintiff in error committed the crime of larceny, Dolan, the decoy of the packing company, was a guilty participant in the matter, unless the element of guilt on his part was absent, because, while in the transaction he acted ostensibly as an accomplice of the accused, his acts were in fact those of the packing company. So, in the circumstances characterizing the taking of the barrels of meat from the loading platform the case comes down to this: If a person procures another to arrange with a third person for the latter to consummate, as he supposes, larceny of the goods of such person, and such third person, in the course of negotiations so sanctioned by such person, suggests the plan to be followed, which is agreed upon between the two, each to be an actor in the matter; and subsequently that is sanctioned secretly by such person, the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offense of larceny; and such person carries out a part of such plan necessary to its consummation assigned to such other in the agreement aforesaid, such third person not knowing that such person is advised of the impending

7 L.R.A.(N.S.)

offense; and at the finality causes one of its employees to, tacitly at least, consent to the taking of the goods, not knowing of the real nature of the transaction,—is such third person guilty of the crime of larceny, or does the conduct of such person take from the transaction the element of trespass or non-consent essential to such crime?

It will be noted that the plan for depriving the packing company of its property originated with the accused, but that it was wholly impracticable of accomplishment without the property being placed on the loading platform and the accused not being interfered with when he attempted to take it. When Dolan agreed to procure such placing the packing company in legal effect agreed thereto. Dolan did not expressly consent, nor did the agreement he had with the packing company authorize him to do so, to the misappropriation of the property. Did the agreement in legal effect with the accused, to place the property of the packing company on the loading platform, where it could be appropriated by the accused, if he was so disposed and was not interfered with in so doing, though his movements in that regard were known to the packing company, and his taking of the property, his efforts to that end being facilitated as suggested, constitute consent to such appropriation?

The case is very near the border line, if not across it, between consent and nonconsent to the taking of the property. In *Reg. v. Lawrance*, 4 Cox, C. C. 438, it was held that, if the property was delivered by a servant to the defendant by the master's direction, the offense cannot be larceny, regardless of the purpose of the defendant. In this case the property was not only placed on the loading platform, as was usual in delivering such goods to customers, with knowledge that the accused would soon arrive, having a formed design to take it, but the packing company's employee in charge of the platform, Ernst Klotz, was instructed that the property was placed there for a man who would call for it. Klotz from such statement had every reason to infer, when the accused arrived and claimed the right to take the property, that he was the one referred to and that it was proper to make delivery to him, and he acted accordingly. While he did not physically place the property, or assist in doing so, in the wagon, his standing by, witnessing such placing by the accused, and then assisting him in arranging the wagon, as the evidence shows he did, and taking the order, in the usual way, from the accused as to the disposition of the fourth barrel, and his conduct in respect thereto, amounted, practically, to a delivery of the three barrels to the accused.

In *King v. Egginton*, 2 Bos. & P. 508, we have a very instructive case on the subject under discussion here. A servant informed his master that he had been solicited to aid in robbing the latter's house. By the master's direction the servant opened the house, gave the would-be thieves access thereto, and took them to the place where the intended subject of the larceny had been laid in order that they might take it. All this was done with a view to the apprehension of the guilty parties after the accomplishment of their purpose. The servant, by direction of the master, not only gave access to the house, but afforded the would-be thieves every facility for taking the property; and yet the court held that the crime of larceny was complete, because there was no direction to the servant to deliver the property to the intruders or consent to their taking it. They were left free to commit the larceny, as they had purposed doing, and the way was made easy for them to do so; but they were neither induced to commit the crime, nor was any act essential to the offense done by anyone but themselves.

In harmony with the case last discussed, in *Williams v. State*, 55 Ga. 391, cited by counsel for the plaintiff in error, it was held that the owner of property may make everything ready and easy for a larceny thereof by one purposing to steal the same, and then remain passive, allowing the would-be criminal to perpetrate the offense of larceny as to every essential part of such offense, without sacrificing the element of trespass or nonconsent; but, if one ostensibly acting as an accomplice, but really for the owner of the property, for the purpose of entrapping the would-be criminal, does acts amounting to the constituents of the crime of larceny, although the accused concurred in and supposed he prompted the act, he is not guilty of larceny. The circumstances of that case were these: The would-be criminal, when he took the property, supposed he was committing the offense of larceny, and that his associate was criminally participating therein; but because, as a fact, such person was acting by direction of the owner, and actually placed the property in the hands of the taker, the element of nonconsent essential to larceny did not characterize the transaction. A distinction was drawn between one person inducing another to commit the crime of larceny of the former's goods, or such person aiding in the commission of the offense, so far as the mental attitude of such other is concerned, by doing some act essential to such an offense, and merely setting a trap to catch a would-be criminal by affording him the freest opportunity to commit the of-

fense. The latter does not sacrifice the element of nonconsent. *State v. Jansen*, 22 Kan. 498; *Varner v. State*, 72 Ga. 745; *State v. Duncan*, 8 Rob. (La.) 562; *Reg. v. Williams*, 1 Car. & K. 195; *King v. Egginton*, supra.

In the case before us the owner of the property, through its agent, Dolan, did not suggest the plan for committing the offense of larceny, which was finally adopted; but the evidence shows conclusively that, by the consent or direction of the packing company, through words or otherwise, he suggested the commission of such an offense and invited from the accused plans to that end. The fair construction of the evidence is that in the finality the plan was a joint creation of the two, and that it required each to be an active participant in its consummation. It seems that there is good reason for holding that the situation in that respect falls within the condemnatory language in the opinion of the court in *Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710, cited to our attention by counsel for the plaintiff in error. That will be apparent from the closing words of the opinion, which are as follows: "A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

We cannot well escape the conclusion that this case falls under the condemnation of the rule that, where the owner of property, by himself or his agent, actually or constructively, aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense. Here Mr. Layer, acting for the owner of the property, packed or superintended the packing of the four barrels of meat as suggested by the owner's agent in the matter, Dolan, and caused the same to be placed on the platform, knowing that the accused would soon arrive to take them, under an arrangement between him and its agent, and directed its

platform boss, when he inquired as to the purpose of so placing the barrels, "Let them go. They are for some man and he will call for them." He, from the standpoint of such employee directed the latter to deliver the barrels to the man when he called, the same in all respects as was done in *Williams v. State*, supra. He substantially made such delivery, by treating the accused when he arrived upon the scene as having a right to take the property. In that the design to trap a criminal went a little too far, at least, in that it included the doing of an act, in effect preventing the taking of the property from being characterized by any element of trespass.

The logical basis for the doctrine above discussed is that there can be no larceny without a trespass. So, if one procures his property to be taken by another intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting and the crime not fully consummated, however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an intention to commit the crime of larceny; but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property as to put him in the position of having consented to the taking. If I induce one to come and take my property, and then place it before him to be taken, and he takes it with criminal intent; or if, knowing that one intends to take my property, I deliver it to him, and he takes it with such intent,—the essential element of trespass involving nonconsent requisite to a completed offense of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present. Some writers, in treating this subject, give so much attention to condemning the deception practised to facilitate and encourage the commission of a crime by one supposed to have such a purpose in view that the condemnation is liable to be viewed as if the deception were sufficient to excuse the would-be criminal, or to preclude his being prosecuted; that there is a question of good morals involved as to both parties to the transaction, and that the wrongful participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offense of larceny. That is wrong. It is the removal from the completed transaction, which, from the men-

tal attitude of the would-be criminal may have all the ingredients of larceny, from the standpoint of the owner of the property of the element of trespass or nonconsent. When such element does not characterize a transaction involving the full offense of larceny so far as the mental purpose of such would-be criminal is concerned, is often not free from difficulty; and courts of review should incline quite strongly to support the decision of the trial judge in respect to the matter, and not disturb it except in a clear case. It seems that there is such a case before us.

If the accused had merely disclosed to Dolan, his ostensible accomplice, a purpose to improve the opportunity when one should present itself to steal barrels of meat from the packing company's loading platform, and that had been communicated by Dolan to the company, and it had then merely furnished the accused the opportunity he was looking for to carry out such purpose, and he had improved it, the situation would be quite different. The mere fact that the plan for obtaining the property was that of the accused, under the circumstances of this case, is not controlling. Dolan, as an emissary of the packing company, as we have seen, was sent to the accused to arrange, if the latter were so disposed, some sort of a plan for taking some of the company's property with the intention of stealing it. Though the accused proposed the plan, Dolan agreed to it, which involved a promise to assist in carrying it out, ostensibly as an accomplice, but actually as an instrument of the packing company. That came very near, if it did not involve, solicitation by the company, in a secret way, for the accused to take its property as proposed. With the other element added of placing such property on the loading platform for the accused to take pursuant to the agreement, with directions, in effect, to the person in charge of the platform, to let the accused take it when he came for that purpose, we are unable to see any element of trespass in the taking which followed. The packing company went very significantly further than the owner of the property did in *King v. Egginton*, supra, which is regarded as quite an extreme case. It solicited the opportunity to be an ostensible accomplice in committing the offense of larceny, instead of being solicited in that regard; and the property was in practical effect delivered to the would-be thief instead of its being merely placed where he could readily trespass upon the rights of the packing company by taking it. When one keeps in mind the plain distinction between merely furnishing opportunity for the execution of a formed design to commit lar-

ceny and negotiations for the purpose of developing a scheme to commit the offense, regardless of who finally proposes the plan jointly adopted, and not facilitating the execution of the plan by placing the property pursuant to the arrangement where it can readily be taken, but in practical effect, at least, delivering the same into the possession of the would-be thief, one can readily see that the element of trespass, involving non-consent, is present in the first situation mentioned, and not in the last; and that the latter pretty clearly fits the circumstances of this case.

The judgment is reversed, and the cause remanded for a new trial.

CALIFORNIA SUPREME COURT.

G. W. DWINNELL, Respt.,
v.

W. F. DYER et al., Appts.

(145 Cal. 12, 78 Pac. 247.)

Mines—location of claim.

1. A location of a mining claim which complies with the act of Congress, but fails to comply with the local statute as to form and record of notice, will, upon the

repeal of the local statute, become valid if the required assessment work has been and is continued.

Same—order of location acts.

2. The order in which the acts for the location of a mining claim have been done is immaterial where every act necessary to a complete location has been done before an adverse claim has accrued.

(McFarland, J., dissents.)

(April 28, 1904.)

A PPEAL by defendants from a judgment of the Superior Court for Siskiyou County in plaintiff's favor in an action brought to establish a mining claim. Reversed.

The facts are stated in the opinions.

Messrs. Gillis & Tapscott, for appellants:

After the repeal of the statute defendants might adopt their former valid acts.

Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Crown Point Gold Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87; North Noonday Min. Co. v. Orient Min. Co. 6 Sawy. 299, 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. 703.

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Defendants could hold the portion of the claim of which they had actual possession.

Armstrong v. Lower, 6 Colo. 581; *Lebanon Min. Co. v. Consolidated Republican Min. Co.* 6 Colo. 371; *Faxon v. Barnard*, supra; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 503, 11 Fed. 125; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 209, 31 Cal. 390; *Hess v. Winder*, 30 Cal. 355; *Rogers v. Cooney*, 7 Nev. 219; *Campbell v. Rankin*, 99 U. S. 262, 25 L. ed. 436; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732.

Mr. R. S. Taylor for respondent.

Chipman, C., filed the following opinion:

Plaintiff alleges ownership of a quartz

mine called Cuban Beauty No. 2, situated in Siskiyou county; that defendants unlawfully entered upon plaintiff's said land with force and arms, and drove off plaintiff's men there employed, and are excavating gold-bearing rock contained therein. It is prayed that defendants be enjoined from interfering with said mining property, and that plaintiff be adjudged to be the owner thereof. Defendants Oscar Dyer and Charles Trucdale disclaimed all interest in the land in controversy. Defendant W. F. Dyer answered, claiming ownership in certain three mining claims, known as Squaw Creek Gold Mine No. 1 and No. 2 and No. 3. It is alleged that a portion of plaintiff's said claim overlaps a portion of Squaw Creek Gold Mines Nos. 2 and 3; ownership is claimed at the commencement of the action and some time prior thereto, and that defendant and

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his predecessor in interest have been in possession continuously since September 12, 1898, and since said date have been entitled to possession; denies plaintiff's ownership of any part of said overlapping ground; denies interference with plaintiff or claim of his said alleged claim except as to said triangular piece. The court found the facts for the plaintiff, and, as conclusions of law, found that plaintiff is the owner, and entitled to have defendants restrained from interfering therewith. Judgment was accordingly entered, from which, and from the order denying their motion for a new trial, defendants appeal.

Certain errors of law occurring at the trial are specified by defendants, but, as they are not noticed in their brief, they will be deemed waived. Appellants' contention is that the evidence does not sustain the find-

ings in certain particulars, namely: (1) That at the time plaintiff made his location, November 26, 1900, the ground was unoccupied and subject to location; the contention of defendant being that he had long prior to that date made a valid location of ground including that in dispute. (2) Under like contention, the finding is claimed as unsupported that plaintiff complied with law. (3) Also as unsupported that one Grant Davis had attempted to locate the same land as that covered by plaintiff's location, and thereafter sold and conveyed the same to plaintiff; and this because the Davis location was in conflict with a prior location by defendant; that the Davis location did not include any ledge in place; that Davis had made no discovery of mineral in place within the lines of his location. (4) Also as unsupported, so far as concerns de-

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I. "Mining claim" and "location" defined.

A mining claim is a parcel of land containing precious metal in its soil or rock. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

"Mining claim" is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes and holds in accordance with mining laws, local or statutory. *Mt. Diablo Mill & Min. Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886.

And it includes the vein specifically located, and also all the surface ground located on each side of it, and all other veins

pendant, that the attempted early locations of Davis and of defendants Dyer and Phillips were not made in compliance with the law then in force, to wit, the act of March 27, 1897, of this state; defendant's contention being that his location was valid.

There is evidence that Davis made his location October 30, 1898, on which day he posted notice at the center of the north line of the claim bordering on the so-called Cuban Beauty. The lines were run out, and corners marked. The notice was not recorded until September 8, 1899. The Cuban Beauty and the Dewey, both of which corner with the Cuban Beauty No. 2 at the northeast corner of the latter, were located at the same time by the Davis party, and formed one group of mines. Davis subsequently

also located the Black Bear No. 2, which lies south of and adjoining the Cuban Beauty, and west of the Cuban Beauty, No. 2, and joins it, but extends south less than half the length of the latter. He conveyed to plaintiff on November 27, 1899, by deed placed in escrow, which was delivered on compliance with the contract of sale in September, 1900. There is evidence, though not without conflict, that when these locations were made there was no other location, or signs of any other location, of the ground involved. On November 26, 1900, plaintiff relocated the Cuban Beauty No. 2 through one Cousins, who did the work. This location was intended to be and was substantially identical with the original Davis location. Cousins testified that Davis

or lodes apexing inside the surface lines. *Ibid.*

Independent of the acts of Congress providing a mode of acquisition of title to the mineral lands of the United States, the term has always been applied to a portion of such lands to which the right of exclusive possession and enjoyment by a private person or persons has been asserted, by actual occupation or by compliance with the local mining laws, rules, usages, or customs. *Williams v. Santa Clara Min. Asso.* 66 Cal. 193, 5 Pac. 85.

As the term is used in the statutes of the United States, it is that portion of a vein or lode, and of the adjoining surface of the earth, or of the surface and subjacent material, to which a claimant has acquired a right of possession by virtue of compliance with the laws of the United States, and the local rules and customs of miners.

And where a claim is located upon a discovery within its limits of a vein or lode of quartz-bearing copper and gold, which is in all respects regular, it is a "mining claim" within the meaning of the proviso in the act of Congress of June 3, 1878, as amended by the act of Congress of August 4, 1892, and not subject to purchase under that act, though the application to purchase was made so soon after the location that the locator had no reasonable opportunity to develop his claim sufficiently to ascertain with any certainty the extent or value of the mineral deposits contained therein. *Michie v. Gothberg*, 30 Land Dec. 407.

But the mere existence of quartz or a vein does not, of itself, constitute a mine, or warrant the discoverer in locating a mining claim, so as to render a trespasser thereon liable under Mont. Comp. Stat. § 1482, p. 1055, providing that any person who shall remove any stake or monument of any claim, or obliterate, deface, or destroy any notice placed thereon, shall be deemed guilty of a misdemeanor. *Territory v. Mackey*, 8 Mont. 168, 19 Pac. 395.

So, a location of a mining claim is the act of appropriating a parcel of land containing precious metal in its soil or rock according 7 L.R.A.(N.S.)

to established rules. *St. Louis Smelting & Ref. Co. v. Kemp* and *McFeters v. Pierson*, *supra*.

The word "location" includes all the acts requisite to perfect the right of possession of a mining claim, including the discovery. *Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co.* 73 C. C. A. 35, 141 Fed. 563; *McKay v. McDougall*, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669.

And it usually consists in placing on the ground in a conspicuous position a notice setting forth the name of the locator and the fact that the claim is located, with a description of the extent and boundaries of the parcel located according to statutory authority or local customs. *St. Louis Smelting & Ref. Co. v. Kemp*, *supra*.

It does not mean merely the initiation of a location by entry and performance of the first necessary step. *McKay v. McDougall*, *supra*.

Nor is a location of a mining claim made by taking possession alone, but by marking on the ground, recording, and doing whatever else is required for that purpose by act of Congress and the local laws and regulations. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *Noyes v. Black*, 4 Mont. 527, 2 Pac. 769; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735.

It is the discovery by a qualified person of a lode or vein of mineral-bearing rock in place on the vacant land of the United States, and the appropriation thereof, evidenced by posting notice and recording the same, and by marking on the ground the boundaries so that they may be readily traced, that initiates a valid mining claim. *SHARKEY v. CANDIANI*.

And the essentials to complete location which will vest title in the claimant usually are, first, discovery; second, notice; third, location; fourth, marking the boundaries; and fifth, record. *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 350, 47 N. W. 290; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

The word "location," in its application to mining claims, however, is frequently used

had previously shown him the lines and corners, and in January, 1900, defendant Oscar Dyer, in company with Davis, showed him some of the lines and corners. Speaking of the relocation in November, 1900, he testified: "At the time I located this claim, I went all over it. As for mining work, there was a small hole dug on it. In some small places it was picked a little. There wasn't a square yard of dirt or rock moved in any one place. I don't think it would amount to a cubic yard." When Oscar Dyer was with Cousins in January, 1900, he told Cousins that his brother (defendant) claimed the ground west of the southeast corner of the Davis claim, and that more than the assessment work had been done. Cousins testified: "I then said that I had seen they had.

But it wasn't on what we claimed. They hadn't hit a lick of work on what we claimed. North of our south line he had done a lot of work upon the hill and on the ground we didn't claim."

It appears from plaintiff's testimony that he relocated the Cuban Beauty No. 2 because of some doubt of the legality of the Davis location under the state mining law of 1897, and his attempt to do the assessment work was in order to hold the claim if the Davis location was legal. As to the relocation in 1900, the assessment work becomes immaterial, as it might be done at any time during the year 1901, and the action was tried in August of that year. It also appeared from plaintiff's testimony that he acquired all the Davis group of claims, and the contract of

in a restricted sense to portray the placing of the claim, the posting of the notice, and the marking of the boundaries, excluding discovery. *Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. supra.*

And the use of the word "location" with relation to mining ground, in an agreed statement of facts in a controversy stipulating that the lode claims of the plaintiff were located in compliance with the law at dates anterior to the location of defendant's tunnel site, and as to an issue made in the pleadings upon the question whether mineral in rock in place was discovered upon the plaintiff's claim before the location of the tunnel site, the testimony tending to negative such discovery, is in its restricted sense, excluding discovery, and does not estop the defendant from litigating the issue relative to the discovery of mineral in rock in place in the plaintiff's claim prior to location of the defendant's tunnel site. *Ibid.*

So, in mining parlance the word "location" is sometimes used as synonymous with the term "mining claim." *McPeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

But this use of the term has grown incidentally out of the fact that the mining claim is located; and it cannot be deemed a strictly correct one.

For examples of the use of the word "location" in its restricted sense, as indicating a mere placing of the claim, see *infra*, VII. f.

II. Scope of note.

For the purpose of this note, the word "location," though sometimes used in its more restricted sense, is to be given its broader scope, including all the acts requisite to perfect the right of possession of a mining claim. And what is here intended to be considered is the act of locating, not the thing located. It is not intended, however, to include anything beyond the steps necessary to initiate and perfect a right of possession. Questions of forfeiture by abandonment, or failure to work the claim, or

otherwise, of rights once fully acquired, are not regarded as legitimately within the scope of this note. Though the rule has been adopted, as seems to have been done in at least one jurisdiction, that assessment work is a part of the process of location, and that this must be properly done to constitute a complete location, the question of the effect of failure to do it is one of forfeiture rather than of location, and cases on that subject have been left for future consideration.

The design of this note is to consider the questions, What may be located as a mining claim? Who may locate? and What steps must be taken to consummate a location? Questions as to rights acquired by location or as to rights lost after acquisition, are not within the scope of this note. Nor is the subject territorially unlimited. Both before and after the enactment by Congress of the mining laws, the right to appropriate mineral lands was confined, as we shall see (*infra*, III. V.), to the public lands of the national government; and since, in the thirteen original states, the national government never owned any public lands, there is nothing in them to which location can apply. So, though in a number of the other states much of the land was originally public domain, it has been disposed of in other ways, as by sale, and by provision for leasing, etc., so as to leave nothing to which rules with reference to location of mining claims are applicable. With some exceptions of a minor character, mining laws and rules with reference to locations of mining claims upon the public domain would appear to be confined in their operation to the precious-metal-bearing states and territories, consisting of Alaska, Arizona, Arkansas, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

The act of Congress of May 17, 1884, establishing a civil government for Alaska, extends to it the provisions of the mineral laws of the United States; and the acts of Congress relating to the location and possession of mining claims constitute the law

sale calls for the payment of \$125,000 for all the mines. There were some others besides the three mentioned by plaintiff in his testimony following: "There were three claims,—the Cuban Beauty, the Cuban Beauty No. 2, and the Admiral Dewey,—and that work [the assessment work for 1899] on the Admiral Dewey was supposed to develop the three claims, and was done for that purpose; and then I did the assessment work for those three claims on the Admiral Dewey. I spent about \$3,000 on the Admiral Dewey for the time in doing it. I ran about 500 feet of tunnels, and then I built some buildings, and then I fixed the trail and general development of the mining claims." Allen Davis testified that he was working on the Dewey mine about May 1, 1899, and met

defendant William Dyer there at that time; and, in a conversation, Dyer, in reply to a question as to the line between sections 6 and 7, and as to whether his location extended into section 6, pointed out about where the section line was, and stated: "I haven't got anything in 6. All of mine is in section 7." The south line of the Cuban Beauty No. 2 is admittedly a considerable distance north of this section line,—“300 or 400 feet,” as testified by witness Cousins. Dyer's claims did in fact extend onto section 6, and he probably meant no more in his statement to Cousins and those present than that he claimed nothing within the lines of the Davis location of the Cuban Beauty No. 2. Dyer knew where the section line was, and so testified. The court found that the

of Alaska on that subject. *Meydenbauer v. Stevens*, 78 Fed. 787; *Price v. McIntosh*, 1 Alaska, 286.

As to branches of subdivisions of the general subject of location of mining claims, heretofore treated in this series, reference is made to note, “Veins intersecting, crossing, or uniting,” to *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 50 L.R.A. 209; note, “Lodes or veins within placer claims,” to *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 50 L.R.A. 289; note, “Rights under tunnel-site locations,” to *Brewster v. Shoemaker*, 53 L.R.A. 793; and note, “Relocation of mining claim as abandoned or forfeited,” to *Wilson v. Freeman*, 68 L.R.A. 833.

III. Location previous to mining statutes.

a. Foundation of the right.

Previous to the Federal mining acts of 1866 and 1872, there existed no provision for the disposition of the public mineral lands; but a system was permitted to grow up by the voluntary action and assent of the population by which such lands were appropriated and used for mining purposes by the free and unrestrained occupation of the mineral regions for the purpose of taking minerals, which was tacitly assented to and encouraged by the government; and the right of miners to be protected in their selected localities came to be regarded as having the force and effect of *res judicata*. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113.

This right was based upon appropriation and possession. *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *Brown v. 49 & 56 Quartz Min. Co.* 15 Cal. 153, 76 Am. Dec. 468.

The rights of miners who had taken possession of mines and worked and developed them were rights which the government had, by its conduct, recognized and encouraged, and was bound to protect. *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790.

And, in determining controversies between persons in possession, for mining purposes, 7 L.R.A. (N.S.)

of mining lands belonging to the United States, the court proceeded upon the presumption of a grant from the government to the first appropriator of mines, water privileges, and the like. *Coryell v. Cain*, 16 Cal. 567.

And the question involved in ejectment for mining claims upon public lands was, Which one of two competing claimants, as against the other, had the better right to mine the land in question? and the doctrine that the plaintiff must recover upon the strength of his own title did not apply. *Richardson v. McNulty*, 24 Cal. 339.

Actual possession was *prima facie* evidence of title in the possessor, and was protected by law against lawless invasion without right or color of right; and a person who knew that a mining claim was in the actual possession of another could not make an entry thereon in good faith, unless it was made by some right, or color of right, existing before the entry. *Phenix Mill. & Min. Co. v. Lawrence*, 55 Cal. 143.

And an entry and location of a mining claim in the possession of another was invalid and conferred no rights, where the locator entered not upon faith of any title in himself, but to take advantage of what he supposed to be a defect in the title of the person in possession. *Ibid*.

b. Miners' rules and regulations.

The fact that undefined possession was calculated to lead to conflicting interests appealed to the love of order and system and of fair dealing possessed by the vast number of miners attracted to mining regions by the discovery of gold in the west, in common with the rest of the American people, and led to the framing by them, in the different regions which they occupied, of rules, differing in different districts only according to the extent and character of the mines, for their government, by which they were permitted to appropriate ground for mining purposes, and the extent of the ground they could severally hold was designated, their possessory right to such ground secured and

Squaw Creek No. 2 included some of the ground embraced in the Cuban Beauty No. 2.

It is not necessary to discuss the validity of the original location by Davis, for the court found that it was not made in conformity with the state law (Stat. 1897, chap. 159, p. 214), and the finding cannot be questioned by plaintiff. *Cowing v. Rogers*, 34 Cal. 648. Nor do we think it necessary to examine the evidence, particularly as to the validity of the Dyer locations made about the same time, for they also failed to comply with the statute, and the court so found. Dyer subsequently posted a new notice, January 14, 1899, recorded March 13, 1899. The statute above referred to was in force until February 28, 1899, when it was repealed. Stat. 1899, chap. 113,

p. 148. Dyer claims under this location, as well as his location in 1898. But we think the evidence fails to establish the validity of either location, while there is evidence showing the validity of plaintiff's location of November 26, 1900. As we understand the purpose of the evidence as to these early locations, it was not so much to show valid locations in fact as it was to show the intention of the locators as to the particular ground in question. Appellant's contention is that he took all the ground south and west of a line drawn from the southeast corner of the Brown Bear claim to what is now claimed by plaintiff to be the southeast corner of the Cuban Beauty No. 2, and, as the Brown Bear claim lay west of the Cuban Beauty No. 2, and extended only about 600

enforced, and contests between them either avoided or determined. *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240.

These regulations, rules, and customs were appealed to in controversies in the courts, and received their sanction. *Ibid*.

And the manner of locating a mining claim upon the public domain was regulated by the rules and by-laws made by the inhabitants of the district in which the claim was situated, or, in the absence of such rules and by-laws, by the local usages and customs of the district. *Sullivan v. Hense*, 2 Colo. 424; *Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co.* 9 Colo. 343, 12 Pac. 212; *Mallett v. Uncle Sam Gold & S. Min. Co.* 1 Nev. 188, 90 Am. Dec. 484.

And a right to a mining claim vested upon the taking in accordance with local rules. *McGarrity v. Byington*, 12 Cal. 426, 2 Morrison. Min. Rep. 311.

Where such rules, customs, or usages existed in a mining district, a valid location of a mining claim could be made only according to their requirements. *Sullivan v. Hense*; *Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co.*; and *Mallett v. Uncle Sam Gold & S. Min. Co.*—*supra*; *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 32 L. ed. 172, 8 Sup. Ct. Rep. 1214.

And where local mining customs existed with reference to locating mining claims, controversies affecting a mining right were required to be solved and determined by them, whether they were written or unwritten. *Morton v. Solambo Copper Min. Co.* 26 Cal. 527, 4 Morrison, Min. Rep. 463.

The title presumed to rest in the first appropriator of mining lands was a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. *Mallett v. Uncle Sam Gold & S. Min. Co.* *supra*.

And a miner locating a claim where no mining laws existed held it by actual occupancy and such work for the development of the mine as, under all the circumstances, was deemed reasonable. *Ibid*.

The rule that the mode of acquiring a min-

ing claim, and its extent, were governed by local mining rules, was not deemed inconsistent with the statutory provision giving effect to local regulations, provided such regulations should not be inconsistent with the Constitution or laws of the state, where no right of property would attach or was affected thereby. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

And, under a statutory provision that customs, usages, and regulations shall govern the decision of an action with reference to possession of certain mining claims, no distinction is made between the effect of a custom or usage, proof of which must rest in parol, and a regulation which may be adopted at a miners' meeting, embodied in a written local law. *Harvey v. Ryan*, 42 Cal. 626.

c. What land could be taken.

Previous to the Federal statutes on the subject, by the policy of the government all citizens were permitted to dig for gold and silver upon the public lands. *Hicks v. Bell*, 3 Cal. 219; *Stoakes v. Barrett*, 5 Cal. 37.

As a general rule the public mineral lands of the state were open to the occupancy of every person who, in good faith, chose to enter upon them for the purpose of mining. *Gillan v. Hutchinson*, 16 Cal. 153.

And, under a statutory provision in California that all lands shall be regarded as public lands until the legal title is shown to have passed from the government to private parties, a person going upon mineral land to mine is not presumed to be a trespasser. *Burdge v. Smith*, 14 Cal. 380; *Smith v. Doe*, 15 Cal. 100.

And the mere possession of a tract of mineral land was not sufficient to support ejectment as against a person entering upon and occupying it for mining purposes. *Smith v. Doe*, *supra*.

But to authorize the invasion of private property in order to mine for gold or silver required specific legislation. *Stoakes v. Barrett*, 5 Cal. 36.

And the California act of April 20, 1852,

feet along the latter, the said line would cut off more than a third of the southwest portion of the Cuban Beauty No. 2, including the ledges and rock in place found on the latter by Davis, its original locator. This contention of appellant is based largely on evidence that Davis himself conceded this to be the dividing line in February, 1890, when he and appellant and some other persons were on the ground for the purpose of ascertaining its location. It appeared, however, that, when Davis took the party to what in fact was the southeast corner of his claim, he by mistake told them it was the southwest corner, and that his southeast corner lay over east, near the Chadwick claim. The evidence here is in sharp conflict, and there is evidence that the Cuban

Beauty No. 2 was laid out originally as claimed by plaintiff, and that, when Davis pointed east for his southeast corner, he by mistake called it the southwest corner, which would thus cut off the triangular piece in the southwest part of the claim. This was all cleared up to the satisfaction of the trial court, and, as there was evidence to support its conclusion, it cannot now be disturbed. Besides, the trial court held that, as these declarations of Davis were made after he had sold the property to plaintiff, they were inadmissible as affecting plaintiff's title; and this ruling, though objected to at the time, is not now questioned. The bearing of this evidence was confined to its effect upon statements of plaintiff's witnesses as to where the lines of plaintiff's claim

prescribing the mode of maintaining and defending possessory actions on public lands, gave permission to all persons to work the mines upon public lands, notwithstanding that they might be in the possession and enjoyment of another for the purpose of agriculture or grazing. *Ibid.*; *Rupley v. Welch*, 23 Cal. 452.

And, under that act, the rights of agriculturists in the occupation of public lands were made to yield to those of the miner, where gold was discovered in their lands. *Tartar v. Spring Creek Water & Min. Co.* 5 Cal. 395.

Miners were given the right, in good faith, to extract any valuable metals that might be found in lands occupied by settlers for agricultural purposes, provided it was exercised in the most practicable manner and with the least injury to the occupant. *McClintock v. Bryden*, 5 Cal. 97, 63 Am. Dec. 87; *Clark v. Duval*, 15 Cal. 85; *Smith v. Doe*, *supra*.

Nor was this right affected by the fact that the occupant for agricultural purposes located upon such lands prior to legislation authorizing the location for mining purposes. *McClintock v. Bryden*, *supra*.

Or by the fact that lands taken up for agricultural purposes had been inclosed. *Clark v. Duval*, *supra*.

And the cultivation of land and the raising of crops of grain or grass thereon were uses of land purely for agricultural or grazing purposes, within the meaning of a statute providing that possession of public lands containing mines of precious metals, for agricultural and grazing purposes, shall not preclude the working of such mines by any person desiring to do so. *Rupley v. Welch*, *supra*.

But, while the legislature, in California, saw fit to foster and protect the mining interests as paramount to all others, in permitting miners to go upon public lands occupied by others, it legalized what would otherwise have been a trespass; and its act could not be extended by implication to cases, or classes of cases, not specially provided for. *L.R.A. (N.S.)*

vide for. *Fitzgerald v. Urton*, 5 Cal. 308; *Burdge v. Underwood*, 6 Cal. 45.

And a miner had no right to dig or do other work within the inclosure surrounding a dwelling house, corral, or other improvements of value. *Burdge v. Underwood*, *supra*.

And occupation of a lot on mining lands for the purpose of hotel keeping was not inconsistent with the policy of the law with regard to mining claims; and the person so occupying had a right to be reasonably protected in his occupation, and could not be disturbed by a person endeavoring to mine in his inclosure. *Fitzgerald v. Urton*, *supra*.

And, by the California act of April 25, 1855, it was provided that whenever any person shall, for mining purposes, desire to occupy or use any mineral lands then occupied by growing crops, he shall give a bond to the owner of the crops conditioned to pay any damage sustained by reason of their destruction. *Rupley v. Welch*, *supra*.

This act merely regulated a right to mine on public lands used for agricultural purposes, previously vested in the miner, and was not subject to constitutional objection. *Ibid*.

Though it was designed for the protection of growing crops and improvements in the mining districts of the state, and, so far as it purported to give a right of entry upon mineral lands in case no such right existed anterior to its passage, it was clearly invalid. *Gillan v. Hutchinson*, 16 Cal. 153.

And under it valuable and permanent improvements, such as houses, orchards, vineyards, etc., and growing crops of every description, were protected against appropriation for mining purposes. *Ibid*.

And a tract of land taken up under the California possessory act, and inclosed, and upon which were planted fruit and ornamental trees and shrubbery, could not be entered upon and dug up for mining purposes, so as to destroy the trees and shrubbery; and such entry and destruction might be enjoined. *Daubenspeck v. Gear*, 18 Cal. 444.

But where a miner desiring to mine on

were in fact located. Appellant used at the trial a plat by way of illustration. Much of the evidence brought out in connection with this map is so reported as to be unintelligible here, though doubtless was understood by the trial judge. The diagram was not proved to be correct. It furnishes us but little aid, because not drawn to show the exact situation of the several claims referred to in the evidence, and is but an approximation of their relation to each other. It is confusing by reason of this fact, and also because the top of the map is south instead of north, which latter is the usual and better method of preparing illustrative maps. From the best consideration we can give of the evidence with this map in hand, we think the findings are supported.

lands occupied for agricultural purposes offered to give the proper bond to indemnify the occupant against damage from the destruction of his crops, provided for by law, and the occupant refused to receive such bond, the entry of the miner upon such land for mining purposes was not unlawful and could not be treated as a trespass; but he was liable for damage to the growing crops caused by his acts, and was compelled to give the bond required by statute upon demand. *Rupley v. Welch*, 23 Cal. 452.

And the owner of an orchard upon public lands could not restrain miners from digging up his ground for mining purposes, where the trees planted thereon were not planted in good faith, but rather as a means of stopping the mining. *Ensminger v. McIntire*, 23 Cal. 593.

Nor could he do so unless he showed priority of appropriation of the land in controversy. *Ibid*.

So, the act of a person of taking up and inclosing 12 acres of mineral land in a mining district under the pretext of holding it in exclusive occupancy as a town lot did not affect the right of a miner subsequently to enter upon the land in good faith for the purpose of digging gold therein, where in his operations he did no injury to the comfortable use of the premises as a residence, or for carrying on any mechanical or commercial business. *Martin v. Browner*, 11 Cal. 12.

Nor did an entry upon a portion of public land by virtue of the California act of 1858, as seminary land, to which the state was entitled under act of Congress, prevent its subsequent entry by another for the purpose of the extraction of gold, and the use of the water running through it as auxiliary to mining, where the land was mineral land. *Burdge v. Smith*, 14 Cal. 380.

And a person might take up a claim for mining purposes that had been and still was used as a place for tailings by another, though his mining right would be subject to this prior right of deposit; but the claim of the miner would not be subject to those who should come after him. *O'Keiffe v. Cunning*, 7 L.R.A. (N.S.)

The principal point urged by appellant is that he was in possession of the contested ground when plaintiff made his last location, and therefore it was not unoccupied mineral land and subject to location by plaintiff. Defendant claims from the evidence that the man sent to relocate the claim for plaintiff was driven off by defendant before he did any work; that defendant had a dwelling house on the claim, was living in it and working on the claim, and had done about \$2,000 worth of work on it; and had the claim marked off so that the boundaries could be readily traced. And it is claimed that plaintiff had to commit a trespass upon the ground in order to locate. The decisions are not entirely harmonious as to whether an occupation such as is described above,

ham, 9 Cal. 589, 9 Morrison, Min. Rep. 451.

And one person might locate ground containing mineral for fluming purposes, and another might, either at the same time or at a different time, locate the same ground for mining purposes; and the two locations, being for different purposes, would not be in conflict. *Ibid*.

The rights of miners and persons owning ditches constructed for mining purposes, however, were not paramount to all other rights of a different character, regardless of time or mode of their acquisition. *Wixon v. Bear River & A. Water & Min. Co.* 24 Cal. 367, 85 Am. Dec. 69.

And a person entering lands for mining purposes could not divest the vested right of property of another in a reservoir which he had constructed across the bed of a ravine for the purpose of collecting the water flowing down the same for the purpose of irrigating a garden or fruit trees. *Rupley v. Welch*, *supra*.

So, Cal. act March, 1856, § 11, for the protection of actual settlers, and to quiet titles in the state, was designed for the benefit of those who desired to build up homes in the country, and for that purpose were seeking, in good faith, lands for settlement and occupation; and miners engaged simply in extracting gold from a quartz vein were not "settled upon" the vein, within the meaning of these words as used in the statute, so as to permit them to avail themselves of the two years' limitation of that act. *Fremont v. Seals*, 18 Cal. 434.

Nor could one entering upon public lands for mining purposes when the lands have been taken up for other purposes justify his entry in any way, except by showing that the land was public land, that it contained mines or minerals, and that the person entering did so for the bona fide purpose of mining. *Lentz v. Victor*, 17 Cal. 271.

And that lands were public lands, and that they contained mines or minerals, and that the person entering upon them against a prior possession did so for the bona fide purpose of mining, were in the nature of a

under an invalid location, would be sufficient to prevent a valid location being made by another qualified person, provided he could do so without the use of force. The question is not necessarily involved in this case. There is evidence, which the trial court accepted, showing that the facts are not as above claimed. Defendant had done much work on a claim at considerable distance from plaintiff's claim, and he had a dwelling house on one of his claims, but it was a mile from plaintiff's claim. There was evidence that these improvements were not on any claim that encroached upon plaintiff's claim. Defendant's map shows a cabin which was erected by defendant more recently, but it is not on plaintiff's claim. The only work done by defendant on any

part of plaintiff's claim is described as of but small extent. The evidence is not that Cousins, who made plaintiff's location, was driven off by defendant at the time the location was made. This circumstance happened some time before, when he went there to do assessment work under the Davis location. So far as the evidence shows, Cousins made the relocation peaceably, and without interruption or objection by any person. He was familiar with the lines by previous examination of them, and he testified that when he relocated the claim he went all over it, and found only such evidences of work on it as have been already stated. He found no person on any part of the claim, and no one in actual possession of any part of it. The utmost that can be said

justification of the entry as against an apparent and prima facie right of the actual prior possessor; and were required to be affirmatively pleaded, with all the requisite averments to show the right under the statute, or by law, to enter, in an action of ejectment brought by the actual possessor against the person so entering. *Ibid.*

So, previous to the Federal mining laws, the acquisition of possessory title to land valuable only for the metals which it contained, such as land on which tailings had been deposited, which was not claimed for any other purpose, was governed by the same rules ordinarily controlling possessory titles to mining claims. *Rogers v. Cooney*, 7 Nev. 213.

And whether a town lot located by a miner for mining purposes was so necessary for his use to enable him to work his mine as to make his right superior to that of a pre-emptor, in accordance with the act of Congress of July 1, 1864, providing that, where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to lodes to be acquired shall be subject to such recognized possession, and the necessary use thereof, was a question of fact for the jury. *Courchaine v. Bullion Min. Co.* 4 Nev. 369.

d. The question of possession.

While mining claims were held by possession, that possession was regulated and defined by usage and local and conventional rules; and the actual possession which is applied to agricultural lands was not required, in case of a mining claim, in order to give a right of action for the invasion of it. *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

And going on a lead to work it, or even work done in proximity to it, for the purpose of extracting, or preparing to extract, minerals from it,—as, for example, starting a tunnel a considerable distance away to run into a claim,—constituted possession of the claim, which would sustain an action against a person subsequently taking possession. *English v. Johnson*, 17 Cal. 107, 7 L.R.A. (N.S.)

76 Am. Dec. 574, 12 Morrison, Min. Rep. 202.

But the possession of a mining claim which enabled one to maintain an action must have been either actual possession or constructive possession, under the rules or regulations of miners. *Pralus v. Jefferson Gold & S. Min. Co.* 34 Cal. 558.

And a claim of possession of lands for mining purposes must have been in some way defined as to limits before possession of, or working upon, it gave possession to any more than that part so possessed or worked. *Attwood v. Fricot*, supra.

And constructive possession of a mining claim, which would sustain an action to quiet title thereto, could be established only by proof of local mining customs, rules, and regulations in force in the district embracing the claim, and that particular acts were required thereby in the location and working of claims, and that the locator had substantially complied with such requirements. *Pralus v. Jefferson Gold & S. Min. Co.* supra.

But actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extended by construction to the limits of the claim held in accordance with such custom. *Hicks v. Bell*, 3 Cal. 219; *Attwood v. Fricot*, supra.

And a person who made a location of a small tract of mining land of demarked limits, and took possession thereof, was prima facie rightfully possessed, in the absence of any proof that his claim was opposed to the local rules. *English v. Johnson*, supra.

And such possession taken for mining purposes embraced the whole claim thus characterized, though the actual occupancy or work was on or of only a part, and though the party did not enter in accordance with mining rules or under a paper title. *Ibid.*

And, when accompanied with actual occupancy of a part of the tract, was sufficient to enable the possessor to maintain ejectment for the entire claim. *Table Mountain Tun-*

of the evidence in support of defendant's contention is that he had an invalid location on which he had done much work outside the boundaries of the claim in dispute, that he claimed that his location overlapped and included some of plaintiff's ground, and that in 1899 he had done some prospecting work on the disputed ground, but was not working this ground when plaintiff's relocation was made.

In view of this state of facts, the case of *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, would seem to settle the question against defendants' contention. In that case Belk attempted to make a location in December, 1876, and did everything necessary to a valid location, if the ground was then subject to location. There was, however, a

prior locator, whose rights precluded a valid location by Belk. This prior locator's rights expired on January 1, 1877, and were in fact then lost. Belk claimed that, upon the failure of the prior locator to keep his location alive, his (Belk's) location, made in December, at once attached. The court held that it did not so operate. Between December 19th and February 21st following, Belk did a small amount of work on the claim, which did not occupy more than two days of his time, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On February 21, 1877, defendants Meagher and others entered on the property peaceably and made another relocation, doing all that was required to perfect their

nel Co. v. Stranahan, 20 Cal. 198, 9 Morrison, Min. Rep. 457, 21 Cal. 548.

Nor did the fact that location was not originally made in strict accordance with the mining rules in force at the time invalidate it as to coclaimants and their grantees, where it was actually possessed and worked for several years, and was generally recognized as valid by the miners in the vicinity. *Kinney v. Consolidated Virginia Min. Co.* 4 Sawy. 382, Fed. Cas. No. 7,827.

So, prior possession of a mining claim, not taken in pursuance of mining rules, was good as against one who subsequently took possession in the same way. *English v. Johnson*, supra.

While a person could not, in defiance of mining rules, take up any quantity of mineral land he chose, and hold it by merely putting up stakes, or marking lines, or inclosing it, he could hold the quantity allowed to be taken up by him by the rules without strictly complying with the regulations prescribing the mode of taking, so as to be protected in the possession of that quantity as against one not claiming through the rules. *Ibid.*

And the prior appropriator of public lands got the better right where the title of the respective parties was based on possession alone, though the prior appropriation was for agricultural purposes, while the subsequent appropriation was for mining purposes. *Gibson v. Puchta*, 33 Cal. 310.

e. Extent of claim.

Previous to the enactment of the Federal mining laws, the extent of a mining claim depended upon the question of reasonableness; and, if the quantity of ground included in a mining claim was unreasonable, the location was not effectual for any purpose, and possession under it extended only to the ground actually occupied. *Table Mountain Tunnel Co. v. Stranahan*, supra.

And general customs in force at the time of the location of a mining claim were admissible in evidence upon the question of the reasonableness of its extent, where there

were no local customs or regulations in force in the district at that time. *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387.

And the testimony of witnesses as to the extent of a mining location was not objectionable as not being the best evidence, in an action for the recovery of possession of mining ground, where the location was not made by notices alone, boundaries having been designated by fixed objects on or near the exterior boundaries. *Kelly v. Taylor*, 23 Cal. 11.

But the quantity of ground a miner might claim by appropriation for mining purposes might be limited by the mining rules of the district. *Prosser v. Parks*, 18 Cal. 47; *United States v. Castillero*, 2 Black, 17, 17 L. ed. 360.

And the length of a mining claim located in a district might be proved by showing the rule or custom of the mining district as to the length of claims as shown by the record of such claims. *Sullivan v. Hense*, 2 Colo. 424.

And, if a locator took more land than these rules allowed, he got no title to the excess against one who complied with the laws and took such excess in accordance with them. *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574, 12 Morrison, Min. Rep. 202.

But a person who took up and marked out a larger mining claim than the rules allowed was entitled to keep and maintain possession of it as against one entering without complying with the rules. *Ibid.*

Nor could a local rule be given in evidence to affect the validity of a claim acquired previous to its establishment. *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198, 9 Morrison, Min. Rep. 457, 21 Cal. 548.

And evidence of differing customs in different mining districts was not admissible to show the reasonableness or unreasonableness of the extent of a mining claim; a general custom was required to be proved if one existed. *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387.

Under these rules and regulations, however, the location of the lode was regarded

rights, if the premises were then open to them. After showing that the rights of Belk were not affected by the Montana statute, and that his right of location depended entirely on the act of Congress, the court said: "All he got or could get by his entry was possession, and that, to be of any avail, must be actual. Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself

in and all others out, and, if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept it for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force." The court then said: "There is nothing in *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732, to the contrary of this." Applying the principles of *Belk v. Meagher*, we must hold that defendant acquired no right to the disputed land which constituted it other than unoccupied

as the principal thing, and that of the surface as a mere incident thereto; and a claim was defined by the terms of the notice of location claiming the vein, and not by posts and monuments erected on the ground. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

And a vein located by means of a notice posted on the croppings, and by recording the notice and doing work at the discovery point, without any definition of the boundaries, gave the locator the right to follow the vein in whatever direction it might run to the extent claimed in the location notice, taking the adjacent surface necessary for the convenient working of the mine as a mere incident thereto. *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Elgin Min. & Smelting Co. v. Iron Silver Min. Co.* 14 Fed. 377, Affirmed in 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177.

And, when a mistake in the direction of the vein was discovered, the locator had a right to change the lines of his surface claim, even though by so doing it encroached upon the claim of a subsequent locator. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* supra.

So, where, by the mining laws and regulations of a neighborhood, the locator of a quartz lead therein had a right to a portion of it on complying with certain rules, one of which was that he should post up notices near the premises stating his claim, and the vein as subsequently ascertained ran in a different direction from that given in the notice, the misdescription did not affect his right to hold, as against a subsequent locator, a part of the undeveloped portion of the vein which ran out of the direction indicated in the notice, the main thing being the vein. *Johnson v. Parks*, 10 Cal. 449, 4 Morrison. Min. Rep. 316.

Nor did the fact that a party had located a claim bounded by another claim, in the absence of mining rules regulating the subject of claims, their course, distances, etc., raise any implication or inference that the last located claim corresponded in size, or

the direction of its lines, with the former. *Live Yankee Co. v. Oregon Co.* 7 Cal. 40.

Boundaries of a mining claim were required to be fixed, however, under the mining ordinances of Mexico, or the title was void for uncertainty. *United States v. Castillero*, supra.

f. Notice of appropriation.

Before the enactment of the mineral laws, the right to the possession of a particular piece of mining ground on the government domain might be established by evidence of its appropriation by the claimant by means which, in view of the nature of the subject and of surrounding circumstances, would give notice to those who had a right to know, that that particular mining land was subjected to the dominion and control of some private claimant. *Hess v. Winder*, 30 Cal. 349, 12 Morrison, Min. Rep. 217.

And the location of a claim by the one discovering it, by putting up a written notice with his name and those of the others concerned upon it, thus making claim to the discovery, was the usual mode recognized among miners to indicate the taking up of a mining claim. *Gore v. McBrayer*, 18 Cal. 582, 1 Morrison, Min. Rep. 645.

A location was commonly made by posting a notice in reasonable proximity to the point at which a lode was discovered or exposed, stating that the locator claimed so many feet of the vein extending so far and in such a direction or directions from the discovery point, together with the amount of adjacent surface ground allowed by the rules of the district; and this notice had the effect of holding the ground described a certain length of time, commonly ten days, after which it was necessary to have the notice recorded by the district recorder in order to keep the claim good. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* and *Gleeson v. Martin White Min. Co.* supra.

To hold a mining claim by virtue of prior possession alone, however, without refer-

public land, or precluded plaintiff from making a valid location thereon. See the question discussed and cases cited pro and con in Lindley on Mines, 2d ed. §§ 216-219. *Belk v. Meagher* also disposes of appellant's further contention that the repeal of the act of 1897 did not impair his rights vested by virtue of his invalid location. He could only claim such land as he actually possessed and was working in good faith.

The judgment and order should be affirmed.

We concur: Gray, C.; Smith, C.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

ence to local mining customs, the locator must have marked out his mining boundaries by such distinct marks or monuments as would indicate to any person what his exterior boundaries were. *Hess v. Winder*, *supra*.

And entry upon a tract of mining ground for mining purposes on the public domain did not give the miner the right to recover damages for an entry by a stranger upon a part of the tract not in his actual occupancy, where his boundaries were not plainly indicated by marks or monuments, and there was no local mining custom allowing his possession to extend to the ground upon which the entry was made. *Ibid*.

And the boundaries of land claimed for mining purposes must have been indicated by such definite physical marks or monuments as would fairly advertise to all concerned where and what it was, and its extent. *Ibid*.

The marks must have been of sufficient prominence to be found by one honestly concerned and diligently endeavoring to discover whether the land was claimed by some other person for mining purposes. *Ibid*.

The mode of notifying others of the extent of the claim of a possessor of public lands for mining purposes, and what the extent of the mining claim was, however, was generally regulated by the miners of the particular locality, whose rules in this respect were adopted as rules of law; though, in the absence of evidence of such rules, or of the customs of miners in the particular district, the case was governed by the general rules in such cases. *Ibid*.

And it could not be assumed without proof that a certificate of location on the records of a mining district was all that was necessary to make a valid title to a mining claim, or that the certificate itself was made according to legal rules of the district; the evidence should show the essential features of a good location in the district. *Sullivan v. Hense*, 2 Colo. 424.

And where possession of a placer mining 7 L.R.A. (N.S.)

McFarland, Lorigan, and Henshaw, JJ., concur.

A rehearing in banc was subsequently granted, after which, on September 28, 1904, *Beatty, Ch. J.*, handed down the following additional opinion:

Action to quiet title to a mining claim. In his complaint, filed November 30, 1900, the plaintiff alleged, among other things, that he was, and for a long time had been, the owner, entitled to the possession, and in the exclusive possession, of a quartz-lode mining claim, known as the "Cuban Beauty No. 2;" that on the 15th of November, 1900, the defendants had entered upon the claim with force and arms, and had driven off the men employed by him to do the necessary assessment work for that year; that they

claim was asserted under mining rules containing no requirement that notices should be posted upon the claim at the time of location, a custom in the mining district, requiring a party locating to post a notice of his claim upon the ground, was admissible in evidence; such custom merely prescribing an additional and not unreasonable requirement for location. *Harvey v. Ryan*, 42 Cal. 626.

In the absence of any mining rule declaring that a failure to record a claim or entry avoids it, however, an entry with actual possession taken by the claimant was good as against a subsequent entry and location in due form by another. *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574, 12 Morrison, Min. Rep. 202.

And a statutory rule that the records of mining districts shall be taken as evidence in the courts does not extend beyond the records made according to the local rules and customs of the district. *Sullivan v. Hense*, *supra*.

IV. Statutory authority for location.

a. The Federal statutes.

On July 26, 1866, it was enacted by Congress (14 Stat. at L. 251, chap. 262), that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become such, subject to such regulations as may be prescribed by law, and subject, also, to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States, restricting each locator, in § 4 thereof, to but one location on the same lode. This act stood until 1872, when it was superseded and repealed by the act of Congress of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 1, U. S. Comp. Stat. 1901, p. 1424), providing that all valuable mineral deposits in lands

had taken possession of the ground, claimed to own it, and were excavating and removing the gold-bearing quartz, etc. Wherefore he prayed for a temporary injunction, and for a final decree adjudging him to be the owner, etc. By their answer the defendants alleged that W. F. Dyer was the owner of a mining claim located in 1898 as the "Squaw Creek No. 2," a small portion of which was included within the alleged boundaries of the Cuban Beauty No. 2, and they denied that they had excluded plaintiff from any portion of his claim, except that which overlapped the superior claim of W. F. Dyer. As to that portion they admitted, in effect, that they were holding it, and mining and removing the ores contained therein. From this brief statement it will sufficiently appear

that the only material issues presented by the pleadings were those relating to the validity and priority of the overlapping claims. Upon these issues the findings and decision of the superior court were in favor of the plaintiff, and the defendants appeal from the judgment and from an order denying them a new trial.

From the evidence contained in the record, it appears that both parties relied, to some extent, at least, upon locations made or attempted in 1898, all of which were held invalid for failure of the locators to comply with some of the requirements of an act of the legislature of California, passed March 27, 1897, prescribing the manner of making mining locations, etc. Stat. 1897, chap. 159, p. 214. These locations being held void,

belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under the regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. This provision of the act of 1872 was preserved in the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1424), being § 2319 thereof; and it remains unrepealed, and has since furnished authority for the location of mining claims upon the public domain.

And, under it, all valuable mineral deposits in land belonging to the government are free and open to exploration, occupation, and purchase by its citizens under the regulations prescribed therein, and by local customs and laws of miners in the several mining districts, so far as they are not inconsistent with the laws of the United States. *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675.

b. Supplementary legislation by states and territories.

U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, providing that the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory where the district is situated, governing the location and manner of recording mining claims, recognizes the rights of the states to pass acts supplementing the mining acts of Congress in respect to the location of mining claims. *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

And supplementary regulations, concerning the location of mining claims, prescribed by a statute in addition to the congressional regulations, are not invalid on the theory that they were enacted in the exercise of an unlawful delegation by Congress of legis-

lative power. *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211, Affirming 28 Mont. 222, 104 Am. St. Rep. 686, 72 Pac. 617.

The right thus recognized and confirmed has been, as we shall see in subsequent portions of this note, acted upon by the enactment of supplementary legislation to a greater or less extent by nearly all, if not all, the mining states and territories.

c. Supplementary rules and regulations of miners.

Miners may, in their respective districts, make rules and regulations not in conflict with the laws of the United States, or the state or territory in which the districts are situated, governing the location and manner of recording. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 McCrary, 19, 8 Fed. 860.

The statutes of the United States giving citizens and those who have declared their intention to become such permission to explore and occupy mineral lands of the public domain, subject to such regulations as may be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same are not in conflict with the laws of the United States, constitute an absolute grant of legislative power to miners themselves; and the customs, rules, or regulations of miners with reference to location of mining claims within the limits named have the full force of legislative enactments, and are as binding upon the courts as any law of the legislature, and subject to the same rules of construction. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Gropper v. King*, 4 Mont. 367, 1 Pac. 755.

And a mining location is invalid if the district laws are not complied with. *Re Taylor*, 9 Copp, Land Owner. 52, *Mineral Law Dig.* 120; *Re Chavanne*, 7 Copp, Land Owner, 115, *Mineral Law Dig.* 120.

And, while usages and customs of miners cannot be made to override a statute whose meaning is clear and free from doubt, where

the decision of the superior court in favor of the plaintiff was based wholly upon a relocation of the Cuban Beauty No. 2, made November 26, 1900, by the plaintiff, just four days before he commenced this action. In view of the grounds of the motion for a new trial,—i. e., failure of the evidence to sustain the findings, and that the decision is against law,—it will facilitate the discussion to quote some of the more specific findings in full. They are as follows:

"(1) That upon the 26th day of November 1900, plaintiff, a citizen of the United States over the age of twenty-one years, located as a mining claim a certain parcel of land situated in Gazelle mining district, county of Siskiyou, state of California, and described as commencing at a point where

location notice was posted; thence westerly, along the line of the Cuban Beauty quartz mine, a distance of 300 feet, to stake in mound of rock; then southerly, a distance of 1,500 feet, to stake in mound of rock; thence easterly, 600 feet, to a stake in mound of rock; thence in a northerly direction, 1,500 feet, to the southeast corner of the Cuban Beauty quartz mine, to stake in mound of rock; thence along the line of said Cuban Beauty quartz mine to place of beginning,—and commonly known as the 'Cuban Beauty No. 2.' That at the time plaintiff made mining location, said land was unoccupied public mineral land of the United States, and subject to location as such.

"(2) That, in making said location, plaintiff complied with the laws of the United

the meaning is doubtful the statute should receive that construction which is supported by custom and usage, and by contemporary history and interpretation. *McCurtain v. Grady*, 1 Ind. Terr. 107, 38 S. W. 65.

Rules or regulations of miners with reference to location of mining claims, however, which will deprive a party of the right to property, which he is enabled to acquire by a compliance with the provisions of the statutes of the United States, by the imposition of any additional burdens or obligations, must be clear and positive in their character and requirements, and must not rest in inference or presumption; and they must impose an obligation to do some certain and specific act which, if not complied with, will, by the terms thereof, deprive the locator of some right. *Flaherty v. Gwinn*, 1 Dak. 509, Appx.

And a failure of a person locating a mining claim to comply with the local rules or customs of the district with reference thereto will not work a forfeiture, unless such failure is declared by such rules or customs to be a ground of forfeiture. *Rush v. French*, supra.

So, while such failure may be shown by a protest or adverse claim, it does not afford ground for proceeding against the patentee by the government, where no conflict with the general law appears. *Re Hawke*, 14 Copp, Land Owner, 151, Mineral Law Dig. 120.

Nor are rules, by-laws, usages, and customs of mining districts a subject of judicial notice; they must be proved. *Sullivan v. Hense*, 2 Colo. 424; *Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659.

Their existence is to be established by evidence in the case, the same as any other question of fact. *Poujade v. Ryan*, supra.

And one who desires to attack the validity of a mining location upon the ground that the local rules and regulations have not been complied with by the locators must show what such rules and regulations are. *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633.

For this purpose, miners' books of rules, and regulations of miners in the district in 7 L.R.A. (N.S.)

question, are competent evidence. *Orr v. Haskell*, 2 Mont. 225.

And, in the absence of a rule requiring a record, such rules and regulations may be proved by custom or usage, as well as by the act of the miners in their meeting, or by a written record. *Flaherty v. Gwinn*, supra.

And mining customs are competent evidence on an issue as to the validity of a mining claim, however recent the date or short the duration of their establishment. *Smith v. North American Min. Co.* 1 Nev. 423.

A possessor of a mining claim in a mining district is presumed, however, to hold the same by virtue of having complied with the law, and the local rules and customs. *Groppe v. King*, supra; *Robertson v. Smith*, 1 Mont. 410.

And the location of a mining claim is presumed to have been governed by the laws of the United States, in the absence of proof of local customs and rules of miners. *Anderson v. Caughy* (Cal.) 84 Pac. 223.

Nor is it essential that the mining district should be organized and local rules adopted, to hold mining claims and to acquire government title thereto; all that the government requires to be done is prescribed by law, and, in the absence of local rules, a compliance with the public law will secure the claim. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

And, in the absence of a statute making additional requirements, or a local rule or custom, a compliance with the statutes of the United States as to discovery and marking of the boundaries is sufficient to sustain the location of a placer-mining claim. *McKay v. McDougall*, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669.

As to rules and regulations of miners as to recording mining claims, see *infra*, XII. c.

V. What lands may be located.

a. Unoccupied, unappropriated public domain.

1. General rule.

The location of a mining claim must be

States by placing markings at the exterior boundaries of said location, so that the same could be readily traced, and also complied with all local customs and usages in recording notice of said location.

"(3) That, prior to said location by plaintiff, one Grant Davis had attempted to locate the same land covered by the said location of plaintiff herein, and thereafter sold and conveyed said land to this plaintiff by deed.

"(4) That, prior to said location by plaintiff, defendant W. F. Dyer and Frank Phillips had attempted to make locations of certain quartz mining ground in Gazelle mining district, and known as 'Squaw Creek Gold Mine No. 1,' 'Squaw Creek Gold Mine No. 2,' and 'Squaw Creek Gold Mine No. 3.'

That said Squaw Creek Gold Mine No. 2 covers a portion of the same ground covered by the location of the plaintiff herein.

"(5) That the said attempted locations made by said Grant Davis, and by said defendant W. F. Dyer and said Frank Phillips, were not made in compliance with the law then in force when the same was made.

"(6) That upon or about the 15th day of November, 1900, plaintiff sent workmen upon said claim for the purpose of doing assessment work thereon, and upon said day defendants wrongfully and with force and arms entered upon said land of plaintiff and drove off said workmen, and threatened to drive them off if they ever returned, and at the time of the commencement of this ac-

on unoccupied, unappropriated public domain. *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59; *Armstrong v. Lower*, 6 Colo. 393; *Hoban v. Boyer* (Colo.) 85 Pac. 837; *Girard v. Carson*, 22 Colo. 345, 44 Pac. 508; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Walsh v. Henry* (Colo.) 88 Pac. 449; *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, Affirming 85 Fed. 905.

Although a locator performed every act necessary to constitute a valid location of a mining claim, yet, if the territory upon which these acts were performed did not comprise a portion of the unappropriated public domain, open to location as mineral land, he secured no rights thereby. *Kendall v. San Juan Silver Min. Co.* 9 Colo. 349, 12 Pac. 198, Affirmed in 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779.

And it rests with the person asserting, or seeking to sustain, a mining location, to show as one of the material facts that it is on unoccupied and unappropriated mineral domain, and subject to location. *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633.

Nor is the belief of the locator that the land is or is not subject to appropriation material. *Walsh v. Henry*, supra.

Nor has a miner any right to enter upon private land and subject it to such uses as may be necessary to enable him to extract the precious metal which it may contain. *Boggs v. Merced Min. Co.* 14 Cal. 279; *Henshaw v. Clark*, 14 Cal. 460; *Davis v. Wiebold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

And a private owner whose lands are so entered upon is entitled to equitable interference by way of injunction to restrain such entry. *Henshaw v. Clark*, supra.

So, the location of a mining claim on land already sold under Tex. Laws 1887, chap. 99, providing for the sale of state lands set apart for educational and charitable institutions, and repealing all conflicting laws, and containing no provisions with reference to the minerals on such lands, is unauthorized and void. *Heil v. Martin* (Tex. Civ. 7 L.R.A. (N.S.)

App.) 70 S. W. 430, Affirmed in 96 Tex. 209, 71 S. W. 814.

The fact that a part of a mining claim was located upon land which was not at the time public land, however, is of no effect in a contest with reference to a part of the claim which at the time of the location was unoccupied public lands. *Richards v. Wolfing*, 98 Cal. 195, 32 Pac. 971.

And mining locations or entries under the public-land laws, made upon land not at the time regularly subject thereto, may, nevertheless, if maintained in good faith and the land subsequently becomes subject to such locations or entries, be permitted to remain intact as having attached on such date, if at that time there was no adverse claim. *Adams v. Polglase*, 33 Land Dec. 30.

2. Patented lands.

The ownership of minerals contained in public lands patented to an individual passes under the patent, and lands thus patented cannot be taken up for mining purposes under mining laws, or rules and regulations. *Fremont v. Seals*, 18 Cal. 434; *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123; *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69; *Pacific Coast Min. & Mill. Co. v. Spargo*, 8 Sawy. 645, 16 Fed. 348; *SHARKEY v. CANDIANI*.

Unless the premises are so abandoned by the patentees as to render them a part of the unappropriated public domain. *SHARKEY v. CANDIANI*.

Where Congress has provided for the disposition of various classes of public lands, and has authorized the officers of the Land Department to ascertain the character of such lands, and issue patents therefor, in the absence of fraud, imposition, or mistake, the determination of that department as to the character of the land is conclusive; and where a determination is made, and a patent is issued, it is conclusive that the lands in question are nonmineral in character, and no rights thereon can be originated by discovery and location of a mineral vein within

tion still hold possession thereof, and threaten to continue to hold possession."

These findings, when read in connection with the evidence in the case, fully disclose the erroneous view of the law which guided the decision of the superior court. The attempted location of the Squaw Creek claims by Dyer and Phillips was in September, 1898, and the evidence shows without substantial conflict that they then did everything necessary to constitute a valid location of the ground under the laws of the United States; that is to say, they discovered a lode of gold-bearing quartz, they posted on the ground a notice claiming 1,500 feet along the supposed course of the vein and 300 feet on either side, they plainly marked the exterior lines of their claim, including the point

of discovery, and shortly afterwards commenced the work of development, which they prosecuted with more than sufficient diligence. In addition to this, Dyer, who had acquired the interest of his co-locator, Phillips, built a house on the claim and was residing there within his marked boundaries at the time when plaintiff's employees came on the ground, November 15, 1900, for the purpose of doing assessment work for the Grant Davis location of Cuban Beauty No. 2, and also when plaintiff made the location on November 26, 1900, which the court finds to have been a valid location of unoccupied mining ground, and upon which alone his right of recovery is made to depend. The attempted location of the Cuban Beauty No. 2 by Grant Davis was made in October, 1898,

the limits of the patent. *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58.

And one who discovers a vein the top or apex of which lies within the limits of another lode claim, as the same is described in a patent issued to the owner, can claim no rights by virtue of such discovery. *Up-ton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

A patent to land issued by the United States carries all the mines in the land patented to which no right has attached at the time the patent issues. *Pacific Coast Min. & Mill. Co. v. Spargo*, supra.

And it is conclusive as to the priority of its location over any other, and confers upon the patentee title to the entire surface of the claim as against the owner of an unpatented conflicting claim. *Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co.* 52 C. C. A. 222, 114 Fed. 420; *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 665, 109 Fed. 538, Reversing ruling on this point in 108 Fed. 189, but Affirming judgment on other grounds.

It is at least conclusive as to which is the superior claim within the overlapping surface boundaries, though not necessarily a determination that that claim was of prior location. *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769.

But a judgment in a prior suit involving a question as to which of two conflicting claimants had a right to a piece of mining ground, in which it was necessary to prove the right of possession to the ground in order to establish a right thereto as against the United States; and, in order to do this, it was necessary to show a valid location,—is conclusive only as to the right of possession of that piece of ground, and is not conclusive in a subsequent action between the parties upon the question of priority. *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284.

So, proof of the date of the location of a mining claim, and of the fact that such location is excepted from patents for an adjoining location, raises a presumption that

the former location was first made. *Van-Zandt v. Argentine Min. Co.* 2 McCrary, 159, 8 Fed. 725.

And a provision in a patent for public lands that it is subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises granted, does not apply in favor of parties claiming to be proprietors, who locate mines after the issue of the patent; it applies only in favor of persons who are the proprietors of mines at the time when the patentee's rights attach. When the patent issues it covers everything embraced in the land to which no prior right has attached. *Pacific Coast Min. & Mill. Co. v. Spargo*, supra.

Nor will a mining location, made a few days prior to the end of publication of notice of application for a patent, sustain an adverse claim. *Smead v. Deadwood Min. Co.* 7 Copp, Land Owner, 50, Mineral Law Dig. 125.

And the failure of the locator of a mining claim to interpose an adverse claim in proceedings instituted by another to obtain a patent for a claim including a part of his claim waives all his rights and loses to him the benefit of his location; and all lands in it, not covered by the patent, are thrown open to exploration, and become subject to claim for new discoveries. *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110.

So, that the claimed discovery of a lode is, in fact, on land appropriated by a prior location, cannot be asserted by the prior locator where he failed to adverse an application for a lode patent on the junior location, and the same was patented. *American Consol. Min. & Mill. Co. v. De Witt*, 26 Land Dec. 580.

And a judicial award to a junior locator, made in adverse proceedings, of a small part of the ground in conflict, is none the less binding upon the parties and the Land Department because made in pursuance of a stipulation between the parties. *Re Stranger Lode*, 28 Land Dec. 322.

a month later than the discovery and attempted location of the lode by Dyer; and the act done by Davis—giving the utmost credit to his testimony—fell far short of the efforts of Dyer to comply with the law. His evidence leaves it very doubtful if he ever discovered any gold-bearing rock in place, or did anything except to mark the boundaries of his claim.

The court finds that his claim as marked was the same as the location made by plaintiff November 26, 1900, and there is evidence that this claim at its extreme southern end includes some croppings of a lode, which appears to be the same as that upon which Dyer has done a large amount of work. But this finding that plaintiff's location embraces the identical ground covered

by the Grant Davis claim is sustained by no testimony aside from that of Davis, and his testimony on the stand is in direct conflict with statements he admits having made when on the ground with Dyer and others for the purpose of adjusting their lines so as to avoid a conflict of locations. At that time he stated that his southwest corner was where he now claims his southeast corner was placed, and the change he thus makes involves a swinging of the southern end of his claim 600 feet to the west, making it by that means alone cover a triangular portion of Dyer's claim, including the only rock in place which could have been the basis of a valid location. He, however, says that his statement on the ground was a mistake, and the trial judge accepted his ex-

But a judgment, in an action to determine the right of possession as between two overlapping mining claims, in favor of the plaintiff after the withdrawal by the defendant of his answer, reciting the priority of the plaintiff's location, after which the defendant abandoned a portion of his claim, including that embraced in the judgment, is not admissible in a subsequent action between the same parties in respect to ground not embraced in the judgment, as evidence of prior location. *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 613, 15 U. S. App. 456, 61 Fed. 557.

A location of a mining claim is not absolutely void, however, because made upon land at that time segregated from the public domain by being subjected to an entry for a mineral patent, where the entry was invalid and was afterwards canceled; in such case the land becomes subject to location, and the prior location becomes effective from that time, if rights thereunder were then being, and were thereafter, asserted according to the mining law. *Adams v. Polglase*, 32 Land Dec. 477, Affirmed on motion to review, in 33 Land Dec. 30.

So, land embraced within a mineral application and subject to appropriation thereunder, but excluded therefrom when entry for patent is made, is thereafter vacant public land, and subject to location as such, and may be properly included within a subsequent application of another; and the fact that the discovery lies on the excluded tract does not affect the validity of the claim. *Re Adams Lode*, 16 Land Dec. 233.

But where an entry has been erroneously canceled, the claim covered thereby cannot be appropriated by strangers to the record who had located it while the entry was still subsisting. *Re Harrison*, 2 Land Dec. 767.

3. Lands appropriated for mining purposes.

(a) General rule.

Title to a mining claim cannot be initiated by an entry upon a prior valid existing location. *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633; *Sierra Blanca Min. & Reduction L.R.A.* (N.S.)

tion Co. v. Winchell (Colo.) 83 Pac. 628; *Lebanon Min. Co. v. Consolidated Republican Min. Co.* 6 Colo. 371; *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240; *Anderson v. Caughey* (Cal.) 84 Pac. 223; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 McCrary, 19, 8 Fed. 860.

And a better right in a third party may be shown by an adverse claimant for the purpose of defeating a mining location. *Girard v. Carson*, 22 Colo. 345, 44 Pac. 508.

The effect of a valid location of a mining claim is to segregate the ground from the public domain; and, until the locator either abandons his claim, or forfeits it, the ground is not unoccupied public land, and cannot be located or possessed by another. *Meydenbauer v. Stevens*, 78 Fed. 787; *Porter v. Tonopah North Star Tunnel & Development Co.* 133 Fed. 750; *Price v. McIntosh*, 1 Alaska, 286; *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723; *Score v. Griffin* (Ariz.) 80 Pac. 331; *Eilers v. Boatman*, 3 Utah, 159, 2 Pac. 66; *Slothower v. Hunter* (Wyo.) 88 Pac. 36; *Cone v. Roxanna Gold Min. & Tunneling Co.* 2 Denver Legal Adv. 350; *Branagan v. Dulaney*, 2 Land Dec. 744.

Until some act or laches of the owner occurs by which the title reverts to the government. *Slothower v. Hunter* and *Score v. Griffin*, supra.

And an adverse claimant may show that the locator's location was made upon ground embraced within a prior valid and subsisting location. *Hoban v. Boyer* (Colo.) 85 Pac. 837.

And that a prior location existed which precluded a possibility of a valid location by the plaintiff may be given in evidence under a general denial of the plaintiff's title and right of possession, in an action by him to quiet title to a mining claim. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488.

Nor is a location made upon a valid subsisting claim given validity by the subsequent forfeiture of the senior claim; a location of a mining claim to be good must be

planation, as he had a right to do, and as we should, perhaps, be bound to do if the fact were material, which, as will appear, we do not deem it to be, so far as the present appeal is concerned. In view, however, of the necessity for a new trial, and the possible materiality of this fact in some different aspect of the case, it may properly be suggested that an accurate instrumental survey of this original claim in connection with the lines of the older claims—the Cuban Beauty and Dewey, with reference to which the Cuban Beauty No. 2 was located, and the subsequently located claims of Chadwick and the Black Bear No. 2, located with reference to the Cuban Beauty, the Dewey, and Cuban Beauty No. 2—would probably show whether the testimony of Grant Davis, in

addition to being inconsistent with his former statements, does not also involve a geometric absurdity; that is to say, whether it does not require us to believe that by going south on the west side of a claim bounded by parallel lines we will reach the southeast, instead of the southwest, corner. But, assuming for the present purpose that the plaintiff's location of November 26, 1900, covered the identical ground included by the boundaries marked by Grant Davis in October, 1898, there is no evidence that either Davis or the plaintiff ever did, or attempted to do, any development work within those boundaries prior to the 15th of November, 1900, when plaintiff's men found Dyer in possession and were driven off the ground by him and his employees; Dyer having in

good when made, and conflicting claimants must each stand on his own location and can take only what it will give him under the law. *Lockhart v. Farrell* (Utah) 86 Pac. 1077; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Montagne v. Labay*, 2 Alaska, 575; *Dufresne v. Northern Light Min. Co.* 2 Alaska, 592.

Montagne v. Labay and *Dufresne v. Northern Light Min. Co.* supra, followed *Belk v. Meagher*, supra, and refused to follow *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; and in the former case it was said that the case of *Lavagnino v. Uhlig*, infra, V. a, 3, (b), applies as authority only in adverse proceedings where a patent to mining property has been applied for, and is binding only within its own limited circle of exceptional facts and circumstances; and that it does not apply in a controversy wholly between senior and junior locators.

A stranger going upon land held under a valid mining location for the purpose of discovering veins or of otherwise interfering with the locator's possession and use is a trespasser. *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240.

And a valid mining claim cannot be initiated by the commission of a trespass. *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58.

Nor is a subsequent location of a mining claim extending over a senior discovery in the actual possession of another valid as to the portion thereof occupied under the senior claim. *Lebanon Min. Co. v. Consolidated Republican Min. Co.* supra; *Re Stranger Lode*, 28 Land Dec. 322.

A junior locator of a mining claim conflicting with a senior one has no right to any portion of the area in conflict. *Argentine Min. Co. v. Benedict*, 18 Utah, 183, 55 Pac. 559; *Book v. Justice Min. Co.* 58 Fed. 106.

And in such case no question as to its being a cross vein can be considered. *Book v. Justice Min. Co.* supra.

The cardinal principle which governs conflicting claims of appropriators of mining locations and other rights on the public do- 7 L.R.A. (N.S.)

main is that, other things being equal, the prior locator prevails. *Conway v. Hart*, 129 Cal. 483, 62 Pac. 44; *Bulette v. Dodge*, 2 Alaska, 427.

And seniority in such case is determined by the order in which they were located, whether they have been patented or remain unpatented. *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769.

And a lode claim which includes land embraced within a senior location will not support a mineral entry; it should be made to terminate where the lode in its onward course intersects the exterior boundary. *Re Howard*, 15 Land Dec. 504.

So, where one person makes a valid location of a placer mine for the benefit of himself and another, and a third person makes a subsequent location of the same claim at the suggestion of the associate, the doctrine of estoppel cannot be applied to make the second location good as to the associate's part and bad as to the former locator's part. In such case the first location excludes a second location during the continuance of its validity. *Russell v. Dufresne*, 1 Alaska, 486.

But the owner and locator of a vein cannot follow it beyond his own end lines; and a vein beyond such lines is subject to further discovery and appropriation. *Larkin v. Upton*, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, Affirming 7 Mont. 449, 17 Pac. 728.

Though a junior location of an excess of a senior location over the maximum allowed by law ought not to be sustained, unless it is taken from that part of the claim not actually occupied by the diggings or property of the senior locator. *Price v. McIntosh*, 1 Alaska, 286.

Nor does the fact that land is held as a placer-mining claim necessarily prevent lode locations from being made upon it. *Hughes v. Ochsner*, 27 Land Dec. 396.

And, where the evidence on an issue as to which of two persons made the first valid location of a mining claim upon grounds in dispute is conflicting, a question of fact for the jury is presented. *Stemwinder Min. Co.*

the meantime, as above stated, built a cabin on the ground, taken up his residence there, and continued work upon the vein.

But the whole question as to what, if any, effect the Grant Davis location may have had upon the rights of the parties is eliminated from the case as presented on this appeal by the finding of the court—amply sustained by the evidence, even if the respondent could question it—that his attempted location was invalid for want of conformity to the requirements of the law then in force. The law to which this finding (No. 5) refers was the above-cited act of March 27, 1897, prescribing certain particulars that location notices must contain, and requiring the record of such notices within certain limited periods. This state law was

no doubt valid as one of the local regulations authorized and sanctioned by the act of Congress, and, so long as it remained unrepealed, was obligatory upon those who desired to secure mining claims in this state by the constructive possession resulting from a technical compliance with the law. The superior court, therefore, was right in concluding that neither the Davis location nor the Dyer location was valid at the time it was made. But the act of 1897 was repealed long before the plaintiff made his location in November, 1900. In the first place, an act properly entitled was passed March 20, 1899 (Stat. 1899, chap. 113, p. 148), for the purpose of repealing it; but, owing to a faulty wording of the body of the act, there seems to have been a question whether it

v. Emma & L. C. Consol. Min. Co. 2 Idaho, 456, 21 Pac. 1040, Affirmed in 149 U. S. 787, 37 L. ed. 960, 13 Sup. Ct. Rep. 1052.

But where an attempted location of a mining claim by the first discoverer was insufficient and invalid, and, before a subsequent sufficient location by him, the claim was located by another, the right of the second locator depends entirely upon the sufficiency of his location; and an instruction in an action involving the relative rights of the two locators, leaving the matter of the validity of the second location, and of its effect, to the jury, is erroneous. *Brown v. Oregon King Min. Co.* 110 Fed. 728.

And one who attacks a mining location upon the sole ground of the existence of a previous location of the same claim has the burden of showing that the previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes. *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Porter v. Tonopah North Star Tunnel & Development Co.* 133 Fed. 756.

And this must be established by a preponderance of the evidence. *Porter v. Tonopah North Star Tunnel & Development Co.* supra.

But, as between two conflicting locations of mining claims, the court may presume that the prior locator had prima facie the better right; and the burden rests with the junior locator of rebutting the presumption by showing the invalidity of the prior location. *Lockhart v. Farrell* (Utah) 86 Pac. 1077.

(b) Effect of defects in prior location.

Though lands legally located for mining purposes are not public lands and subject to location as such, where a location for mining purposes is an invalid one, the lands are open to bona fide entry by others for the purpose of initiating a new location. *Miller* 7 L.R.A. (N.S.)

v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

And an attempted location of a mining claim does not prevent the claim from being open to subsequent location, where the person attempting to locate had not then and never made any discovery of mineral thereon. *Ibid.*

Until the discovery upon unappropriated public land of the United States of a mineral-bearing lode, and the distinct markings of the boundaries of the claim including it, so that they can be readily traced, the lode and land sought are open to location and appropriation by any competent locator; but, when these requirements have been complied with, the land is no longer public. *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, Affirming 85 Fed. 905.

So, when a mining claim is abandoned, the ground is subject to location subsequent to the abandonment. *Paragon Min. & Development Co. v. Stevens County Exploration Co.* (Wash.) 87 Pac. 1068.

And where one goes upon mineral lands of the United States and works thereon without complying with the requirement of any law, either Federal or district, or any local custom, relying exclusively on his possession or work; and a second person peaceably locates a mining claim covering the same ground, and in all respects complies with the requirements of the law and with mining rules and regulations,—the second person is entitled to possession thereof as against the first. *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

And this is so no matter who is entitled to the credit for the discovery. *Gleeson v. Martin White Min. Co.* supra.

And, as against a subsequent locator, a mining location not perfected according to the territorial laws, within the time provided, is forfeited and void, and the ground embraced therein is open to location. *Lockhart v. Wills*, 9 N. M. 354, 54 Pac. 336, Affirmed in part in 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665.

Failure of a locator of a mining claim,

effected the desired repeal. In consequence of this uncertainty the same act, properly worded, was introduced at the extra session of the legislature in 1900, and finally passed February 8th of that year, taking immediate effect. Stat. 1900, chap. 6, p. 9. The result of this repeal was to make the validity of mining locations in this state solely dependent from that time forward upon a compliance with the laws of the United States and such valid local regulations as the miners themselves may have adopted in their respective districts. There is no evidence of an organized district including these claims, and no suggestion of a failure to comply with any miners' rules or customs. So that the point to be considered is the effect upon the Davis and Dyer locations of

the entire elimination from our state or local laws of all regulations additional or supplemental to the laws of the United States governing the location of mining claims.

The repeal of the state law took effect at least as early as February 8, 1900, if not on the 20th of March, 1899, and the condition in which it found the Davis and Dyer claims was this: Davis had never attempted anything except a technical location, and in that he had failed. Dyer had also failed in his earlier attempt at a technical location, but he was on the ground working the vein within his marked boundaries, and had done everything necessary to constitute a valid location under the only law then and thereafter in force. This being so, his claim was thenceforward good so long as he continued

within the proper time, to comply with the location statutes, forfeits all right to any benefits therefrom, except as he may be aided thereby in proof of actual possession; and the remainder of his lode, aside from that in his actual possession, is open to exploration and location as though he had never attempted to perfect a statutory location thereon. *Armstrong v. Lower*, 6 Colo. 581.

But the area of conflict between two mining locations does not, upon forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocater of the forfeited location to adverse successfully the application for a patent by the junior locator; since the latter's right, under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, to a patent which would exist in the case of failure of the owner of a subsisting senior location either to adverse the application, or to prosecute such adverse, if one was made, must also arise from the forfeiture of the claim of the senior locator before the junior locator's application for a patent is made, and the consequent inability of the senior locator to adverse successfully after the forfeiture is complete. *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

Nor can one who attempted a technical location of a mining claim, but failed, hold the ground as against one who also failed at an attempt at a technical location, but who was on the ground working the vein within his marked boundaries, and had done everything necessary to constitute a valid location under the law then and thereafter in force. *DWINNELL v. DYER*.

And where land embraced in a placer-mining claim is found to be nonmineral, and therefore not patentable, so that the placer claimant cannot take the legal title thereto, the basis of his claim to the lodes therein disappears, and no prejudice to the claim of a lode applicant can result from a judgment of the court awarding the placer claimant the right of possession of the ground in controversy as a part of the placer in which the lodes are contained. *Clipper Min. Co. v. Eli Min. & Land Co.* 33 Land Dec. 600. 7 L.R.A. (N.S.)

But where a lode has been discovered on the surface, and it is in the actual occupation of the person to whom it was granted by the purchaser at a given point, a valid location cannot be made thereon by others. *Lebanon Min. Co. v. Consolidated Republican Min. Co.* 6 Colo. 371; *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702.

And, if the discovery and location of a mine were within the boundaries of another mine as evidenced by its discovery notice, and such discovery was made within a prescribed period after the date of the posting of the notice of discovery of the latter mine, pursuant to a statutory provision giving such a period for discovery, the location of the junior locator is invalid as to the conflicting area. *Sierra Blanca Min. & Reduction Co. v. Winchell* (Colo.) 83 Pac. 628; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

And such invalidity is not cured by failure of the senior locator to perform the necessary discovery work. *Sierra Blanca Min. & Reduction Co. v. Winchell*, supra.

Nor are lands in actual possession of a person open to location as a mining claim, where failure of the person in possession to comply with local customs or rules with reference to locations of mining claims by posting a notice, requiring working, etc., is not of itself declared to work a forfeiture. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

And a person in actual possession of a mining claim of no greater extent than the law allows him to hold may maintain an action against a trespasser, though he has not performed all the acts required to perfect a valid location. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 503, 11 Fed. 125.

'Ground in the actual possession of a person under claim or color of right cannot be located by another person, because such ground is not vacant and unappropriated. *Bulette v. Dodge*, 2 Alaska, 427.

So, possession of a mining claim under title deraigned from the locator, who located some time before by posting notice containing such specific calls and reference to monuments that a surveyor would have

to do the necessary assessment work. This work, and far more than necessary to satisfy the requirements of the act of Congress, was clearly proved without any substantial conflict in the evidence, and therefore the concluding portion of the first finding, to the effect that on November 26, 1900, plaintiff's mining location was made upon unoccupied mineral land of the United States, is unsustained by the evidence. This finding is apparently based upon the view that the Dyer location, having been originally defective by reason solely of noncompliance with the state law, although fully complying with the laws of the United States, acquired no validity by the repeal of the state law. But this is not a correct view. The repeal of the state law, of course, had no affirmative

effect in giving validity to the location; but it did away forever with the necessity of conforming to its provisions, and left unimpaired and unaffected every right which is conferred by a compliance with the provisions of the Revised Statutes of the United States. Dyer, having complied with those provisions, was certainly in no worse a situation with respect to this ground than the plaintiff. He had discovered the ledge once. He could not discover it again. He had marked the boundaries of his claim. There was nothing to be gained by marking again boundaries that were already marked. The laws of the United States require no posting or recording of notices, but merely provide that a notice, when required by local regulations, must contain certain things in

no difficulty in locating the boundaries with knowledge of the location of the monuments, is good as against a relocation by a person having knowledge of the former location, and of such possession, as successor in interest of the former locators, though witnesses with the location notices in their hands were at the time unable to find all the particular monuments referred to in the notices. *Yreka Min. & Mill. Co. v. Knight*, 133 Cal. 544, 65 Pac. 1091.

But a mining claim the boundaries of which are marked on the ground and notice of which is posted thereon has priority over another with reference to which such steps have not been taken, though the notice of the latter was recorded prior to the marking of the boundaries and the posting of the notice of the former. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

So, one who located unsurveyed government lands on which he had discovered a coal vein about ten years before, and who returned to it year after year and spent large sums of money in developing it and making it of great value, and putting it in shape to be profitable when transportation facilities could be obtained, which promised to be available, and caused lines to be run to it from the nearest government surveys, and ascertained its exact location, is sufficiently in possession to preclude another from entering on it, notwithstanding a mere temporary absence, the recovery being confined to the cabin, tunnels, and other improvements, together with the convenient spacing around them, and not including the whole section of the land claimed. *Davis v. Dennis* (Wash.) 85 Pac. 1079.

Nor are the facts that, when a person went upon mining ground to locate it, there were a tent, bedding, and tools thereon, and a person in charge, and monuments had been erected thereon, which could, and should, have been seen, insufficient to notify him that the ground had been appropriated by others and was not open to location. *Talnadge v. St. John*, 129 Cal. 430, 62 Pac. 79.

Nor can a claimant of a mine in possession, who sells the same to another by deed, 7 L.R.A. (N.S.)

properly designating the surface boundaries of the claim, acquire rights as against his grantee by virtue of any subsequent location, which will defeat or limit his grantee's estate, or any right pursuant thereto; and the fact that such subsequent location was made upon a vein not transferred to the grantee, but which intersects a vein having its apex within the surface boundaries of the granted vein, and was made prior to a relocation by the grantee of the granted vein, is immaterial. *Stinchfield v. Gillis*, 96 Cal. 33, 30 Pac. 839.

It has been held, however, that the fact that a prior location of a mining claim had been made, which had not yet expired at the time of a subsequent discovery thereon by another, does not prevent such discovery from forming a proper basis for a location by the discoverer after the former locator's title is forfeited, where there is nothing to show that the presence of the second discoverer upon the claim was unauthorized. *Russell v. Dufresne*, 1 Alaska, 486.

And where an attempted location was in itself invalid, the claim may be subsequently located without reference to whether or not it had been abandoned. *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

And in such case knowledge upon the part of a person seeking to locate a mining claim, that another had previously attempted to locate it, is immaterial, and does not affect the validity of the second location. *Brown v. Oregon King Min. Co.* 110 Fed. 728.

And where, after putting up an initial monument and examining the claim sought to be located, the locator wishes to abandon it, and tears down the monument, and goes away with the intention of not coming back, and pays no further attention to it, the land covered by the claim is open to location the moment such act takes place and such intention is formed; and others wishing to locate the ground will not be required to wait until it has become forfeited by reason of a noncompliance with requirements as to sinking a discovery shaft, recording the no-

order to be of any effect. There was no longer any law providing for notice or record, or giving any effect to a recorded notice, and all that Dyer could do was to perform the amount of development work required by the law of Congress, and that he was doing when this action was commenced and injunction issued, more than a month prior to the expiration of the year allowed to him for that purpose.

Upon these facts, we cannot understand how it could be held that at the time of plaintiff's attempted location the ground was unoccupied. Dyer had in fact a *pedis possessio* to the extent of his visible boundaries, and the fact that those boundaries had been marked in connection with an attempted location, invalid only because of failure

to comply in other particulars with the state statute of 1897, then no longer in force, made them none the less efficacious for his protection. *Conway v. Hart*, 129 Cal. 483, 484, 62 Pac. 44. The working of a quartz lode inside of defined boundaries is not only a *pedis possessio* of all the ground within such boundaries, but is in itself the substance of everything required by law to constitute a valid location; and ever since the decision of this court in *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574, it has been held to give a good title to a mining claim (not excessive in extent), regardless of local rules providing for the posting and recording of notices. It is actual possession, while a formal location is only constructive possession. In addition to the cases of Eng-

tice, and building monuments. *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723.

Nor does evidence that a mining claim was located upon old mining claims tend to show a prior location, or even an attempted prior location, under the mining laws. *Patchen v. Keeley*, 19 Nev. 404, 14 Pac. 347.

Though a ruling of the court respecting an inference deducible from the prior possession of the plaintiff in an action to quiet title to a mining claim is not erroneous or prejudicial to the defendant, where the validity of the original location is not put in issue by the answer, which only sets up a forfeiture of the claim by the plaintiff and the defendant's relocation thereof. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548, Affirming 6 Mont. 53, 8 Pac. 153.

And evidence of the location of a mining claim and the working of the mine by the locators for several years; and that they had placed stakes around the claim, and sunk a shaft, and taken out rock; and that they left it, and, several years afterwards, went back and found the stakes and shaft and claim in substantially the same position,—is sufficient to sustain a finding that the land was vacant property upon their return, and open to location. *Conway v. Hart*, 129 Cal. 483, 62 Pac. 44.

4. Occupation without color of title.

While possession of a mining claim is good as against mere intruders, the mere fact of possession is not good as against one who locates in compliance with mining laws. *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93.

The mere naked possession of a mining claim upon the public lands is not sufficient to hold it as against a subsequent location made in pursuance of the law, and kept alive in compliance therewith. *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Noyes v. Black*, 4 Mont. 527, 2 Pac. 769; *Garthe v. Hart*, supra.

And persons claiming lands for no other purpose than the right of way and support of a ditch are not entitled to question the

right of another to locate, possess, and explore the land as mineral, subject to their admitted right of way. *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54.

And it has been held that the occupation, by aliens, of mining land, does not exclude it from the operation of the mining acts precluding citizens from taking it up as mining land belonging to the United States; and that aliens so occupying mining land when the same is taken up and located in a proper manner by citizens, though occupying peaceably, become trespassers in law upon the legal rights of the citizens. *Chapman v. Toy Long*, 4 Sawy. 28, Fed. Cas. No. 2610.

And that both the person making a location of mining ground and his grantees, who succeed to his rights, must have the capacity to possess and purchase; otherwise the grant of the government becomes devested, and the ground is again open to location; and, where a citizen conveys an unpatented mining claim to an alien, the conveyance has the effect so to restore the claim to the public domain as to authorize its location and possession by a citizen. *Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. 759.

But, while any competent locator may enter upon mineral lands of the United States upon which there is no valid existing location even though they are in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself, no right can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry upon lands in the actual possession of another engaged in mining; the entry must be open, above-board, and made in good faith. *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673.

A miner may hold the place in which he is working on the public domain against all others having no better right. *Zollars v. Evans*, 2 McCrary, 39, 5 Fed. 172.

And a location of a mining claim, made upon ground not vacant and open to location, but which is in actual and adverse occupancy of another, is void. *Gird v. California Oil Co.* 60 Fed. 531; *Cowell v. Lambers*, 10 Sawy. 246, 21 Fed. 200.

lish v. Johnson and Conway v. Hart, above cited from the decisions of this court, we refer for a fuller statement and elucidation of the views here expressed as to the location of mining claims since the act of Congress of May 10, 1872, to the following cases: *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312; *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *North Noonday Min. Co. v. Orient Min. Co. (C. C.)* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.)* 7 Sawy. 96, 11 Fed. 666. The Nevada cases were among the first that arose under the act of Congress of May, 1872, and the views therein expressed were substantially embodied in the charge to the jury given by Judge Sawyer in the two cases

cited from the Federal Reporter. The decisions of Judge Sawyer have been cited and followed in numerous subsequent cases in the Federal and state courts, and we are not aware that they have ever been seriously questioned.

It is proper here to notice the case of *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, which in the department opinion affirming the judgment and order of the superior court was cited as a controlling authority. It will not be difficult, we think, to point out a distinction between that case and this which makes it totally inapplicable to the point to be decided here. In that case *Belk*, in December, 1876, posted a notice of location upon mining ground then covered by a valid claim of third parties, who by their acts

A location cannot be extended over a senior discovery in the actual possession of another, though the senior discoverer failed to locate under the law. *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702; *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

And an instruction in an action involving the right to a mining claim, that lands may be located where they are not in actual possession of one entitled thereto, is erroneous as submitting to the jury a question of law. *Jordan v. Duke*, 4 Ariz. 278, 36 Pac. 896.

Entering upon the premises in the actual possession of another for the purpose of performing acts necessary to constitute location and possession of a mining claim is a trespass, and cannot form a basis for the acquisition of title. *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919; *Lebanon Min. Co. v. Consolidated Republican Min. Co.* 6 Colo. 371.

So, as between two persons, neither of whom had done any work before his attempted location of conflicting mining claims, and both of whom claimed to have made valid mining locations, the issue must be determined by a reference to priority in the statutory designation on the surveys of the limits of the claim. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

A person asserting the location of a mining claim as against another in actual possession has the burden of showing that the latter was not there at the time of his location. *Faxon v. Barnard*, supra.

5. Lands claimed under Mexican and Spanish grants.

The rule adopted in the earlier history of the country was that a Mexican or Spanish land grant, confirmed or allowed as prescribed by law, of a quantity of land to be afterwards surveyed and laid off within a certain territory, vested in the grantee a present and immediate interest which carried with it the ownership of the minerals contained therein. *Fremont v. United States*, 17 How. 542, 15 L. ed. 241.

And that a patent from the United States government for land issued upon a confirma-

tion of claims held under grants of the Mexican government invested the patentee with the ownership of the precious metals contained in it. *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123; *Fremont v. Seals*, 18 Cal. 433; *Ah Hee v. Crippen*, 19 Cal. 492.

And where lands were claimed under a Mexican grant, and, after a confirmation under the act of Congress of 1851, and pending proceedings thereunder for location, a third person took up a mining claim thereon in pursuance of the act of Congress of 1866; and a patent was subsequently issued upon the Mexican grant,—it included the mine so located, and defeated the location thereof. *Manning v. San Jacinto Tin Co.* 7 Sawy. 418, 9 Fed. 726.

So, a person locating a mine upon lands claimed under a Mexican grant, after confirmation and pending proceedings for location, but before patent, could not, after patent, on a bill in equity, question the correctness of the location of the grant on the ground that it was fraudulently located by officers of the government with the knowledge of the patentee, upon lands not covered by the grant, and for the fraudulent purpose of securing the mine. *Ibid.*

In *United States v. San Pedro & C. del A.* Co. 4 N. M. 405, 17 Pac. 337, however, it was held that a grant of lands by the government to an individual under the Mexican and Spanish colonization laws, as well as under the pre-emption laws and land acts of the United States, does not include mineral deposits in the land; and that a grant thus made by the Mexican government gave title to the land only; and that a confirmation of such grant by Congress, after the acquisition by the United States of the territory comprising such lands, confirms title only as passed by the grant.

And, by act of Congress of March 3, 1891, it was provided that no allowance or confirmation of any claim shall confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise

done in compliance with the law of the United States had become invested, according to its express terms, with the "exclusive right of possession" of the ground so located until the 1st of January, 1877. If by that date they did not resume work on the claim their right of possession would lapse, but in the meantime it was unquestionable; and, when Belk attempted his location he not only posted his notice upon ground not open to location, but he was guilty of an unlawful act,—a trespass upon the lawful possession of others. A careful reading of Chief Justice Waite's opinion will show that for this reason alone his acts done in December were held utterly void. In this case the acts of Dyer, done while the act of 1897 was in force, were every one of them lawful, and

every one of them constituted a step taken in compliance with the law of Congress. His discovery was upon unoccupied land of the United States. His entry, his marking of boundaries, his work on the lode,—everything he did,—was free from any imputation of illegality, and, when he had fully complied with the act of Congress, there was nothing left for him to do except to post and record the notices as prescribed by the state law, in order to make his location perfect; and this he could have done at any time before the ground became subject to an intervening right.

Under the law of Congress, under the law of this state, and under every code of district laws adopted by miners that has come to my notice, the prescribed order of the

entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act.

Under this act, lands held under the Mexican or Spanish grants, with reference to which there was no reservation, either by treaty or by law, are not reserved lands, and are lands belonging to the United States, within the meaning of § 2319, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424), and are open to exploration and purchase under the mining laws of the United States. *Lockhart v. Wills*, 9 N. M. 344, 54 Pac. 336. Affirmed in part in 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665; *Lockhart v. Leeds*, 10 N. M. 568, 63 Pac. 48.

And lands claimed to be within the limits of a Mexican grant are not withdrawn and reserved from entry under the mining laws of the United States by the fact that the claim is before the court of private land claims for adjudication, there being nothing in the treaty with Mexico to work that result, and the act of 1854 (10 Stat. at L. 308, chap. 103), reserving such lands until the final action of Congress on such claims, having been repealed by the act of Congress of March 3, 1891, establishing the court of private land claims. *Lockhart v. Johnson*, 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665.

6. Indian reservations.

The effect of a treaty with a nation of Indians, by which a district therein described is set apart for the absolute and undisturbed use and occupation of such Indian nation, is to withdraw the agreed district from private entry or appropriation for the purpose of discovering and locating mining claims. *Kendall v. San Juan Silver Min. Co.* 9 Colo. 349, 12 Pac. 198, Affirmed in 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779.

And no rights can be acquired to lands by location of mining claims when the same are covered at the time by an Indian reserva-

tion. *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426; *Uhlig v. Garrison*, 2 Dak. 71, 2 N. W. 253; *French v. Lancaster*, 2 Dak. 346, 47 N. W. 395; *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98; *Kendall v. San Juan Silver Min. Co.* supra.

And the person attempting such location acquires no rights which will avail him against a location made by another after the land is opened for settlement. *Kendall v. San Juan Silver Min. Co.* supra.

The mineral laws do not subject to exploration and entry lands which have been allotted to Indians for a reservation. *Re Acme Cement & Plaster Co.* 31 Land Dec. 125.

And U. S. Rev. Stat. § 2319 (U. S. Comp. Stat. 1901, p. 1424), declaring all mineral deposits in the public lands of the United States open to exploration and purchase, and the lands containing the same to occupation and purchase, does not prevent the President from reserving by proclamation a portion of the unoccupied public lands of the United States for an Indian reservation; such a proclamation not constituting a repeal or suspension of the act. *Gibson v. Anderson*, 65 C. C. A. 277, 131 Fed. 39.

A person in possession of a mining claim within an Indian reservation, prior to its relinquishment, with the requisite discovery and the boundaries sufficiently marked, and with a notice of location posted, and a disclosed vein of ore, may, however, upon the relinquishment of the reservation, adopt what has been done, causing the proper record to be made, and hold his claim dating his rights from that day. *Noonan v. Caledonia Gold Min. Co.* 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911, Affirming 3 Dak. 189, 14 N. W. 126; *Kendall v. San Juan Silver Min. Co.* supra.

And where, in such a case, the locator was on that day in actual possession of the ground located upon, with the requisite discovery of a vein of valuable minerals thereon, and then or thereafter performed every act necessary to constitute and maintain a valid location, another person can claim no

acts necessary to a valid location is, first, the discovery of mineral-bearing rock in place; second, the posting of notice at or near the point where the ledge is exposed; next, the recording of notice; next, the marking of boundaries; and, finally, the work of development. But, although this is the proper and natural order of procedure, it is not obligatory, in the absence of intervening rights. It is, indeed, universally held that, when every act necessary to complete a location has been done before an adverse claim has accrued, the order in which such acts have been performed is immaterial. If, for instance, a locator, before the discovery of any lode, begins by first marking out a surface claim, his location is perfected if he develops a lode within his boundaries

before a good location is made by an adverse claimant. So here Dyer, having done everything required by the act of Congress, could have perfected his claim under the state law, if it had remained in force, by a subsequent posting and recording of the prescribed notices. To state the matter in another form: Several distinct acts are essential to constitute a valid location. The order in which they are performed is immaterial. Dyer performed all the acts required by the Federal statute in a perfectly legal manner, and they were all valid. The acts to be performed under the state law had been omitted, but were still performable at his option without any infringement of intervening claims when the state released him, in common with all others, from compliance with

portion thereof by virtue of an attempted adverse prior location made before that date. *Golden Terra Min. Co. v. Smith*, 2 Dak. 374, 11 N. W. 97.

Nor is the admission, in an action to adverse a claim to mining ground, of evidence of acts of location of the claim in question, done prior to the date upon which an Indian reservation was removed from the lands in question, in connection with the existence of the result of such acts on and after that date; such acts consisting of the discovery within the limits of the claim of a vein of gold-bearing ore, and the staking of the ground,—erroneously prejudicial as against a party claiming an adverse right based on possession by virtue of what existed and was done by him in support and maintenance of his claim on and after that date. *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98.

And immaterial evidence and findings in an action brought to determine conflicting claims to mining ground, with reference to facts and matters occurring prior to the date when an Indian reservation was removed from the land in question, are not ground for reversal, where the cause was tried by the court, and the findings distinctly and clearly discriminated between acts done before and those done after that date, and the evidence fully supported the findings. *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426.

In the above case *French v. Lancaster*, 2 Dak. 276, 9 N. W. 716, *supra*, was distinguished upon the ground that that case was tried by a jury.

So, one who entered on an Indian reservation and attempted to locate a mining claim, to which, after the treaty opening the reservation, he was given a patent, had, prior to such treaty, sufficient right in such claim to part with a portion thereof by dedication for highway purposes; and the public, under such dedication, and under an act of Congress granting a right of way for the construction of highways over public land, acquired a valid title, of which no subsequent act on his part or on the part of his

grantees could deprive it. *Deadwood v. Whittaker*, 12 S. D. 520, 81 N. W. 908.

But where mining claims are sought to be located within the boundaries of a tract once set apart for an Indian reservation, which has not been opened to white people for any other purpose than locating, developing, and operating mines, it is important that, before a locator shall be adjudged to have acquired the right to a patent, there shall be a showing that the ground claimed is in fact mining ground, containing gold or other precious metals in sufficient quantities to pay for working, and that the purpose of the locator in acquiring title is to develop and operate mines. *Durant v. Corbin*, 94 Fed. 382.

Nor does an act of Congress restoring to the public domain a portion of an Indian reservation, and providing that, subject to the right of individual allotments therefrom to Indians as prescribed therein, the same shall be open to settlement and entry by proclamation of the President, and shall be disposed of under the general laws, operate of itself, in advance of the proclamation of the President, to give the right to locate mining claims therein under the mineral laws. *McFadden v. Mountain View Min. & Mill. Co.* 38 C. C. A. 354, 97 Fed. 670, *Reversed on other grounds* in 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488.

And, under the act of Congress of March 3, 1901, opening lands acquired from certain tribes of Indians by treaty to settlement; and under the proclamation of the President, issued July 4, 1901, fixing the opening day for entry upon such lands on August 6, 1901, containing an express warning that no person shall be permitted to settle upon property, or enter any of said ceded lands, except in the manner prescribed by the proclamation after the expiration of sixty days from the time the same are opened to settlement and entry,—persons qualified to make mining locations and obtain title to public lands could not occupy any of such lands for the purpose of discovering minerals, prospecting for oil, or making mineral locations, until sixty days after August 6,

its local law. His claim was then perfect. Belk, on the contrary, commenced his attempted location by an unlawful trespass upon the rights of others, which for that reason was totally invalid as the foundation of any right, and, excluding this unlawful act from consideration, it was held that his subsequent acts, prior to Meagher's location, were insufficient to secure the ground. Dyer's acts, on the contrary,—none of which could be excluded from consideration on the ground of illegality,—did, long prior to the 26th of November, 1900, constitute a perfect location as the law stood from and after the 6th of February of that year.

We have not overlooked the contention of respondent that it is found as a fact by the superior court (concluding portion of the

first finding) that, when plaintiff made his location on November 26, 1900, the ground was vacant and unoccupied, and his further contention that there is sufficient conflict and uncertainty in the evidence regarding the Dyer locations to sustain this finding in its broadest sense. We think, however, that such a finding would not only have been in conflict with all the substantial evidence in the case, but it would have been inconsistent with other and more specific findings, and with the allegations of the complaint. The allegation of the complaint is that the ouster by defendants occurred on the 15th of November, 1900, and the evidence conforms strictly to this allegation. It shows that on that day two men employed by plaintiff to do assessment work on his supposed claim

1901; and a location under the placer mining law for the purpose of mining for petroleum and oil, made during such sixty days, was contrary to law, and void. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936.

So, a person making mining locations on an Indian reservation on May 27, 1902, on which day Congress passed an act subjecting mineral lands in the reservation to entry, acquires no rights by such location, where on the same day Congress, by two joint resolutions, postponed the operation of the act until a subsequent day. *Gibson v. Anderson*, supra.

But where an act of Congress opens a part of an Indian reservation, and restores the lands to the public domain subject to the rights of the Indians to make selection of land to be allotted to them in severalty, the purpose and intent are to award to each Indian agricultural land for his home; and lands valuable for minerals contained in them are not subject to be selected for allotment to Indians. *Collins v. Bubb*, 73 Fed. 735.

Mining laws and the right to locate and enter mineral lands, however, have been extended over lands ceded to certain Indians in a number of instances. This was done with reference to lands ceded to certain Indian tribes in Oklahoma by act of Congress of June 6, 1900, and with reference to mineral lands in the Colville Indian reservation, in the state of Washington, by act of Congress of July 1, 1898. *Re Acme Cement & Plaster Co.* 31 Land Dec. 125; *United States v. Four Bottles Sour-Mash Whisky*, 90 Fed. 720.

And the act of Congress of June 6, 1900, subjected from the time of its passage, to the mineral laws and to mineral exploration and entry, all of the lands which were to be allotted or opened to settlement thereunder, so far as the same should be found to contain valuable mineral deposits. *Re Acme Cement & Plaster Co.* supra.

And the provisions thereof were not intended to operate as an exception to the settled principles applied by the Land De-

partment in the administration of the public land laws generally; and controversies between mineral and agricultural or town-site claimants, as to any of the land over which the mining laws were extended by that act, are to be determined by the same principles which apply to like controversies with respect to public lands elsewhere. *Re Mining Claim*, 31 Land Dec. 154.

But lands subjected by that act, to the mining laws and to mineral exploration and entry, like other land subject to the mining laws or to mineral exploration, are not always so subject, but only so long as they remain free from any vested right of ownership in an Indian or white person; and, upon their allotment in severalty, or by title thereto being earned by homestead entry men by compliance with the homestead law, lands allotted or embraced in the entry cease to be subject to statutes like the mining laws, which prescribe the manner of disposing of public lands. *Re Acme Cement & Plaster Co.* supra.

And of the lands ceded to the United States by the Comache, Kiowa, and Apache Indians, sections 16 and 36, 13 and 33, reserved for school purposes under agreement ratified by that act, are not thereby made subject to the operation of the mining laws. *Re School Sections*, 32 Land Dec. 95.

Though the rule is different with reference to the like sections reserved for school purposes of the lands ceded to the United States by the Wichita and affiliated bands of Indians under agreement ratified by the act of Congress of March 2, 1895. *Ibid.*

So, under the act of Congress of July 1, 1898, intended to authorize prospectors and miners to explore the Colville Indian reservation for the purpose of developing its mineral resources, and authorizing citizens who make discoveries of valuable minerals therein to locate, claim, and work them, the lands can be entered only under and in accordance with the general law of the United States in relation to the entry of mineral lands. *United States v. Four Bottles Sour-Mash Whisky*, supra.

And lands ceded by Indian tribes to the

were driven from the ground by Dyer and his men. At that date, then, when, according to the specific findings of the court, plaintiff had acquired no rights to any of the ground in controversy, the defendants were on the ground and remained in possession, claiming it under the location which the court finds they had long before attempted to make. It was eleven days later that the plaintiff's supposed right was initiated by his formal location of November 26th, and when four days later, on November 30th, he filed his complaint in this action, he alleged the ouster on the 15th, the taking possession and claim of ownership by defendants, and that they were excavating and threatening to continue excavating the gold-bearing rock. In short, the allegations of the complaint itself on any fair construction of their terms are inconsistent with the assumption that Dyer was not in possession of his claim at the date of plaintiff's location.

Finally, we think that a new trial should have been granted upon the ground that the decision is against law for want of a finding upon the most material issue presented by the pleadings. It is found that plaintiff made a location of the ground in November,

1900, and it is found that Dyer's previous location was invalid for lack of conformity to a law in force at the time it was made. This finding, however, is entirely consistent, as we have endeavored to show, with the supposition that after the repeal of the act of 1897 his location may have been or become perfect, and the material question—the issue upon which the whole case depends—is not whether Dyer had a good claim in 1898 or 1899, but whether he had a good claim prior to November 26, 1900. Upon this point there is no direct finding, and, if it be contended that it is indirectly or inferentially found against the defendant, we can only repeat that such finding is not only in conflict with the evidence, but inconsistent with the allegations of the complaint.

The judgment and order appealed from are reversed.

We concur: Shaw, J.; Van Dyke, J.; Lorigan, J.; Henshaw, J.

McFarland, J., dissenting:

I dissent, and adhere to the opinion heretofore rendered in department. I think that the judgment and order appealed from should be affirmed.

United States under agreement ratified by act of Congress, which have been heretofore set aside and reserved by the Secretary of the Interior for county-seat town sites under the act of Congress of March, 1901, or which have been reserved and appropriated by authority of law for any other specific purpose, are not subject to the operation of the mining laws. *Re School Sections, supra.*

7. Military and naval reservations.

Mineral lands may be included in reservations for military purposes; and, when so included, they are not subject to appropriation by mineral claimants during the time the reservations exist. *Re Ft. Maginnis, 1 Land Dec. 552.*

But, where mining claims were legally located and held prior to a reservation of the land comprising them for military purposes, the miners' rights cannot be divested by such taking. *Ibid.*

So, a discovery of mineral upon lands within a naval reservation is not on unoccupied land open to exploration or location, and will not sustain a location of a mineral claim. *Behrends v. Goldsteen, 1 Alaska, 518.*

And this is so when the discovery is within the reservation, though the land lies partly within and partly without such reservation. In such case the whole claim is void. *Ibid.*

So, a mineral entry based on a location made after the withdrawal of the land for a reservoir site under the act of Congress of 7 L.R.A. (N.S.)

October 2, 1888, reserving from sale as property of the United States all such lands as should thereafter be designated or selected for reservoirs, confers no right; but an entry based upon such a location may be suspended, and, if it subsequently appears that the land is not required for reservoir purposes, it may then pass to patent. *Re Colomokas Gold Min. Co. 28 Land Dec. 172.*

8. Tide lands.

Mineral lands below high tide are not a part of the mineral lands of the United States, subject to exploration and location for mining purposes, like those above high tide; U. S. Rev. Stat. § 2319 (U. S. Comp. Stat. 1901, p. 1424), providing that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States, being construed as subject to the general policy of the government that tide lands are never to be sold, but are to be held in trust for the new States that shall be carved out of the public domain. *Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311; Re Logan, 29 Land Dec. 395.*

And a miner who discovers a lode above mean high tide, and locates thereon, cannot follow the lode and include in his location a part thereof, or mineral lands that may extend into and under the sea, below mean high

OREGON SUPREME COURT.

FRANK C. SHARKEY et al., Appts.,
v.

C. F. CANDIANI et al., Respts.

(— Or. —, 85 Pac. 219.)

Referee—act beyond jurisdiction—waiver.

1. Participating in the taking of testimony by a referee out of the jurisdiction of the court without a special order authorizing it waives the error.

Patent—mine—effect.

2. The issuance of a patent to a mining claim is conclusive to establish all facts necessary to its validity as against one claiming adverse rights.

Mine—marking boundaries—statute.

3. A statute making null and void a mining location which does not comply with its requirements as to marking of boundaries, applies only in favor of conflicting claimants, and does not prevent a correct marking before adverse claims attach.

Same—subsequent discovery.

4. The subsequent discovery of mineral-bearing ore validates the location of a mining claim invalid for want of such discovery, in the absence of intervening rights.

Same—managing partner—authority.

5. The managing partner of a mining

tide. His claim ends at the shore line. *Alaska Gold Min. Co. v. Barbridge*, supra.

So, lands below high-water mark of a meandered stream like the Missouri river are not public lands within the meaning of the mining laws, and are not subject to appropriation and entry as a mining claim. *Re Argillite Ornamental Stone Co.* 20 Land Dec. 585.

It is provided, however, in the act of Congress extending the laws of the United States relating to mining claims to the district of Alaska (*Carter's Anno. Alaska Codes*, p. 139), that, subject only to such general limits as may be necessary to exempt navigation from artificial obstruction, all land and shoal water between low and mean high tide on the shores, bays, and inlets of Behring sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intention to become such, under such reasonable rules and regulations as the miners in organized districts may have heretofore made, or hereafter may make, governing the temporary possession thereof for exploration and mining purposes, until otherwise provided by law; but no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company, to excavate or mine under any of said water below low tide.
7 L.R.A.(N.S.)

claim possesses sufficient authority from his co-owners to bind them by his negligence in permitting the location of a conflicting claim and its improvement until paying ore is discovered, so that the partners cannot subsequently assert their rights to the land within the conflicting location.

Same—abandonment.

6. Mining locators who have not perfected their title, who attempt to point out to another unlocated land, and, after he has selected it, place the stakes of the location for him, will, after they have permitted him to improve it at great expense until he has discovered paying ore, be held to have abandoned their claim so far as it conflicts with the later location.

(May 1, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Lane County in favor of defendants in a proceeding to establish title to a mining claim. Affirmed.

Statement by Moore, J.:

This cause having been reargued, the opinion heretofore announced, which has not been published, will be changed to accord with the view now entertained. This is a suit by Frank C. Sharkey, Louis Zimmer-

b. Mineral lands.

1. Restriction to.

Only the mineral lands of the general government are subject to exploration and location in a proper case for mining purposes. *Armstrong v. Loer*, 6 Colo. 393; *Re Deadwood Town Site*, 8 Copp. Land Owner, 18, Mineral Law Dig. p. 452.

This is implied in the language of the grant,—“all valuable mineral deposits in lands belonging to the United States are hereby declared to be free and open to exploration and purchase.” U. S. Rev. Stat. § 2319, U. S. Comp. Stat. 1901, p. 1424.

And it is and has been the settled policy of the government to withhold mineral lands from public land grants, unless they are expressly granted; and such a grant, which does not in express terms include mineral lands, does not transfer to the grantee lands valuable for mineral deposits, though there is no express exception of mineral lands in the grant. *Re Florida C. & P. R. Co.* 26 Land Dec. 600.

The rejection by the Land Department of an application for a patent to a mining claim because of failure to establish the presence in the land involved of mineral deposits of such extent and value as to justify the issuance of a patent, however, does not amount to a determination that the location upon which the application is based is invalid. *Clipper Min. Co. v. Eli Min. & Land Co.* 33 Land Dec. 660.

man, Fred E. Sharkey, and N. B. Standish, against C. F. Candiani, Caesar Marco, and J. J. Tyler, to determine the right of possession of certain mineral land. The complaint states that the defendants secured a survey of what they designated as the "Doctor" lode in the unorganized mineral district of Blue river, Lane county, and applied for a United States patent therefor; whereupon plaintiffs interposed an adverse claim to a part of the premises included in such survey, and instituted this suit, alleging, *inter alia*, that they were in possession of the Louise and Lucky Boy No. 4 quartz mining claims, which were prior locations, the validity of which had been maintained, detailing the manner thereof and showing wherein the Doctor lode conflicted with such

claims. The answer, having denied the material allegations of the complaint, averred that plaintiffs had abandoned all interest in the premises inconsistent with the boundaries of the Doctor lode, and that by reason of their conduct they ought to be estopped to assert any claim thereto; setting out the facts which, it is asserted, constituted the alleged impediment which the law raises to preclude the maintenance of this suit. The allegations of new matter in the answer having been denied in the reply, the cause was referred, and from the testimony taken the court found that the defendants, by reason of plaintiffs' conduct, were entitled to the possession of the premises in dispute, and, having rendered a decree in accordance therewith, the plaintiffs appeal.

2. What are, within statutory grants, exceptions, and reservations.

(a) General rules.

There is no certain, well-defined, obvious boundary between mineral lands and those which cannot be so classed. Perhaps the true criterion would be to consider whether, upon the whole, the lands appear to be better adapted to mining, or to other purposes. *Ah Yew v. Choate*, 24 Cal. 562.

To constitute mining land, it must appear as a fact that mineral can be secured therefrom with profit. *Re Royal K. Placer*, 13 Land Dec. 86.

And this rule applies as well in an *ex parte* case as upon the application of a mineral locator, conflicting with that of some other locator or claimant. *Ibid*.

And an allegation in a complaint, in an action involving title to a mining location, that the location does not contain named minerals in lode deposits of value sufficient to justify the expense of exploitation, charges that the ground is nonmineral, and is an allegation of fact, and not one of a legal conclusion. *O'Keefe v. Cannon*, 52 Fed. 898.

So, proof of the mineral character of the land must be specific, and based upon the actual production of mineral. *Kings County v. Alexander*, 5 Land Dec. 126.

And a mere theory that limestone underlies the surface of land, unsupported by evidence tending to establish its presence, is insufficient to establish its mineral character. *Ferrell v. Hoge*, 27 Land Dec. 129.

And the mere facts that colors of gold may be found by panning in the dry beds of creeks, and miners, upon such encouragement, might be led further to explore in the hope of finding gold in paying quantities, are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land, in a contest between a mineral claimant and one claiming land under other laws of the 7 L.R.A. (N.S.)

United States. Steele v. Tanana Mines R. Co. 148 Fed. 678.

So, evidence of the digging of a prospect hole to the depth of 10 feet, in which about 2 cents' worth of gold was found, and that there were ample time and opportunity to test the extent and value of alleged mineral deposits in the ground, without any systematic or continuous prospecting or working of the claim having been done, does not show a discovery upon which a mining claim may be based, within the meaning of the timber and stone act of June 3, 1878, withdrawing mining claims from the operation of that act. *Purtle v. Steffee*, 31 Land Dec. 400.

In the above case, *Michie v. Gothberg*, 30 Land Dec. 407, *infra*, was distinguished upon the ground that in that case the mineral location interposed by protest against the application to purchase under the timber and stone act was based upon an actual discovery of mineral sufficient to sustain it until reasonable opportunity had been afforded the locator to ascertain, by further developing, the extent and value of the mineral deposit he had discovered.

So, the existence of mineral in such quantities as to justify the expenditure of money in the effort to secure it must be established as a present fact, to bring the land within the class subject to location and entry for mining purposes. *Re Downs*, 7 Land Dec. 71; *Kings County v. Alexander*, *supra*.

And evidence that neighborhood or adjoining lands are mineral in character; and that the land in controversy may hereafter develop mineral to such an extent as to show its mineral character,—is not sufficient to establish it. *Kings County v. Alexander*, *supra*.

Land containing gold in sufficient quantities to justify men of ordinary prudence in the expenditure of money and labor in mining developments, however, must be regarded as mineral in character. *Aspen Consol. Min. Co. v. Williams*, 23 Land Dec. 34.

And evidence of facts tending to show that a mining claim was deemed valuable for mining purposes is sufficient to go to the

Messrs. Snow & McCamant, for appellants:

A location once regularly made confers a right equivalent to patent; any entry on such lands, so regularly located, constitutes a trespass, and every attempted subsequent location thereon is void.

Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 612; McCulloch v. Murphy, 125 Fed. 147.

The Doctor location, there being no prior right of entry upon the ground covered by Louise and Lucky Boy No. 4, is void.

Gwillim v. Donnellan, *supra*; Aurora Hill Consol. Min. Co. v. 85 Min. Co. 12 Sawy.

jury on an issue as to whether or not the lands were vacant mineral lands of the United States subject to location. It is not necessary to show that there was a reasonable probability that the claim would become a source of profit. United States v. King, 9 Mont. 75, 22 Pac. 498.

And land on which mineral of commercial value is found is subject to appropriation and entry under the mineral land laws, regardless of the fact that, from lack of transportation facilities, the mineral cannot at the present time be put upon the market. Smith v. Wallace, Departmental Decision of March 24, 1896, Mineral Law Dig. 345.

So, in the absence of any adverse claim, it will be presumed that lodes exist in land legally located as lode claims. Apple Blossom Placer v. Cora Lee Lode, 21 Land Dec. 438.

And if the mineral character of a mining claim is founded upon the exploration of only one portion thereof, the burden thereby cast upon one attacking the mineral location is sustained by evidence of exploration on that same portion, sufficient to demonstrate its nonmineral character, by overcoming the alleged prior exploration and discovery. Washington v. McBride, 25 Land Dec. 169.

Nor is the fact that no active mining operations have been carried on on lands since their purchase of any effect on the question of their mineral character, where, during such time, the land has been involved in litigation. Active mining operations are not essential in order to establish the mineral character of the land. Aspen Consol. Min. Co. v. Williams, 23 Land Dec. 34.

And where a mineral location is based upon a discovery within its limits of a vein or lode of quartz-bearing copper and gold; and it appears that the same is in all respects regular, and that the time intervening between the date of the location and the filing of an application to purchase the land under the act of June 3, 1878, as amended by the act of August 4, 1892, was so short as not to afford the mineral locator a reason-

359, 34 Fed. 515; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608; Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. 5 McCrary, 298, 17 Fed. 57; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Quinby v. Conlan, 104 U. S. 421, 26 L. ed. 800; Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130.

Where the validity of a junior location depends upon forfeiture or abandonment of a senior one, the burden of proof to show such forfeiture or abandonment is upon the junior claimant.

2 Lindley, Mines, § 643; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936; Walton v. Wild Goose Min. & Trading Co. 60 C. C. A. 155, 123 Fed. 209; Hammer v. Garfield Min. & Mill. Co. 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548.

able opportunity to develop his claim sufficiently to ascertain with certainty the extent or value of the mineral deposit contained therein,—such location will be regarded as a mining claim within the meaning of the proviso to such act, and the land therein embraced will not be regarded as subject to purchase thereunder. Michie v. Gothberg, *supra*.

But where the local land officer and the commissioner of the General Land Office concur in finding that land is mineral in character, and subject to sale as such, the evidence being conflicting, great consideration should be given to such determination; and it should not be rejected unless a mature and careful examination of the entire record clearly demonstrates that it is wrong. Washington v. McBride, *supra*.

And the report of the surveyor as to the mineral character of a claim is sufficient to warrant its location as a placer mine, in the absence of anything to bring in question the bona fides of the claim, or tending to show that the ground is valuable, or is sought, for any other than mining purposes. Re Lincoln Placer, 7 Land Dec. 81.

But the report of the United States deputy surveyor, stating that a claim is underlain with a deep bed of gravel-bearing placer gold, does not establish its mineral character so as to justify its location and entry for mining, where it also states that the successful working of said claim as a placer mine will depend upon the building of a bed-rock flume. Re Downs, 7 Land Dec. 71.

And since a surveyor is not required, or afforded opportunity, to pass over the interior or body of sections he surveys, and he is not directed to search for mines, but merely to report such as come to his knowledge while passing along the outlines of the sections surveyed, his return that lands are mineral or nonmineral does not preclude the assertion of any right, or the proof of the facts of the case as they really exist. Win-scott v. Northern P. R. Co. 17 Land Dec. 274.

Nor does an ordinary assay certificate establish the value of a vein of mineral; and

Equitable estoppel never arises where there has been a bona fide mistake of the parties as to where the true boundary of the true owner lies, even where, as a result of this mistake, improvements have been erected.

Minneapolis Mill Co. v. Minneapolis & St. L. R. Co. 51 Minn. 304, 53 N. W. 639; *Cronin v. Gore*, 38 Mich. 381; *Proctor v. Putnam Mach. Co.* 137 Mass. 159; *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 760; *Iverson v. Swan*, 169 Mass. 582, 48 N. E. 282; *Boggs v. Merced Min. Co.* 14 Cal. 279; *Maye v. Tappan*, 23 Cal. 306.

To constitute an estoppel by the acquiescence of a party it is essential that he who is claimed to be estopped should have had knowledge of the facts, and he who claims the estoppel should have been ignorant of the truth, and have been led into doing that which he would not have done but for such silence.

Mullaney v. Duffy and Iverson v. Swan,

supra; *Wait v. Gover*, 11 Ky. L. Rep. 750, 12 S. W. 1068; *Schraeder Min. & Mfg. Co. v. Packer*, 129 U. S. 688, 32 L. ed. 760, 9 Sup. Ct. Rep. 385; *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499; *Warner v. Fountain*, 28 Wis. 413; *Bigelow, Estoppel*, 5th ed. pp. 609, 618, 626; *Henshaw v. Bissell*, 18 Wall. 255, 271, 21 L. ed. 835, 840; *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927.

Equitable estoppel never arises as between conflicting claimants, whether of mining lands or otherwise, where the means of information are equal to both parties.

Gleeson v. Martin White Min. Co. 13 Nev. 442; *Maye v. Tappan*; *Brant v. Virginia Coal & I. Co.*; *Mullaney v. Duffy*; and *Iverson v. Swan*,—*supra*; *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353.

Messrs. Thompson & Hardy and L. Billeu, for respondents:

Appellants had abandoned to respondents the ground embraced in the Doctor location,

it is not sufficient to establish the mineral character of the land containing it. *Dobler v. Northern P. R. Co.* 17 Land Dec. 103.

Only the government of the United States, or persons claiming lands under the government as nonmineral lands, can properly raise the question whether the lands are subject to be located as mineral lands. *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54.

On this subject, see also *infra*, V. c.

(b) Grants to states for educational and other purposes.

Grants of public lands to a state or territory for school or other purposes pass no title to mineral lands then known to be such as a matter of governmental policy, whether they are expressly reserved or not. *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.* 102 U. S. 787, 26 L. ed. 126; *Keystone Lode & Mill Site v. Nevada*, 15 Land Dec. 259; *Re Utah*, 32 Land Dec. 117.

Thus, the grant of the 16th and 36th sections of public land to the state of California by the act of Congress of March 3, 1853, was not intended to include mineral lands known to be such when the same was surveyed. *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.* *supra*.

As to this point, the above case appears to have overruled *Wedekind v. Craig*, 56 Cal. 642, and *Higgins v. Houghton*, 25 Cal. 254.

So, the provision of § 7 of that act, that no person shall obtain the benefit of this act by a settlement or location on mineral lands, expressly excepts from the grant mineral lands known to be such when the surveys of them were made. *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.* and *Wedekind v. Craig*, *supra*.

And school indemnity selection lands, if mineral in character, are open to exploration and purchase under the mining laws prior to 7 L.R.A. (N.S.)

the approval of the selection. *McQuiddy v. California*, 29 Land Dec. 181.

But a patent transferring public lands to an individual is a record of a judgment of the state by its officers, duly appointed for that purpose, that conditions and characteristics of the land are not such as to constitute it mineral land, within the meaning of a statute reserving mineral lands from a grant of school lands. *Ah Yew v. Choate*, 24 Cal. 562.

And the mere fact that land patented to an individual was ascertained to contain a sufficient amount of gold to induce the patentee to mine it therefor is not sufficient to establish that it was mineral land, within the meaning of a statute excepting mineral lands from a grant of school lands, as against evidence to the contrary, furnished by the patent. *Ibid*.

So, the act of Congress of March 21, 1864, providing for the admission of Nevada into the Union as a state, and granting thereto certain sections of land for school purposes, does not pass title to lands known to be mineral in character, though the grant does not, in terms, except such lands; the same remaining part of the public domain, and subject to location for mining purposes. *Keystone Lode & Mill Site v. Nevada*, *supra*.

And the provision of that act, granting specific sections of public land which had not yet been surveyed, constituted a present grant of land equal in amount to the specified sections, the grant to take effect when the status of the land was fixed by survey and they became capable of identification; and where, subsequent to such grant, an act was passed reserving from sale all mineral lands of the state; and after this the legislature of the state of Nevada unqualifiedly accepted the grant,—the acceptance of the grant was in its modified form, not including mineral lands, so that a patent of such

and cannot be heard to assert a title they disclaimed.

Golden Terra Min. Co. v. Mahler, 4 Pacific Coast L. J. 405, 4 Morrison, Min. Rep. 390; Patterson v. Hitchcock, 3 Colo. 533, 5 Morrison, Min. Rep. 542; Seymour v. Wood, 53 Cal. 303; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246; Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585.

Moore, J., delivered the opinion of the court:

It is contended by plaintiffs' counsel that an error was committed in refusing to strike from the transcript much of the testimony given by defendants' witnesses, because it was taken out of the jurisdiction of the trial court, without an order to that effect. The statute authorizes a court, when a suit is at issue upon a question of fact, to refer the cause, and also to appoint a special referee for the purpose of taking testimony

of witnesses residing more than 20 miles from the place of holding court. Bellinger & C. Comp. § 827. This suit was begun and tried in Lane county, and the referee appointed therein, without an order of special reference, went to Multnomah county, where, over objection and exception of plaintiffs' counsel, the testimony of defendants' witnesses was taken. These witnesses, however, were cross-examined before such referee by plaintiffs' counsel, who thereafter, in Lane county, offered testimony in rebuttal thereof. In Brush v. Mullany, 12 Abb. Pr. 344, it was insisted that a referee appointed in one county in New York could not, without special appointment, take the testimony of witnesses in any other county of that state; the court holding that an objection interposed on that ground went to the jurisdiction of the referee, and intimating that it was doubtful whether or not an indictment for perjury would lie against any of the witnesses who were sworn before him

lands by the state did not include the mineral lands; and mineral lands were not thereby withdrawn from location for mining purposes. Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, Affirming 10 Nev. 290.

And the reservation therein from sale, of lands valuable for mines of gold, silver, quicksilver, or copper, applies to lands granted prior to and at the time of the passage of the act, as well as to future acts or grants. Heydenfeldt v. Daney Gold & S. Min. Co. 10 Nev. 290.

And it is not limited to the public lands then belonging to the United States, but includes all unsurveyed lands whether the same or any portion thereof had been previously granted or not. All lands are public within the meaning of the word "public," as used in that act, until the survey thereof is made. Ibid.

But, in excluding mineral land from the lands granted by that act, Congress intended to exclude only such as were valuable for mining purposes; and the mere fact that the land contained copper, gold, and silver bearing quartz is not sufficient to impress it with the character of mineral land within the meaning of the reservation. Merrill v. Dixon, 15 Nev. 406.

Nor was the 2,000,000-acre grant by the United States to the state of Nevada of land for school purposes, to be selected by the state from unappropriated, nonmineral, public lands, made by the act of Congress of June 16, 1880, intended to include any mineral lands. Garrard v. Silver Peak Mines, 82 Fed. 578, Affirmed in 36 C. C. A. 603, 94 Fed. 983.

And under it the state has no authority to issue a patent for mineral land. Ibid.

So, under that act, and under Nevada act of March 3, 1887, expressly disclaiming, on behalf of itself and its grantees, any rights

to any mineral lands which had been, or might be, selected under such grant, the state acquired no right to land selected under the grant which was, in fact, known mineral land containing salt and precious metals, and which had been previously appropriated under an act authorizing such appropriation, and had since remained in the actual possession of the appropriator and his grantees. Garrard v. Silver Peak Mines, 36 C. C. A. 603, 94 Fed. 983.

And a patent issued by the state under that act, and under the Nevada statutes, providing for the sale of such lands, but permitting any citizen to enter on any mineral land in the state, notwithstanding the state's selection of it, conveys to a patentee no title to a lode or vein of mineral in the patented lands; and one taking a patent to such lands acquires no interest in a mine located after his application was filed, and before the patent issued, notwithstanding the fact that the selection by the state under the grant from the government determined that the lands were agricultural and nonmineral. Stanley v. Mineral Union, Limited, 26 Nev. 55, 63 Pac. 59.

Nor did the grant of school lands to the state of Utah, made by act of Congress of July 16, 1894, carry with it lands known to be chiefly valuable for mineral at the time when the state's right would attach, if at all. Re Utah, 32 Land Dec. 117.

But a mineral return by the surveyor general does not have the effect of establishing the character of lands as chiefly valuable for mineral, and cannot of itself operate to take lands out of a grant to a state for school purposes as mineral lands; this can be done only by proof clearly showing that the lands were, at the time when the right of the state would have attached, known to contain valuable deposits of mineral, and to be chiefly valuable on account of such deposits. Ibid.

outside the county in which he was appointed. In that case, however, a default by all the defendants having been entered, the cause was referred and the testimony taken in their absence, thus precluding the implication of a waiver. In *Blevins v. Morledge*, 5 Okla. 141, 47 Pac. 1068, an objection was interposed that a trial before referees was conducted outside the jurisdiction of the court, and it was held untenable where the point was not raised in the court below. It is fairly to be implied from the decision in that case that an objection to the taking of testimony by a referee, outside the jurisdiction of the court appointing him, could be waived by the parties. In New York a reference ordered by a court of special and limited jurisdiction requires the referee to

take the testimony within such jurisdiction. *Bonner v. McPhail*, 31 Barb. 106. Where, however, attorneys stipulate that a referee appointed by a surrogate in a county of that state may take the testimony of witnesses in another county therein, and an order to that effect is entered, it cannot be subsequently attacked, on the ground of a want of jurisdiction, by a party who appeared before the referee in such other county and there participated in the proceeding had therein before such referee. *Re Davenport*, 37 Misc. 179, 74 N. Y. Supp. 940. In the case at bar, though plaintiffs' counsel objected and excepted to the taking of the testimony by the referee in Multnomah county, they nevertheless participated therein by cross-examining the witnesses produced by the de-

And a mineral location of land within the state, made prior to the admission thereof as a state, is not of itself sufficient to establish the mineral character of the land located, so as to defeat a grant to the state. *Re Mahoganey No. 2 Lode Claim*, 33 Land Dec. 37.

But where the state was specially notified of the pendency of an application for a patent under such a location, and made no objection by way of protest or otherwise to the allowance of a mineral entry, it is bound by the record made upon such application; and a hearing for the purpose of determining the character of the land is unnecessary. *Ibid*.

An entry upon lands reserved by the act of Congress of March 2, 1853, for the purpose of being applied to common schools in Washington territory, and granted to the state to take effect as soon as it should be organized under the enabling act of February 22, 1889, made subsequent to the survey of such lands and the approval of the enabling act, however, is void, whether the lands are entered under the timber and stone act, or under the mining laws. *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784.

So, the state of Michigan was admitted to the Union with the unalterable understanding that every section number 16 in every township of public lands, and, when the section has been sold or disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the state for the use of schools; and the entry by a mining company on lands in such sections, or their equivalent, and a patent issued therefor, do not confer title. *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338.

Nor are lands reserved for the benefit of public schools, or donated, to any state, subject to location or entry as placer-mining claims under the act of Congress of August 4, 1892. *Re Harper*, 16 Land Dec. 110.

(c) Town-site grants.

(1) Generally.

The acts of Congress relating to town sites 7 L.R.A. (N.S.)

recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated is secured; thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found to occupation and purchase in the same manner as such deposits are elsewhere explored and possessed, and the lands containing them acquired. *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

And whenever mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, arising from prior occupation, are not interfered with. *Steel v. St. Louis Smelting & Ref. Co. supra*; *Re Deadwood Town Site*, 8 Copp, Land Owner, 18, Mineral Law Dig. 452.

Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. *Steel v. St. Louis Smelting & Ref. Co. supra*; *Poire v. Wells*, 6 Colo. 406; *Poire v. Leadville Improv. Co.* 6 Colo. 413.

And a patent issued under the general town-site laws, for land embraced in an unincorporated town site, is inoperative to convey title to any lands known to be valuable for minerals at the date of the town-site entry, or to any valid mining claim or possession held under the mining laws at the date of such entry. *Lalande v. Saltese Townsite*, 32 Land Dec. 211; *Moyle v. Bul-lene*, 7 Colo. App. 308, 44 Pac. 69.

Nor will present or prospective value of mineral lands for town-site purposes prevent acquisition of title thereto under the mineral laws. *Kemp v. Starr*, 6 Copp, Land Owner, 3, Mineral Law Dig. 452; *Re Deadwood Town Site, supra*.

And where a large tract of land is granted

fendants. To strike from the transcript the testimony so taken would be to permit plaintiffs to speculate on securing a decree in their favor; but, failing in this respect, now to insist that an error was thereby committed, would be allowing them to take advantage of an irregularity which, in our opinion, they voluntarily waived; the want of jurisdiction being only to the person.

Considering the case on its merits, the transcript shows that, prior to November, 1899, the plaintiffs and J. W. Moore and G. A. Dyson, as tenants in common, were in possession of the Louise and Lucky Boy No. 4, and other quartz-mining claims in the Blue river district upon which improvements have been made of the value of about \$40,000; the property being treated as one mine,

which is known as the "Lucky Boy Group," and was under the supervision of the plaintiff Frank C. Sharkey as managing partner. A statement of the means adopted by plaintiffs to secure a title to their claims is not deemed essential, for a patent from the United States having been executed to them therefor, except as to the premises in conflict, is conclusive of all the facts necessary to establish the validity thereof as against a party claiming adverse rights. *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225; *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513; *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 290, 119 Fed. 164; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 290,

for town sites, and a patent is issued for a smaller portion of such tract, valuable mineral deposits in such land outside of the patent, but in the town-site tract, are equally open to exploration and purchase with those in lands outside of the town site. *Davis v. Wiebbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

The rule that lands in which a vested right of ownership has been acquired are not subject to the mining laws or to mineral exploration and entry applies, however, to lands to which vested rights of ownership have been acquired under the town-site law. *Re Mining Claim*, 31 Land Dec. 154.

And the term, "mine of gold, silver, cinnabar, or copper," as used in the acts of Congress providing that no title to any such mine shall be acquired under provisions relating to town sites, applies to paying mines known to exist at the time of the granting of town sites, or which there was good reason to believe then existed; and, if the land was not known to be mineral at the time of the issuance of the patent, it passes by the patent, and is not open to subsequent location. *Smith v. Hill*, 89 Cal. 122, 26 Pac. 644; *Davis v. Wiebbold* and *Re Mining Claim*, supra.

A patent for a town site after issue thereof is conclusive as to the nonmineral character of the land, and can be assailed only in a direct proceeding by the United States. *Carter v. Thompson*, 65 Fed. 329.

And it cannot be attacked collaterally by persons locating mining claims subsequent to the entry of the town site, and the issuance of the patents therefor, on the ground that the land covered by such patents was mineral at the time of its entry, and hence did not pass under the patents, and was not withdrawn from location. *Board of Education v. Mansfield*, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 286; *Re Duffy Quartz Mine*, 18 Land Dec. 259.

Nor is a mining location of land within certain named town sites, made after special reservation of those town sites pursuant to a statute providing therefor, of any, validity 7 L.R.A. (N.S.)

or effect whatever. *Re Mining Claim*, supra.

And where entry of a town site was made and the patent issued, and it was not known that there were any valuable minerals within the town site, the patentee, or a person holding under him, cannot be deprived of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer. *Davis v. Wiebbold*, supra; *Re Laney*, 9 Land Dec. 83; *Re Williams*, 9 Copp, Land Owner, 147, *Mineral Law Dig*, 452; *Re Mining Claim*, supra.

In *Davis v. Wiebbold*, supra, it was said that the language in *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389, supra, was used with reference to mines in unoccupied public land in unpatented town sites, and it is applicable only to them and to mines in public land in patented town sites outside of the limits of the patent.

Nor can the locator of a lode-mining claim which is partly embraced in a town site obtain any rights by virtue thereof within the limits of the town site. *Re Laney*, supra.

So, the policy of the United States government, of conveying town-site lands to the states, was to reserve only such mineral lands as were valuable as such. *Richards v. Dower*, 81 Cal. 44, 22 Pac. 304.

A mine is not reserved from the Federal grant of town-site lands to a state, unless it is not only known, but known to be valuable, at the date of the patent, or discovered to be so before the occupation or improvement of the lot containing it for residences or business under the town-site title. *Ibid*.

And a mining claim is not legally known to exist, within the meaning of these rules, where the boundaries of the claim located are not specifically marked on the ground, and due notice of the location given. *Re Duffy Quartz Mine*, supra.

And if the lands were not known at that time to be valuable for mining purposes, the fact that they had been valuable, or that they were afterwards discovered to be still

181 Fed. 579; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Cathoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885. The defendant Candiani having been advised by Zimmerman to go to the Blue river mining district and secure a quartz claim, accepted from him a letter of introduction which, in November, 1899, he presented at the mines to Frank C. Sharkey, who showed him and his associate, one G. B. Perelli, every attention possible. After remaining plaintiffs' guests several days, Candiani and Perelli went to a tunnel on one of the claims, known as the "Gold Dollar," where they saw Dyson, who, in answer to their inquiry as to whether or not there was any mining property that could be secured in that vicinity,

informed them that vacant public land could be found just above the place where he was working, showing them the northeast and northwest corners of the Gold Dollar claim. Perelli, going a few feet north of the boundary of such claim, prospected the ground, and returning to the tunnel wrote a location notice, calling the premises 'the "Doctor" claim. Dyson signed his name as a witness to the notice, which was posted on the stub of a tree on the claim selected. The day being very stormy, Dyson agreed to mark on the ground the boundaries of the Doctor claim, and Candiani and Perelli in a day or two thereafter left the mines without informing the superintendent of the location they had made. Candiani, on returning to Portland, however, told Zimmerman that he

valuable, for such purposes, does not prevent the patentee under a town-site patent from taking title. *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, Affirming 81 Cal. 44, 22 Pac. 304; *Bonner v. Meikle*, 82 Fed. 697.

So, the exception of mineral lands from the town-site grant of lands applies only to such lands as were at the time of the grant known to be so valuable for minerals as to justify expenditure for their extraction. *Davis v. Wiebold* and *Bonner v. Meikle*, supra; *Harkrader v. Goldstein*, 31 Land Dec. 87.

If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them; or, though they might be mined at a small profit, if they are of more value for agriculture than for mining,—they are not mineral lands within the meaning of the statutes. *Richards v. Dower*, 81 Cal. 44, 22 Pac. 304.

And land will not be deemed to have continued to be valuable as mineral land merely because a ledge had once been profitably worked, so as to be exempted from a grant of town-site lands. *Ibid*.

(2) Determination as to character.

The question whether town-site lands are mineral, so as to be open to location, is one for the consideration of the Land Department, in an application for a patent. *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447; 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Ryan v. Granite Hill Min. & Development Co.* 29 Land Dec. 522.

And a decision of that question by the court does not bind or conclude the department, or relieve it from the duty of making its own decision in the premises. *Ryan v. Granite Hill Min. & Development Co.* supra.

So, whether rights have been acquired in town-site lands which would preclude their location for mining purposes, and the issue of a patent therefor to a miner, when not subjected, under the act of Congress, to local tribunals, is a matter properly cognizable by the Land Department when applicable L.R.A.(N.S.)

tion is made for a patent. *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

But whether a ledge was known to be valuable for mining purposes at the time when a town-site patent covering it took effect is a question of fact for the trial court in an action involving a possessory right, which cannot be reviewed on appeal to a Federal court, where the only question of Federal law in the case had been rightly settled below. *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, Affirming 81 Cal. 44, 22 Pac. 304.

So, one who asserts a right to town-site lands has the burden of showing that they are mineral, and are, therefore, excepted from the town-site grant. *Richards v. Dower*, 81 Cal. 44, 22 Pac. 304.

And where a person acted in good faith in locating upon or purchasing town lots, and made improvements thereon under the belief that the land was not mineral, his rights ought not to be disturbed without clear and satisfactory proof that, within their limits, there had been found a lode or vein of mineral. *Bonner v. Meikle*, supra.

But where land is within a well-known mineral locality, the presumption, before its survey, is that it is mineral in character. *Re Deadwood Town Site*, 8 Copp, Land Owner, 18, Mineral Law. Dig. 342.

And clear and positive proof alone can overcome the mineral return of land near valuable mines. *North Leadville Town Site v. Searl*, 7 Copp, Land Owner, 36, Mineral Law Dig. 341.

(d) Homestead pre-emption and other agricultural grants.

(1) Generally.

Known mineral land is expressly exempted from homestead pre-emption by act of Congress. *Boggs v. Merced Min. Co.* 14 Cal. 279; *Gold Hill Quartz Min. Co. v. Ish*, 5 Or. 104; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

And it remains subject to location for

had established a claim joining the Gold Dollar. In the winter of 1899 or 1900, Dyson and Standish made some markings of the Doctor claim, for which service Candiani sent the former by Zimmerman \$10 in payment thereof, but when this money was delivered Zimmerman did not know that Dyson had indicated any line on the Doctor claim.

The statute of this state in force when Candiani attempted to establish the Doctor lode required the locator of a mine, before the expiration of ninety days from the date of posting the notice of selection of mineral land, to sink a discovery shaft upon his claim to the depth of 10 feet, or deeper, if necessary, to show a vein of mineral deposit in place. Laws 1898, p. 17, § 3. No work

having been done on the Doctor claim within the time prescribed, Candiani returned thereto and posted thereon another notice, of which the following is a copy, to wit: "Notice is hereby given that Charles F. Candiana, a citizen of the United States of America, conforming to the mining laws thereof, and of the state of Oregon, and the local rules, regulations, and customs of miners, has located, and by this notice do relocate, claim known as the Doctor lode or mining claim, said claim being discovered on the 16th day of November, 1899, and do claim 960 feet on this lead, lode, or vein, bearing mineral in place, by 600 feet in width, the same being 300 feet on each side of the center thereof, together with all dips, spurs, and angles, and all other veins or lodes the

mining purposes. Gold Hill Quartz Min. Co. v. Ish, supra.

Nor do known deposits of precious metals in public lands pass by a patent thereof as agricultural lands. Gold Hill Quartz Min. Co. v. Ish and Deffebach v. Hawke, supra; Bellows v. Champion Mine, 4 Copp. Land Owner, 17; Re Newell, 3 Copp. Land Owner, 50; Re Hurlbut, 5 Copp. Land Owner, 5, Mineral Law Dig. 259.

And the fact that lands were not segregated and leased as mineral lands does not affect their exemption from pre-emption as agricultural lands where their mineral character was known. Gold Hill Quartz Min. Co. v. Ish, supra.

And a pre-emption entry, covering land which is mineral in character, made with knowledge of prior mineral locations thereon, and of the fact that the land was at the time regarded by many in the vicinity as valuable for mineral purposes, is subject to cancellation as having been allowed for known mineral land. Aspen Consol. Min. Co. v. Williams, 23 Land Dec. 34.

And land upon which a valid homestead entry has been made, and which is classed as agricultural, but which is subject to the mineral laws, may be located for mining purposes; and the homesteader may be divested of his rights upon a proper showing, upon application made at any time before final proof and payment are made, and the final receipt issued. Bay v. Oklahoma Southern Gas, Oil, & Min. Co. 13 Okla. 425, 73 Pac. 936.

Rights once vested in an allottee of public lands, or an entry man under the homestead laws, however, cannot be affected by the subsequent exploration or location of the lands for minerals. Re Mining Claim, 31 Land Dec. 154.

And lands not known to contain valuable mineral deposits at the time when the rights of the allottee or homestead entry man become fixed and vested are not thereafter subject to exploration, location, or entry under the mining laws. Ibid.; Re Acme Cement & Plaster Co. 31 Land Dec. 125; Heine v. Roth, 2 Alaska, 417. 7 L.R.A. (N.S.)

And all mineral deposits discovered upon land after a patent therefor has issued to a party claiming under the laws regulating the disposal of agricultural lands pass with the patent, and are withdrawn from location. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200.

But a mining claim located so that a part of it was included within the limits of an agricultural claim, afterwards patented as agricultural lands, is not thereby rendered invalid as against a subsequent comer, who relies wholly upon the supposed defect in the original locator's location. Richards v. Wolfing, 98 Cal. 195, 32 Pac. 971.

Nor do mere surface indications of the existence of veins of mineral constitute a mine expressly excepted out of the pre-emption laws. Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131.

And the fact that there may be some quantity of gold in lands, not in sufficient quantities to warrant miners to work them, does not warrant a location for mining purposes, or prevent a homestead claimant from taking them as agricultural lands. Etling v. Potter, 17 Land Dec. 424.

To be reserved from sale under the agricultural-land laws as mineral in character, lands must be capable of being profitably worked for mineral by the usual mode of mining. Re Deadwood Town Site, 8 Copp. Land Owner, 153, Mineral Law Dig. 346.

The question for determination on an issue as to whether land is mineral or agricultural in its character is whether it is more valuable for mining than for agricultural purposes. Winters v. Bliss, 14 Land Dec. 59; Peirano v. Pendola, 10 Land Dec. 536; Cutting v. Reininghaus, 7 Land Dec. 265; Bay v. Oklahoma Southern Gas, Oil & Min. Co. supra.

If land is worth more for agricultural than for mining purposes it is not mineral land within the meaning of the statutes providing that no lands on which are situated any known mines are subject to pre-emption, although it may contain some

top or apex of which lie within said boundaries, situate in Blue river mining district, county of Lane, state of Oregon, said location being described and marked on the ground as follows, to wit: From this notice of location running 300 feet in a westerly direction to a stake marked 'Southwest stake of the Doctor lode;' thence 950 feet in a northerly direction to a stake marked 'Northwest stake of Doctor lode;' thence running 600 feet in an easterly direction to a stake marked 'Northeast stake of Doctor lode;' thence running 300 feet in a westerly direction to this notice of location. This claim is joining the northeast line of the Gold Dollar claim, and is the extension of the same; and I intend to hold and work said claim in accordance with the local cus-

toms and rules of miners and the mining laws of the United States and of the state of Oregon. Dated on the ground the 14th of February, 1900. Located February 14th, 1900. Discovered November 16th, 1899. C. F. Candiani." He also cut a tunnel into his mine, and prior to June, 1901, made other improvements on the property of the value of about \$8,000, when Frank C. Sharkey, having discovered that the Doctor lode conflicted with plaintiffs' mining claims, took possession of such tunnel and ejected Candiani from the premises, thereby precipitating a difficulty which resulted in this suit.

The statute of this state permits a citizen of the United States, or one who has declared his intention of becoming such, who discovers upon the unappropriated public

measure of gold or silver. *United States v. Reed*, 28 Fed. 482.

And, to exclude lands from appropriation under the homestead law on the ground that they contain a valuable bed of limestone, it must affirmatively appear that they are more valuable on account of the stone than for agricultural purposes. *Long v. Isakson*, 23 Land Dec. 353.

And the same rule applies to coal lands. *Colorado Coal & Iron Co. v. United States*, *supra*.

Nor is the mere fact that lands were being mined or claimed for mining purposes sufficient to withdraw them from entry under the homestead law, if the lands were not in fact mineral, and were worth more for agricultural than for mining purposes. *United States v. Reed*, *supra*.

And the construction of a house and shop upon a placer-mining claim does not tend to show that the person constructing them possesses the land as a miner, or that it is mineral ground; and evidence thereof is not competent as bearing upon the right of possession of a tract of placer-mining ground. *Moxon v. Wilkinson*, 2 Mont. 421.

A locator of a mining claim, contesting the rights of a homestead entry man upon the same property, is not entitled to either joint or adverse possession as against the homesteader. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* *supra*.

(2) Determination as to character.

The existence of known mines expressly excepted out of the pre-emption laws must be determined according to the facts in existence at the time of the sale of the pre-empted lands, and new discoveries after the sale, by which the lands become profitable to work as a mine, cannot affect the title passed by the sale. *Colorado Coal & I. Co. v. United States*, *supra*.

And proof of the mineral character of land, in a contest between a mineral and an agricultural claimant, must be specific and based upon the actual production of mineral, and must show that the mineral value 7 L.R.A. (N.S.)

of the land is greater than its agricultural value. *Dughi v. Harkins*, 2 Land Dec. 721.

And a person asserting the mineral character of land returned as agricultural has the burden of proving it. *Winters v. Bliss*, 14 Land Dec. 59; *Hunt v. Bartholomew*, 10 Copp. Land Owner, 203; *Mineral Law Dig.* 407; *Dughi v. Harkins*, *supra*; *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936.

He must show that, as a present fact, the land is mineral in character, and more valuable for mining than for agricultural purposes. *Dobler v. Northern P. R. Co.* 17 Land Dec. 103; *Tinkham v. McCaffrey*, 13 Land Dec. 517; *Magruder v. Oregon & C. R. Co.* 28 Land Dec. 174; *Creswell Min. Co. v. Johnson*, 8 Land Dec. 440.

And one who attacks an agricultural entry on the ground of the known mineral character of the land at the date of the entry has the burden of proof to establish such character irrespective of the fact that the land had been returned as mineral after the allowance of the agricultural entry. *Aspen Consol. Min. Co. v. Williams*, 23 Land Dec. 34.

Where land has been returned as mineral in the surveyor general's report, and this report remains in force, however, the burden of proof of its agricultural character rests with the person asserting it. *Ibid*.

But a final decision of the Land Department, in which a tract of land is held to be mineral in character, is conclusive only as to the period covered by the inquiry, and will not preclude a subsequent investigation as to the character of the tract on allegation that the mining claims thereon have been abandoned, and that the land has become agricultural in character. *Dargin v. Koch*, 20 Land Dec. 384.

Nor are the returns of the surveyor as to the character of lands, as to being mineral or agricultural, conclusive; and evidence as to the character of the land may be produced in impeachment of his returns. *Gold Hill Quartz Min. Co. v. Ish*, 5 Or. 104.

And evidence that a tract of land returned as mineral had improvements on it to the

domain, a lode of mineral-bearing rock in place, to locate a claim on the vein by posting thereon a notice which shall contain: "First, the name of the lode or claim; second, the name or names of the locator or locators; third, the date of the location; fourth, the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said lode or vein; fifth, the general course or strike of the vein or lode as nearly as may be." A locator is also required to define "the boundaries upon the surface of each claim so that the same may be readily traced. Such boundaries shall be marked within thirty days after posting of such notice by six substantial posts, . . . or by substantial mounds of stone, . . .

value of about \$5,000; and that several acres of it were in a high state of cultivation, producing quantities of fruit, grapes, vegetables, and berries; and that a part of it produced a large quantity of hay; and that the pre-emptor derived from his agricultural operations an actual profit of \$1,000 after allowing prevailing wages for himself and three or four hands,—is sufficient to establish greater value for agricultural than for mineral purposes, as against evidence that the mining claims thereon were unworked and were salable at \$200 or less. *Peirano v. Pendola*, 10 Land Dec. 536.

Nor does a certificate of location of a mining claim establish the mineral character of a tract, in the absence of other evidence showing an actual discovery of mineral. *Etling v. Potter*, 17 Land Dec. 424; *McQuiddy v. California*, 29 Land Dec. 181; *Magruder v. Oregon & C. R. Co.* 28 Land Dec. 174.

And it is not sufficient to overcome an agricultural return of the surveyor general. *McQuiddy v. California* and *Magruder v. Oregon & C. R. Co.* supra.

In *Magruder v. Oregon & C. R. Co.* supra, *Sweeney v. Northern P. R. Co.* 20 Land Dec. 394; *Northern P. R. Co. v. Marshall*, 17 Land Dec. 545; and *Walker v. Southern P. R. Co.* 24 Land Dec. 172,—were overruled as to this point.

To raise a presumption by a location of a mining claim that the land included therein, though returned as agricultural, is in fact mineral, the location must be a legal one in which a discovery in compliance with the law was made. *Rhodes v. Treas*, 21 Land Dec. 502.

But to sustain the location of a mining claim, besides the certificate of location, evidence of the mineral character of the land, or of a discovery of mineral sufficient to warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine, must be given as against an agricultural return. *McQuiddy v. California*, supra.

And when a legal location for mining

one such post or mound of rock at each corner and at the center ends of such claims." *Bellinger & C. Anno. Codes & Statutes*, § 3975. "Any and all locations, or attempted locations, of quartz-mining claims, within this state subsequent to the 31st day of December, 1898, that shall not comply and be in accordance with the provisions of this act, shall be null and void." *Id.* § 3984. An examination of the last notice posted by Candiani will show that it fails in many respects to comply with the statutory requirements, and evidently omits to designate the eastern boundary of the Doctor claim. The trial court, *inter alia*, found, and we think the conclusion is fully warranted by the testimony: "That no markings of the Doctor claim for the purpose of marking

purposes has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is overcome, and the burden of proof shifts to the party attacking the mineral entry. *Northern P. R. Co. v. Marshall*, supra.

And the act of a settler, of swearing falsely in the matter of the land being claimed or worked for precious metals, though it might subject him to perjury, will not vitiate his entry, or render his patent void or liable to cancellation, in the absence of any statute giving it that effect. *United States v. Reed*, 28 Fed. 482.

The general instructions of the Land Office, of April 22, 1880, revoking mineral withdrawals, and shifting the burden of proof from agricultural to mineral claimants, applies to the public lands of Alabama as well as to those of other states. *Re Caste*, 3 Land Dec. 169.

(e) Railway aid grants.

(1) Rights of way.

The act of Congress granting to the Northern Pacific Railway Company a right of way through the public lands, and other similar acts containing no conditions or reservations, pass minerals therein contained; and mining claims cannot be located and worked upon the track and land covered by the right of way. *Wilkinson v. Northern P. R. Co.* 5 Mont. 538, 6 Pac. 349.

And the joint resolution of Congress of January 30, 1865, declaring that no act shall be so construed as to embrace mineral lands, which in all cases shall be, and are hereby, reserved exclusively to the United States, cannot be construed as a reservation of mineral lands from the operation of grants of right of way to railway companies. *Ibid.*

Nor are the mineral lands excluded from the operation of the third section of the charter of the Northern Pacific Railroad Company, granting in aid of the construction of the railroad every alternate section of the public land, not mineral, designated by odd numbers, to a designated amount of

out on the ground the boundaries thereof was ever made until the time of the survey for patent, other than such as was made by Dyson and Standish in December, 1899.' Though our statute has prescribed certain conditions which must be performed in order properly to locate a mining claim, and provided that a failure to comply therewith should annul every attempted location, the enactment was evidently designed as a guide only to determine the rights of conflicting claimants, thus permitting the proper marking of a location at any time before adverse rights attach. *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666, 4 Morrison, Min. Rep. 411; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1

Fed. 522, 9 Morrison, Min. Rep. 529; *Crown Point Min. Co. v. Crismon*, 39 Or. 364, 65 Pac. 87.

Unappropriated lands of the United States containing valuable deposits of mineral are subject to exploration, occupation, and purchase, under regulations prescribed by law, so far as the same is applicable and not inconsistent with the acts of Congress. U. S. Rev. Stat. § 2319, U. S. Comp. Stat. 1901, p. 1424. In commenting upon legislation which the act of Congress of July 4, 1866, authorizes, Mr. Lindley, in his work on Mines, 2d ed. § 249, says: "If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the Federal laws in lands of the public domain, it is simply because

sections, those covered by the right of way. *Ibid.*

Under the right-of-way act of Congress of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), providing for the granting of a right of way through the public lands to any railroad company, and § 4 (U. S. Comp. Stat. 1901, p. 1569), providing that any railroad desiring to secure the benefits of that act shall, within a specified time, file in the land office for the district where the land is located a profile of its road; and that, on the approval thereof by the Secretary of the Interior, the same shall be noted on the plats in that office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject thereto, however, until the filing of a right-of-way map definitely locating the road and the approval thereof thus provided for, the lands covered by a proposed right of way remain open and subject to location for mining purposes under U. S. Rev. Stat. § 2322 (U. S. Comp. Stat. 1901, p. 1425), giving locators for mining purposes an exclusive right of possession and enjoyment of all the surface included within the lines of their location. *Southern California R. Co. v. O'Donnell* (Cal.) 85 Pac. 932.

(2) Subsidy or aid lands.

All, or nearly all, the various acts of Congress, granting public lands in aid of railway construction, except mineral lands; and such a grant will not pass an existing mining claim though it is imperfect. *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790.

And a patent under the act of Congress granting to the Union Central Pacific Railroad and Western Pacific Railroad Company alternate sections of land within certain limits on each side of their respective roads does not include mineral lands which were excepted out of such grant. *McLaughlin v. United States* (Western P. R. Co. v. United States) 107 U. S. 526, 27 L. ed. 621, 7 L.R.A. (N.S.)

2 Sup. Ct. Rep. 852, 108 U. S. 510, 27 L. ed. 806, 2 Sup. Ct. Rep. 802.

And a grantee in such case, who knows that the land is mineral, cannot hold such mineral land as an innocent purchaser. *Ibid.*

And a person entering upon lands for mining purposes may, in ejectment brought by a person claiming title under a grant made by government to a railroad company, show that the land was mineral land, and within an exception to the grant. *McLaughlin v. Powell*, 50 Cal. 64.

So, under these acts, the terms "mineral lands," and "lands valuable for minerals," and "valuable mineral deposits," as used in the mining laws, are not confined to minerals of the metallic class only, but include all kinds of metalliferous deposits, the value, and not the kind, of any common mineral deposit being the controlling key. *Pacific Coast Marble Co. v. Northern P. R. Co.* 25 Land Dec. 233, *Overruling Tucker v. Florida R. & Nav. Co.* 19 Land Dec. 414.

All minerals except coal and iron are excepted from grants to railroads. *Re Arnold*, 2 Copp, Land Owner, 131, *Mineral Law Dig.* 26.

And the rule adopted by the earlier cases was that mineral lands excepted from lands granted by Congress in aid of the construction of a railroad mean lands known to be mineral, or which there was then satisfactory reason to believe to be such when the grant took effect. *Francoeur v. Newhouse*, 14 Sawy. 600, 43 Fed. 236, 40 Fed. 618; *Re Spong*, 5 Land Dec. 193.

Under that rule, the discovery of a coal mine in the lands after the title had vested by full performance of the conditions did not defeat the title. *Francoeur v. Newhouse*, 40 Fed. 618.

And that there was good reason to believe that the land in question was mineral land at the time of the consummation of the grant, and that it was known to be mineral land at the time, is sufficiently shown by evidence that in certain ravines on such land mining had been carried on for a number of years previous thereto; and that,

the government, as owner of the property, sanctions, expressly or by implication, the exercise of such powers." This author, in discussing the necessity for a substantial compliance with the requirements of the acts of Congress in respect to securing public land containing valuable mineral deposits, and of legislation by the states supplemental thereto, which are treated as conditions precedent to the completion of a valid location, further observes: "The order in which the several acts required by law are to be performed is nonessential, in the absence of intervening rights." *Id.* § 330. In *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, it was held that a failure substantially to comply with the provisions of a statute of Nevada, which required a locator

of a mining claim to sink a discovery shaft within a prescribed time after posting a notice of location, forfeited the rights of the locator, whether or not the statute contained a clause to that effect. In deciding the case, the court, referring to the Federal and to the state laws, and to the rules and regulations of miners relating to the steps necessary to be taken to secure a mining claim, says: "Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not; and the mining claim becomes subject to location by any qualified locator." As a forfeiture results from a failure substantially to comply with the requirements of a state statute prescribing the method to be pursued to obtain

prior to the filing of a map of the definite location of the railroad, two quartz lodes had been located thereon; and that the person claiming the land as grantee of the railroad was informed by the company that it was reserved as mineral land when he received his transfer. *Valentine v. Valentine*, 47 Fed. 597.

But in *Northern P. R. Co. v. Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 252, it was held that, under the act of Congress of July 2, 1864, granting sections of land designated by odd numbers to the Northern Pacific Railroad Company, excluding mineral lands, and providing that the lands granted were to be free from pre-emption or other claims or rights from the time of the filing of its map in the General Land Office, mineral lands were not withdrawn from sale prior to the definite fixing of the line of the railroad, and the filing of a plat in the General Land Office; and the railroad cannot maintain a suit in equity to quiet its title to lands within the limits of its grant where patents had been issued to individuals for the lands as mineral lands before the line of the road was so fixed.

And *Northern P. R. Co. v. Sanders*, 1 C. C. A. 192, 7 U. S. App. 47, 49 Fed. 129, holds that the grant does not prevent the location of mines in the reserved lands after the filing of such map and before the definite location of the road; and it does not avail the railroad company that the lands so located for mining purposes are in fact not mineral lands.

And *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, Reversing 46 Fed. 592, overturns the rule of the earlier cases above set forth, and holds that the proviso of the grant of land for railway construction by act of Congress of July 2, 1864, declaring that all mineral lands are excluded from its operation, was intended to exclude from the grant all mineral lands, whether known or unknown, and not merely such as were known at the time to be mineral.

But where the land in question has been patented to a railroad company it is not un-

appropriated public land subject to location, and an attempted location confers no rights. *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58.

Acts of Congress granting lands in aid of the construction of railways, excepting mineral lands, give no authority to issue patents in any case to mineral lands; and this necessarily involves the duty to determine whether the lands to which patents are sought are mineral or not; and, where a patent is issued for lands, this duty will be presumed to have been performed, and the patent will be deemed conclusive. *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. 200; *Winscott v. Northern P. R. Co.* 17 Land Dec. 274.

And an exception of all mineral land in a patent issued to a railroad company under the acts of Congress granting lands to the railway company to aid in the construction thereof, not required by the acts to be inserted, does not affect the conclusiveness of the patent, or leave any part of the land covered open to location for mining purposes. *Cowell v. Lammers and Francoeur v. Newhouse*, *supra*.

To constitute mineral lands within an exception of mineral lands in a patent of lands of the United States granted to a railroad, however, it is not sufficient that the lands had been profitably worked for gold prior to the issuance of the patent; it must clearly appear that they were, at the date of the grant, more valuable for mining than for agriculture, and were known to be so. *Hunt v. Steese*, 75 Cal. 620, 17 Pac. 920.

Lands containing mineral of sufficient quantity and promise to justify expenditure for its extraction, and for further exploration, are mineral lands within the meaning of that term as used in the act of Congress of July 2, 1864, excluding all mineral lands from a grant of lands to the Northern Pacific Railroad Company. *Casey v. Northern P. R. Co.* 15 Land Dec. 439.

But evidence that placer mining for gold had previously been carried on in a stream on a tract of land, but that it had been abandoned as worked out, and that neither

a mining claim, whether or not such statute so declares the penalty, the clause of our law (Bellinger & C. Comp. § 3984), providing that any attempted location of a quartz-mining claim that shall not be in accordance therewith shall be null and void, adds nothing to the enactment which would be so construed in the absence thereof, in case of adverse claimants.

State legislation, supplemental to the acts of Congress, which prescribes the method to be pursued by a locator as a condition precedent to making a valid appropriation of the public lands of the United States containing valuable mineral deposits, is designed as a rule of evidence only, to determine the rights of an adverse claimant of the premises under a subsequent location

thereon of a mining claim. This must, upon principle, be the object of such laws; otherwise the enactments, in case no adverse claim is interposed, would be an interference with the primary disposal of the soil by a state which is inhibited by the enabling act by which it became a part of the Union. Congress has impliedly invited miners to adopt rules and regulations and, in the same manner, requested state and territorial legislatures to enact laws protecting the rights of claimants of mineral lands; which rules and laws are recognized, when not in conflict with the Federal statute, and enforced by the courts in cases involving a contest. The right of the defendants to the Doctor claim depends upon acts of the plaintiffs, constituting an alleged equitable es-

at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is insufficient to establish the mineral character of the land, within the meaning of a reservation of mineral lands from a grant of public lands to a railroad. *United States v. Central P. R. Co.* 93 Fed. 871.

Nor does the mere fact that portions of land contain particles of gold, or a vein of gold-bearing quartz, necessarily impress it with the character of mineral lands, within the meaning of an exception of mineral lands in an act of Congress granting public lands to a railway company; it must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. *Alford v. Barnum*, 45 Cal. 482.

So, in determining whether lands are mineral within an exception of mineral lands from a railway land grant, present contingencies or probabilities are of no effect; the issue is confined to the time when the lands were sold or patented by the government; and it is not material that at that time the lands would have been valuable for mining purposes if water could have been had to work them, and that water has since been secured. *Hunt v. Steese*, supra.

(3) Determination as to mineral character.

On the question as to whether the lands are mineral within an exception of such lands from a grant of public lands to a railway company, contemporaneous construction of the word "mineral" by the executive officers whose duty it is to construe the land laws is, in case of ambiguity, of persuasive force. *Northern P. R. Co. v. Soderberg*, 43 C. C. A. 620, 104 Fed. 425.

And the presumption raised by a mineral return of public lands will remain until disapproved by testimony. *Re Central P. R. Co.* 13 Copp, Land Owner, 218, Mineral Law Dig. 341.

So, the facts that land granted by a railway land grant had been surveyed at a time when mineral lands were not authorized to 7 L.R.A. (N.S.)

be surveyed, and the maps had been filed without designating the land as mineral land, are prima facie evidence that they were not mineral in character, and were included in the congressional grant, and patentable as such. *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. 200.

And a return by a surveyor who surveyed public lands, that they were of little, if any, value for agricultural purposes, and chiefly valuable for timber, imposes the burden of proof of their mineral character upon a person asserting it, as against a person applying to purchase under the timber and stone act of Congress of June 3, 1878. *Purtle v. Steffee*, 31 Land Dec. 400.

Where lands included in a railway land grant, excepting mineral lands, have been located as a mining claim, however, the burden of proof to establish that they are not mineral in character rests with the railroad company. *Northern P. R. Co. v. Marshall*, 17 Land Dec. 545.

And where locations of mining claims were made in conformity with United States statutes and local rules and regulations of the district, it must be presumed that the lands located are mineral in character; and in such case the burden of proof rests with a railroad company claiming under a land grant from the United States to show that they are not mineral in character. *Sweeney v. Northern P. R. Co.* 20 Land Dec. 394.

So, the classification as mineral, by the board of commissioners, of lands under the act of Congress of February 26, 1895, providing for the classification of lands in certain land districts within the land and indemnity grant limits of the Northern Pacific Railroad Company, constitutes a cancellation of the selection of such land by the railroad company, and a determination that it is mineral in character, so that thereafter neither the railroad company nor persons claiming under it can be heard to question its mineral character. *Luthye v. Northern P. R. Co.* 29 Land Dec. 675.

(f) Exchanges for forest reservations.

The act of Congress of June 4, 1897, is a

toppel, tantamount to an abandonment; and, as the plaintiffs did not make a subsequent location of the premises, we do not think they are in a position to insist upon a strict performance of the state statutory requirements by the defendants whose rights, if they exist, must rest upon the alleged abandonment.

It is the discovery by a qualified person of a lode or vein of mineral-bearing rock in place, on the vacant land of the United States, and the appropriation thereof, evidenced by posting a notice, and recording the same when so required, and by marking on the ground the boundaries so that they may be readily traced, that initiates a valid mining claim, the right to the continued possession of which is maintained by annually performing the work prescribed for its de-

velopment, until a patent has been secured. U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424; Or. Laws 1898, § 1, p. 16; Bellinger & C. Comp. Stat. § 3975; Jackson v. Roby, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; Erhardt v. Boaro, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; O'Reilly v. Campbell, 110 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421. It is very doubtful if either Perelli or Candiani found a vein of mineral-bearing rock in place, within the Doctor claim, prior to posting the respective notices thereon; but the testimony shows that the latter, after February 14, 1900, discovered a lode therein, and, if no adverse rights have accrued, the subsequent discovery validates the prior insufficient location. Zollars & H. Chief Consol. Min. Co.

standing offer upon the part of the government to exchange any of its land that is vacant and open to settlement for a like quantity of similar land within a forest reservation, for which it had previously issued a patent, not including lands more valuable for minerals than for forest purposes. *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568.

And the selection of land under that act operates instantly at the time of the selection to vest the full and complete and equitable title in the selector, provided the selected land was at the time of selection vacant and open to settlement; and no subsequent discovery of mineral thereon can impair such title, nor alter the legal character of the land. *Ibid*.

Where a selection has been made in lieu of patented lands surrendered, presumptively the character and condition of the selected tract are such as are indicated by the books of the Land Office; and an equity arises in the selector which entitles him to protection until the fact respecting the character and condition of the selected lands is determined by the Land Department; and the only question that remains open to inquiry by the Land Department up to the time of the issuance of a patent therefor is whether or not the selected land was vacant and open to settlement at the time of its selection. *Ibid*.

And the fact that lands selected were selected in the hope of finding oil in them does not alter the effect of the selection of vesting equitable title to the land in the selector, and rendering it no longer a part of the public domain and open to location for mining purposes. *Ibid*.

Nor do the facts that land selected is situated in the vicinity of producing oil wells, and that it has surface indications of oil, make it mineral land within the meaning of that act. *Ibid*.

But, under the regulations of the Land Department, adopted pursuant to that act, which have the force of law, and which require all applications thereunder to be forwarded by the local officers to the Commissioner of the General Land Office for con-

sideration, together with a report as to the status of the tract applied for, the equitable title to the land selected does not vest in the applicant until approval of the selection by the department, and until such approval the selection is subject to be defeated by proof that the land is in fact mineral in character. *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 4.

And land in the possession of persons prospecting for oil thereon with the intention of locating it as mineral land is not vacant and open to settlement within the meaning of that act. *Ibid*.

It devolves upon the person making the selection of public lands to establish by proof that they are vacant and open to settlement, and therefore subject to selection in lieu of the relinquished forest reserve lands covered by patent, unless such facts are shown by the records. *Ibid*.

c. What substances in lands are mineral.

The rule has been asserted that a reservation of minerals in a land grant includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or nature of the transaction to induce a more limited meaning. *Hext v. Gill*, L. R. 7 Ch. 699. And that gold, silver, cinnabar, lead, tin, and copper, expressly named in the statute, are valuable mineral deposits within the meaning of the Federal mining laws, has never been denied. So, diamonds are a mineral substance. *Copp*, Min. Lands. 88; 1 *Lindley*, Mines, 2d ed. § 420. And land containing agate is mineral if it is most valuable therefor. *Re Gill*, Oct. 8, 1894, *Mineral Law Dig.* 27. And the same rule applies to land containing opal. *Re Palmer*, July 19, 1894, *Mineral Law Dig.* 29.

So, iron is a mineral, and mines of iron may be located as lode claims when it is in rock in place, and as placer claims when it is in the form of a deposit. *Re Stewart*, 1 *Copp*, Land Owner, 34, 1 *Copp*, Min. Lands

v. Evans, 2 McCrary, 39. 5 Fed. 172, 4 Morrison Min. Rep. 407; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347. Thus, in Brewster v. Shoemaker, 28 Colo. 176, 53 L.R.A. 793, 89 Am. St. Rep. 188. 63 Pac. 309, it was held that when the location of a mining claim was void because no mineral had been found within its boundaries, a subsequent discovery of precious metal therein, made after filing the certificate of location, but before the rights of adverse parties had attached, would sustain the location. In deciding that case, Mr. Chief Justice Campbell, speaking for the court, says: "The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of

location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or, file a new one." The patent plaintiffs secured for that part of the Louise and the Lucky Boy No. 4 mining claims, not in conflict with the Doctor lode, having established the validity of the former claims as hereinbefore stated, no subsequent location could be made thereon unless they abandoned their rights thereto so as to render the premises in dispute a part of the unappropriated public domain. They did not

124, Mineral Law Dig. p. 28. It is expressly provided by the congressional land grant of July 2, 1864, to the Northern Pacific Railroad Company, however, that the mineral land excluded from its operation does not include the iron or coal. Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233.

So, umber is a mineral substance. Re Clayton, Jan. 30, 1875, Copp, Min. Lands, 161, Mineral Law Dig. 32. And graphite, plumbago, and black lead are minerals. Re Conrad, Sept. 19, 1893, Mineral Law Dig. 28. And lands valuable for deposits of phosphate are mineral lands within the meaning of the laws relating to the disposal of the public domain. Re Florida C. & P. R. Co. 26 Land Dec. 600.

So, mica is a mineral and lands containing it are excluded from railroad land grants. Re Arnold, 2 Copp, Land Owner, 131, Copp, Min. Lands, 182, Mineral Law Dig. 28. And land chiefly valuable for phosphate deposits is mineral in character, and subject to appropriation under the mineral laws. Gary v. Todd, 18 Land Dec. 58. And guano is a mineral, and lands valuable for deposits of guano are mineral lands within the meaning of the mining laws, and are not subject to selection by the state under the act of Congress of July 16, 1894, § 8, granting public land for the use of an agricultural college in the state. Richter v. Utah, 27 Land Dec. 95. And it has been held that coprolites are a substance which can be got from underneath the surface of the earth for the purpose of profit, and therefore fall distinctly within the definition of minerals. Atty. Gen. v. Tomline, L. R. 5 (Ch. Div. 702).

Likewise, the term "valuable mineral deposits," as used in the mining act of May 10, 1872, includes alkaline substances, such as borax, alkaline earths, sulphur, alum, and asphalt. Re Mineral Lands, 1 Land Dec. 561. And potash is a mineral substance. Maxwell v. Brierly, 10 Copp, Land Owner, 50, Mineral Law Dig. 29. And so is rock salt. Re Megarrigle, 9 Copp, Land Owner, 113. *Contra*, Re Southwestern Min. Co. 14 Land Dec. 597, Mineral Law Dig. 30. And 7 L.R.A. (N.S.)

saline lands are mineral lands within the meaning of the act of Congress of June 16, 1880, granted to the state of Nevada a quantity of land to be selected by the state from unappropriated nonmineral public lands. Garrard v. Silver Peak Mines, 36 C. C. A. 603, 94 Fed. 983, Affirming 82 Fed. 578. And they are expressly included in the provisions of law with regard to the disposition of the public lands for mining purposes. Re Pagosa Springs, 1 Land Dec. 562.

So, soda is a mineral. Circular of July 15, 1873, 1 Copp, Land Owner, 11, Mineral Law Dig. 30. And so is natural gas, within the meaning of a statute which gives corporations power to sell or lease mineral rights under highways. Ontario Natural Gas Co. v. Gosfield, 18 Ont. App. Rep. 626. And land containing a deposit of gypsum, which is more valuable on that account than for agriculture, can be appropriated only as mineral land, and is not subject to school-land indemnity selection. McQuiddy v. California, 29 Land Dec. 181. And albertite is a mineral. Re Noble, April 12, 1892, Mineral Law Dig. 27. And so is fahlband. Circular July 15, 1873, 1 Copp, Land Owner, 11, Mineral Law Dig. 28. And brick clay. Departmental decision of June 19, 1888. Re Blake Placer, on review, Jan. 17, 1889, Mineral Law Dig. 27; Montague v. Dobbs, 9 Copp, Land Owner, 165, Mineral Law Dig. 102.

So, it has been held that placer locations may include quarries of rock valuable for building purposes. Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20.

And that the word "mineral," as used in the exception in the act of Congress of June 2, 1864, granting lands to the Northern Pacific Railroad Company, includes every variety of stone and rock; and that lands which are chiefly valuable for the building stone which they contain are reserved from the grant. Northern P. R. Co. v. Soderberg, 99 Fed. 506.

But, previous to statutory regulation, the prevailing rule appears to have been that the words "mines and minerals," as used in an exception in a royal grant, are to be un-

make a location subsequent to defendants', so as to initiate a new right and thus to take advantage of the invalidity of the defective notice, or for any other reason; and hence the only questions to be determined are the alleged abandonment and the identity of the premises embraced therein.

It will be remembered that Dyson and Standish, two of the cotenants, made some markings on the ground to evidence part of the boundaries of the Doctor lode. All the cotenants, except Moore and Zimmerman, were at the mines and saw Candiani working on the Doctor claim, to which for eighteen months they made no objections, but congratulated him on the progress he was making in cutting the tunnel, until he had expended about \$8,000 and discovered valua-

ble ore, when it was ascertained that he was trespassing on their property. The testimony shows that when Candiani first went to the mines Zimmerman informed him of the number of mineral claims plaintiffs possessed, and told him about how they were situated with respect to each other. Dyson and Standish were pioneers in the Blue river district, and at the time Candiani first posted a notice on the Doctor lode, they were in possession of the Louise and the Lucky Boy No. 4 mining claims. The latter claims were originally surveyed in 1890, the center line "brushed out" and stakes set at the corners; but the country where these mines are situated is mountainous and the surface covered with dense brush and timber. We think it fairly inferable from the testimony

derstood in their popular and ordinary, and not in their scientific, sense. *Gesner v. Halifax Gas Co.* 2 N. S. 72, 7 N. B. 595.

And that "mineral," as the term is used in the mining laws of the United States, embraces nothing but valuable deposits of mineral ore, and does not include mere masses of nonmineralized rock, whether rock in place or scattered about through the soil; and that a valid location cannot be made of land entirely devoid of ore under the mineral laws of the United States because of the existence therein of a ledge of rock or a deposit of limestone. *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784.

In the above case *Freezer v. Sweeney*, supra, was disapproved. And *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316, infra. V. d, was limited and explained; the court saying that that case upheld the title to the stone in question when severed, but had nothing to do with the land from which it was quarried, except by way of argument and illustration.

Under this rule, lands valuable for ordinary building stone are not mineral in character in the sense in which the term "mineral lands" is used when applied to land grants. *South Dakota v. Vermont Stone Co.* 16 Land Dec. 263; *Clark v. Ervin*, 16 Land Dec. 122. And its presence does not render the land containing the same subject to appropriation under the mining laws, or except it from homestead pre-emption. *Conlin v. Kelly*, 12 Land Dec. 1; *Clark v. Ervin*, supra; *Re Randolph*, 23 Land Dec. 329. Apparently Overruling *Re Bennet*, 3 Land Dec. 116.

And this rule included lands chiefly valuable for red sandstone suitable for building purposes, paving, and curbstones. *Hayden v. Jamison*, 24 Land Dec. 403. And so of lands chiefly valuable for a deposit of glass, sand, and building stone, and, where such lands are located, a subsequent intervening homestead entry of another defeats the right of the locator to perfect his claim under an act subsequently passed authorizing such location. *Re Delaney*, 17 Land Dec. 120.

And lands containing ordinary brick clay

are not mineral lands within the meaning of the mining laws, though they are more valuable for such deposits than for agricultural purposes. *King v. Bradford*, 31 Land Dec. 108; *Re Dunluce Placer Mine*, 6 Land Dec. 761.

By the act of Congress of August 4, 1892, however, it was provided that any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law with relation to placer-mining claims, provided that lands reserved for the benefit of public schools, or donated to the state, shall not be subject to entry under this act. *Re Harper*, 16 Land Dec. 110; *Re Minnekahta Stone Mine*, 15 Land Dec. 256; *South Dakota v. Vermont Stone Co.* 16 Land Dec. 263; *Forsythe v. Weingart*, 27 Land Dec. 680.

And a placer location of such lands precludes the sale thereof to a subsequent applicant under the timber and stone act of June 3, 1878. *Forsythe v. Weingart*, supra.

But the act providing that certain kinds of stone quarries may be entered under the placer-mining laws does not authorize a finding that such stone quarries constitute mineral lands in the sense in which such lands are exempted from land grants. *Van Doren v. Plested*, 16 Land Dec. 508.

And the passage of that act cannot validate prior locations in the face of intervening adverse rights. Departmental Instructions of August 29, 1896, Mineral Law Dig. 101.

Stone not only useful for general building purposes, but also valuable for ornamentation of buildings, and for monuments, and other purposes, however, is mineral within the meaning of the mining laws of the United States; and land containing a deposit of such stone may be entered as a placer-mining claim. *McGlenn v. Wienbroer*, 15 Land Dec. 370; *Van Doren v. Plested*, supra.

In *McGlenn v. Wienbroer*, *Conlin v. Kelly*, 12 Land Dec. 1, supra, was distinguished upon the ground that in that case the Land Department refused to cancel an en-

that until June, 1901, when the "Lucky Boy Group" was surveyed for a patent, neither of the respective parties nor their predecessors in interest knew that the Doctor lode conflicted with either of plaintiffs' mining claims. Candiani was a novice in mining, while Dyson and Standish, and most of the other cotenants claiming the Louise and the Lucky Boy No. 4, were experienced in extracting ores, and must have known the method generally adopted of marking on the ground the boundaries of mining claims, of which Candiani was ignorant. The means of information were, therefore, not equal to the respective parties, and, this being so, an estoppel may arise to prevent the plaintiffs from asserting their right to the premises in conflict, on the ground of abandonment.

try which had been existing for seven years, upon the plea that it was fraudulently made, on the ground that common building rock used for general purposes is mineral, and that in that case the stone was useful only for general building purposes, while in this case the stone is not only useful for those purposes, but also very valuable for ornamentation of buildings, and for monuments and other purposes.

So, lands more valuable on account of limestone deposits contained in them than for agricultural purposes are mineral lands within the meaning of the mining laws, and within the meaning of the act of February 26, 1895, providing for the classification of lands within the limits of the Northern Pacific Railroad grant. *Morrill v. Northern P. R. Co.* 30 Land Dec. 475. And public lands more valuable on account of deposits of gypsum and limestone than for agricultural purposes are subject to appropriation under the mineral laws. *Re Hooper*, 1 Land Dec. 560. And so are lands more valuable on account of sandstone contained therein than for agricultural purposes; and a homestead entry thereof is unauthorized. *Hayden v. Jamison*, 26 Land Dec. 373, *Vacating and Reversing* 24 Land Dec. 403. And they should be so classified under the act of Congress of February 26, 1895, providing for the examination and classification of certain mineral lands in certain states. *Beaudette v. Northern P. R. Co.* 29 Land Dec. 248.

So, marble and slate are mineral substances, and as such their existence on land in quantity sufficient to render the land more valuable on that account than for agricultural purposes makes it mineral land within the meaning of the mineral laws, and within the meaning of the excepting clause of the grant of public lands to the Northern Pacific Railroad Company, and therefore not subject to indemnity selection on account of such lands. *Schrimpf v. Northern P. R. Co.* 29 Land Dec. 327; *Pacific Coast Marble Co. v. Northern P. R. Co.* 25 Land Dec. 233.

And land chiefly valuable for deposits of slate found thereon, which are unfit for agricultural purposes, may be appropriated under the act of June 3, 1878, providing for the sale of lands within designated states and territories, valuable chiefly for timber or stone, but unfit for cultivation. *Parks v. Hendsch*, 12 Land Dec. 100.

Abandonment, it is true, is generally understood to mean the intentional relinquishment of a known right. *Oviatt v. Big Four Min. Co.* 39 Or. 118, 65 Pac. 811. The rights of the plaintiffs and of their predecessors in interest to that part of the Louise and of the Lucky Boy No. 4 mining claims, which is in conflict with the Doctor lode, were inchoate when Candiani first attempted to locate a vein thereon, and hence they were susceptible of abandonment, which is equivalent to a relinquishment to the United States of all interest therein. An abandonment results from a mere exercise of the will, and, so far as it relates to a vested estate in real property, is ineffectual to transfer the title. *Philadelphia v. Riddle*, 25 Pa. 259. Experience in the mining re-

culture, may be appropriated under the act of June 3, 1878, providing for the sale of lands within designated states and territories, valuable chiefly for timber or stone, but unfit for cultivation. *Parks v. Hendsch*, 12 Land Dec. 100.

And lands containing stone suitable for making lime may be located and entered as a placer-mining claim, or may be entered or purchased under the stone and timber act. *Shepherd v. Bird*, 17 Land Dec. 82.

So lands chiefly valuable for granite of a good, merchantable quality are mineral lands within the meaning of an exception in grant to the Northern Pacific Railroad Company, made by the act of Congress of June 2, 1864, and do not pass under such grant. *Northern P. R. Co. v. Soderberg*, 43 C. C. A. 620, 104 Fed. 425. And fire clay and kaolin are minerals. *Maxwell v. Brierly*, 10 Copp, Land Owner, 50; *Re Crockwell*, 2 Copp, Land Owner, 66, *Mineral Law Dig.* 27. And china clay is a mineral, within the meaning of an exception of mines and minerals in a land grant. *Hext v. Gill*, L. R. 7 Ch. 699. Likewise, asphaltum is included in an exception, from a royal grant, of all mines and minerals. *Gesner v. Halifax Gas Co.* 2 N. S. 72, 7 N. B. 595.

So, lands chiefly valuable for deposits of asphaltum are mineral lands specifically excepted from the railway grant of public lands to the Southern Pacific Railroad Company, and are not subject to selection as indemnity under that grant. *Tulare Oil & Min. Co. v. Southern P. R. Co.* 29 Land Dec. 269.

And so are lands containing a deposit of gypsum cement, which are more valuable on account of such deposit than for agriculture; and they are not subject to agricultural entry. *Phifer v. Heaton*, 27 Land Dec. 57.

And auriferous cement is a mineral. *Maxwell v. Brierly*, 10 Copp, Land Owner, 50, *Mineral Law Dig.* 27.

But, probably pursuant to the theory that, to be mineral, lands must contain mineral ore, it has been held that lands containing mineral springs are subject to sale under the

gions teaches that locations of mineral-bearing rock are frequently made on public land for speculative purposes only, and are often considered of little value until paying ore is discovered in the immediate vicinity, when, without any expense to the locators, they may become of immense worth. Such possible fluctuations in value demand a different rule from that which usually governs vested estates in land, and necessitate immediate assertion of inchoate rights in mining claims, when, by the exercise of reasonable diligence, the locators could have discovered that their premises were being invaded. Dyson, Standish, and Frank and Fred Sharkey, who are experienced miners and should have known the location of the boundaries of the Louise and of the Lucky Boy No. 4 mining

claims, ought to be estopped to assert that they had any interest therein in conflict with the claim of Candiani as originally indicated on the ground. To allow them to assert an adverse claim to that part of the Doctor lode now in controversy, as it should be surveyed, would be violative of every principle of equity, and result in rewarding them for encouraging the development of the property. Zimmerman, who owns five twelfths of the Lucky Boy group of mines, resides in Portland, and, though he knew Candiani had located a mine in the Blue river district, he was not aware that it conflicted with either claim in which he was interested. Frank C. Sharkey, as superintendent and managing partner, however, represented Zimmerman and also

general laws, and not under acts relating to mineral lands. *Re Pagosa Springs*, 1 Land Dec. 562; *Smith v. Wallace*, Departmental Decision March 24, 1896, Mineral Law Dig. 30. And that the presence of such springs constitutes no bar to an agricultural entry. *Smith v. Wallace*, *supra*. And it has been held that aluminium is not such a mineral as will exempt land containing it from settlement and entry as agricultural land, or warrant the appropriation thereof for mining purposes. *Jordan v. Idaho Aluminium Min. & Mfg. Co.* 20 Land Dec. 500.

d. Placer deposits.

The question whether a location should be made as a lode or a placer claim depends upon the geological formation of the deposits, and is one for the locator to decide. *Re Butler*, June 13, 1892, Mineral Law Dig. 97.

"Placers," in mining parlance, are superficial deposits which occupy the beds of ancient rivers or valleys. *Moxon v. Wilkinson*, 2 Mont. 421.

And, by express statutory enactment (U. S. Rev. Stat. § 2329, U. S. Comp. Stat. 1901, p. 1432), claims usually called placers are declared to include all forms of deposits excepting veins of quartz, or other rock in place. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

The term "placers," as used in that act, means ground within defined boundaries, which contains mineral in earth, sand, or gravel, including valuable deposits not in place,—that is, not in fixed rock,—but which are in a loose state, and may, in most cases, be collected by washing or amalgamation, without milling. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Gregory v. Pershbaker*, *supra*.

And the provision of that act, that claims, usually called "placers," which include all forms of deposit, except veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as 7 L.R.A. (N.S.)

are provided for the vein or lode claims, when construed in connection with §§ 2320 to 2324 inclusive (U. S. Comp. Stat. 1901, pp. 1424–1426), laying down rules governing the location of mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits; and with § 2319 (U. S. Comp. Stat. 1901, p. 1424) thereof, opening to exploration all valuable mineral deposits in lands belonging to the United States,—does not restrict placer-mining claims to deposits of the same kind or nature of gold, silver, lead, cinnabar, tin, or copper, but includes all forms of mineral deposits of whatever kind or nature, whether metallic or otherwise, excepting veins of quartz, or other rock in place. *Pacific Coast Marble Co. v. Northern P. R. Co.* 25 Land Dec. 233.

In the above case, *Tucker v. Florida R. & Nav. Co.* 19 Land Dec. 414, and all other cases in conflict with the views expressed in it, were overruled.

Within this rule, deposits of fire clay or kaolin, though nonmetalliferous in character, are properly subject to entry as placers, and not as lode claims. *Re Dobbs Placer Mine*, 1 Land Dec. 565.

And lands containing mica are subject to appropriation under the placer-mining laws. *Copp, Min. Lands*, 182, 1 Lindley, Mines, 2d ed. § 420.

And land containing valuable deposits of building stone, or limestone, may be pre-empted as placer claims under U. S. Rev. Stat. §§ 2319, 2329, U. S. Comp. Stat. 1901, pp. 1424, 1432, relating to the entry and patent of mining claims. *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316; *Re Bennet*, 3 Land Dec. 116; *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20.

And where lands containing stone suitable for making lime are claimed by location and entry under the placer-mining law by one claimant, and by another by entry under the timber and stone act, the rights of the parties must be determined by priority in the assertion of their claims. *Shepherd v. Bird*, 17 Land Dec. 82.

his predecessor in interest, Moore, in supervising the property; and, though such agent could not, ordinarily, without special authority from all the cotenants, abandon any greater interest that he alone possessed (*Beers v. Sharpe*, 44 Or. 386, 75 Pac. 717; *Conn v. Oberto*, 32 Colo. 313, 76 Pac. 369), the character of his employment and the kind of property in controversy induce the conclusion that he possessed sufficient authority from all the cotenants to bind them by his negligence in permitting Candiani to take, hold possession of, and improve their property for such a length of time.

This brings us to a consideration of the boundaries of the Doctor lode as they should be established. The evidence shows that,

So, lands valuable only on account of marble deposits contained in them are subject to placer entry under the mining laws. *Pacific Coast Marble Co. v. Northern P. R. Co.* supra.

As to ordinary stone as a mineral substance subject to appropriation as such under the mining rules, and as to statutory authority to enter lands chiefly valuable for building stone under the provisions of the law with relation to placer-mining claims, see supra, V. c.

So, the finding of gold in sufficient quantities to justify the expending of money for the purpose of exploration, with the reasonable expectation that the lands will be found to be valuable therefor, justifies the location of a placer-mining claim. *Lange v. Robinson*, 148 Fed. 799.

And umber is a mineral substance, and lands containing it are subject to appropriation under the placer laws. *Copp, Min. Lands*, 161, 1 *Lindley, Mines*, 2d ed. § 420.

And the same rule applies to diamonds. *Copp, Min. Lands*, 88, 1 *Lindley, Mines*, 2d ed. § 420.

Where a claim is, in effect, one for a water right only, however, and there is nothing to show the existence of mineral within it, it is not competent to locate or patent the same as a placer claim. *Re Hale*, 3 *Land Dec.* 533.

Though the fact that mineral did not exist upon an oil placer-mining claim located in good faith is no defense to a prosecution under *Wyo. Sess. Laws* 1888, chap. 40, § 10, making it a misdemeanor to injure or remove certain specified property on a mining claim. *Van Horn v. State*, 5 *Wyo.* 501, 40 *Pac.* 964.

And lands valuable for zinc ores found in them in leads or lodes are not subject to locations as placer-mining claims. *Buffalo Zinc & Copper Co. v. Crump*, 70 *Ark.* 525, 91 *Am. St. Rep.* 87, 69 *S. W.* 572.

So, land containing a valuable deposit of mineral-paint rock in place constitutes a lode claim, if a mineral claim at all within the meaning of the law; and is not subject 7 L.R.A. (N.S.)

October 26, 1898, *F. C. Sharkey and Geo. A. Dyson* located a quartz-mining claim, known as the "Gold Dollar," the description of which, as given in the notice, is as follows: "Commencing at this tunnel and notice and running in a southerly direction towards Main Quartz creek and situated about 400 feet west of the Lucky Boy ledge, and was formerly known as the *Jo. Andrews claim*." Until the plaintiffs secured a survey for a patent, June, 1901, they evidently thought that the Gold Dollar claim was located west of and parallel with the Lucky Boy group, for when Candiani and Perelli first went to the district with a view of securing a claim, they were informed by Dyson that unappropriated mineral land of the United States could be found at the norther-

to location as a placer claim. *Re Barnes*, 7 *Land Dec.* 66.

Though a deposit of gold-bearing gravel is a placer mine as that term is used in the acts of Congress with reference to mining, although the same lies between defined strata of rock and has an average drop of several degrees; that of itself not making a gravel deposit a lode with a top or apex. *Gregory v. Pershbaker*, 73 *Cal.* 109, 14 *Pac.* 401.

Nor is the placer-mining law intended as a catch-all system of taking public lands and allowing parties to play fast and loose to suit their own caprice; and locators, insisting upon the validity of a location by reason of a particular mineral, must show that the location was made for that purpose, and no other. *Clark v. Ervin*, 17 *Land Dec.* 550.

And a location of lands valuable only for common building stone as a placer-mining claim, unwarranted by law at the time it was made, and therefore invalid, cannot be sustained or validated by a subsequent discovery of fire clay, or some other material which is subject to entry under the placer-mining law. *Ibid*.

But the ownership of stone by a person taking it from public lands of the United States is not affected by the fact that it was obtained in an attempt to develop a coal claim thereon. *Johnston v. Harrington*, supra.

As to iron as a placer deposit, see supra, V. c. As to coal and oil as placer deposits, see infra, V. c.

e. Coal and oil lands.

Coal lands are mineral lands, within the meaning of the term as used in the statutes regulating the disposition of the public domain. *Mullan v. United States*, 118 *U. S.* 271, 30 *L. ed.* 170, 6 *Sup. Ct. Rep.* 1041.

And as such they are subject to entry under the mining laws. *McKean v. Buell*, *Copp, Min. Lands*, 343; *Re Coalville Townsite*, 4 *Copp. Land Owner*, 46; *Re Norager*, 10 *Copp. Land Owner*, 54, 1 *Lindley, Mines*,

ly end of the Gold Dollar claim, the corners of which, on that line, were evidenced by stakes which he pointed out to these visitors. The survey referred to disclosed that the side lines of the Louise and of the Gold Dollar claims extended north 40° 30' west, and north 13° 30' west respectively, and that the north center end of the latter claim was situated about 480 feet southerly from the northwest corner of the Louise claim and on or near the western boundary thereof. The Lucky Boy No. 4 claim is a northerly extension of the Louise, and the Doctor lode, as surveyed, is a northerly extension of the Gold Dollar claims, the side lines of which are 260 and 683 feet respectively. Dyson, as plaintiffs' witness, testified that, having been employed by Candiani to mark

on the ground the boundaries of the Doctor lode, he placed a center-end notice on the stump of a tree a few feet north of the boundary of the Gold Dollar claim; that he put up stakes at the northeast and northwest corners of the latter claim for the southeast and southwest corners, respectively, of the Doctor lode; that, going northerly about 900 feet, he put up another center and notice, and also nailed to a tree another stake on which he wrote, as near as he could remember, "Northwest center-end stake of the Doctor mine," and signed the names of Candiani and Perelli as locators; that, having done the writing found on the stake, he was able to read it, saying the word "center" is what he put on it. The stake last referred to was torn down, identified by the witness, offered

2d ed. § 97. And as such they are excluded from pre-emption and homestead claims. *Re Coalville Town Site*, 4 Copp, Land Owner, 46, Mineral Law Dig. 385.

And the provision of the act of Congress of 1864 for disposal in a prescribed mode of any tract embracing coal beds or coal fields, constituting portions of the public domain, and which as mines are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry, constitutes a legislative construction of the provisions of the pre-emption act to the effect that coal lands are to be included in the definition of the terms "mines" and "mineral lands," used therein; and, under that act, known coal lands are not subject to selection by the state in lieu of sections 16 and 36, for school purposes. *United States v. Mullan*, 7 Sawy. 466, 10 Fed. 785, Affirmed in 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041.

Nor can coal lands be included in a town-site entry. *Re Coalville Town Site*, 4 Copp, Land Owner, 46, Mineral Law Dig. 452.

So, school sections containing coal are subject to disposal as other coal and mineral lands. *Re Norager*, 10 Copp, Land Owner, 54; *Re Fox*, 4 Copp, Land Owner, 66, Mineral Law Dig. 393.

And coal lands are not subject to selection in lieu of school lands, by the state of California, under the act of Congress of March 3, 1853, conveying certain lands to the state for school purposes. *Mullan v. United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041.

And the fact that coal lands were in fact listed to the state by the proper officers of the government as in lieu of school lands does not render them subject to selection as such by the state under the act of Congress of March 3, 1853; and such selection can be vacated, and the titles under it annulled, in a suit in equity brought by the United States directly for that purpose. *Ibid*.

The mere statement of witnesses that lands contain large deposits of coal, and are chiefly valuable therefor, is not sufficient, however, to subject them to entry as 7 L.R.A. (N.S.)

coal lands under U. S. Rev. Stat. § 2347. U. S. Comp. Stat. 1901, p. 1440, where it does not appear that any coal has actually been found upon the lands. *Kings County v. Alexander*, 5 Land Dec. 126.

And coal lands are expressly excluded from the operation of the exception of mineral lands in the grant to the Northern Pacific Railroad Company, of July 2, 1864. *Pacific Coast Marble Co. v. Northern P. R. Co.* 25 Land Dec. 233.

So, petroleum is a mineral substance obtained from the earth by processes of mining, and land from which it is obtained may properly be called mining land within the meaning of a statutory provision for mortgaging and leasing mining lands. *Gill v. Weston*, 110 Pa. 316, 1 Atl. 921.

But, previous to special legislation by Congress on the subject, lands containing petroleum were not regarded as falling within the contemplation of the mineral laws, and could not be located and entered as a placer-mining claim. *Re Union Oil Co.* 23 Land Dec. 222.

In the above case the Secretary of the Interior refused to follow *Gill v. Weston*, supra, but distinguished it as being a case of trover and conversion, and not arising under the mining laws.

By 29 Stat. at L. 526, chap. 216, U. S. Comp. Stat. 1901, p. 1434, however, lands containing petroleum or other mineral oils, chiefly valuable therefor, may be entered and patented under the provisions of the laws relating to placer-mining claims. *Chrisman v. Miller*, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468, Affirming 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936; *Re Union Oil Co.* 25 Land Dec. 351.

And, under that act, land containing a deposit of petroleum, which is more valuable on that account than for agriculture, can be appropriated only as mineral land, and is not subject to school indemnity selection. *McQuiddy v. California*, 29 Land Dec. 181.

And it is not subject to selection as in-

in evidence, and is sent up for our inspection. There is written on the upper line thereof, with a lead pencil, the following: "N. W.," and a word that is illegible, but appears to begin with the letter "C" and to have the letter "t" therein. The second line is, "of Doctor Mine;" the third, "Perelli;" and the fourth "Candiani." A re-examination of the testimony convinces us that, when Dyson and Standish originally indicated on the ground the boundaries of the Doctor lode, it was their intention to extend the side lines of the Gold Dollar about 900 feet, so as to include the claim attempted to be located by Candiani and Perelli. Standish appeared as plaintiffs' witness, but he

did not attempt to corroborate Dyson's testimony to which reference has been made. In the absence of such supporting declarations under oath, and from the fact that the Doctor lode was intended and attempted to be located as an extension of the Gold Dollar claim, we think Dyson's testimony should be disregarded, and conclude that the surveyor properly treated the tree having the stake so marked thereon as the northwest corner instead of the northwest center end.

The decree heretofore rendered will be changed to conform with the views now expressed, thereby affirming the decree of the court below; the defendants to recover their costs and disbursements in both courts.

demnity under a railroad land grant, from the operation of which mineral lands are excepted. *Re Union Oil Co.* 25 Land Dec. 351.

But lands are subject to entry and location as placer-mining claims because of petroleum or other mineral oils contained in them, only where they are chiefly valuable for such petroleum or mineral oils. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* supra.

And, while the act of Congress of February 11, 1897, expressly confirms claims to lands containing petroleum theretofore initiated, this confirmation must be construed as applying only to cases where, prior to the enactment thereof, no adverse claim to the land involved had been acquired under other than the mineral law. *Re Oil Lands*, 24 Land Dec. 183.

The question whether lands are chiefly valuable for their mineral oils, so as to be open to location under the placer-mining law, is one of fact, to be proved by a person asserting its mineral character, as against a homestead entry. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* supra.

VI. Who may locate.

a. The general rule.

The general rule is that, in the absence of positive law forbidding it, any person, whether minor, adult, or alien, may lawfully locate upon and take possession of a part of the unsurveyed public domain for mining purposes, and rest secure in that possession until the government calls it in question, and no individual or person may unlawfully interfere; and the power of the courts may be invoked to restrain unlawful interference. *Davis v. Dennis* (Wash.) 85 Pac. 1079.

Previous to the enactment of the Federal statutes on the subject, the public mineral lands of the state were open to the occupancy of every person who in good faith chose to enter upon them for the purpose of mining. *Smith v. Doe*, 15 Cal. 100.

And the fact that persons taking possession of a gold mine and working it were for-
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eigners and without a license afforded no apology to trespassers; the state alone could enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell v. Hagood*, 6 Cal. 148.

b. Citizens.

1. The provisions of the Federal statutes.

By U. S. Rev. Stat. § 2319, U. S. Comp. Stat. 1901, p. 1424, mineral lands of the United States are made subject to location by citizens thereof, or by those who have declared their intention to become such. *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893.

So, a citizen of the Choctaw nation, making a discovery of coal or other mineral, acquires an exclusive right, by virtue of art. 7, § 118, of the Constitution of the Choctaw nation, providing that any citizen of this nation who may find any mineral or minerals shall have the exclusive right or privilege to extract them from the earth, so long as he may choose, within 1 mile in any direction from his works or improvements. Provided, however, he does not interfere with the rights of the former settler to mine the same in any direction within 1 mile from the point of discovery, or at which he commenced work; and this right extends not only to the vein or lead on which the discovery is made, but to all of the gold or other mineral in the earth within 1 mile from the initial point of his commencing work. *McCurtain v. Grady*, 1 Ind. Terr. 107, 38 S. W. 65.

But the act of Congress of March 2, 1897, defining and regulating the rights of aliens to acquire real estate in the territories, has reference only to lands the title to which has passed from the United States, and has become the subject of private ownership, and does not confer upon aliens the right of occupying or purchasing mining claims from the government under the mining laws. *Re Alien Act*, March 2, 1897, 28 Land Dec. 178.

And the act of Congress of May 14, 1898, § 13, according certain privileges in Alaska to citizens of the Dominion of Canada, was

confined in its application to the district of Alaska, and did not extend to any other territory or part of the United States; and, since it has been found impracticable thus far to promulgate or enforce any rules or regulations to carry this provision into effect, it is now inoperative. *Ibid*.

2. Early rule as to effect of alienage.

The earlier cases, in construing the Federal statute on the question of citizenship of the locator of a mining claim, adopted the rule that an alien unnaturalized, and who has not declared his intention to become a citizen of the United States, can acquire no right by location to any of the mineral lands of the United States. *Lee v. Justice Min. Co.* 2 Colo. App. 112, 29 Pac. 1020; *Bohanon v. Howe*, 2 Idaho, 453, 17 Pac. 583.

And that a party seeking to acquire a right of location for mining purposes must be a citizen of the United States, or must have declared his intention to become such. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 44; *Bohanon v. Howe*, supra; *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312; *Re Kemp-ton Mine*, 1 Copp, Land Owner, 178, Mineral Law Dig. 49.

And that the fact of alienage, if raised at the proper time by anyone adversely interested, will defeat the acquisition of title thereto. *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 44, Reversing 2 Colo. App. 112, 29 Pac. 1020.

Under this view, the right to possession of a mining claim comes only through a location, and such location can be made only by a citizen, or one who has declared his intention to become such. *Lee Doon v. Tesh*, supra.

And an alien who has never declared his intention to become a citizen cannot hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* supra.

And he can acquire no right of location which he can convey to a citizen; and such a conveyance by an alien conveys no title. *Lee v. Justice Min. Co.* 2 Colo. App. 112, 29 Pac. 1020.

Nor does the subsequent naturalization of an alien, deprived by this rule of the right to explore, purchase, or occupy mineral lands, retroact so as to affect a prior location or occupation by him. *Wulf v. Manuel*, 9 Mont. 279, 23 Pac. 723.

And a foreigner who posts a notice upon a placer-mining claim, and on the next day makes a declaration of intent to become a citizen of the United States, acquires no right thereby. *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419.
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So, a person holding mining ground under location, the title to which is in the United States, who sues for trespass thereon, must, in order to recover, plead and prove that he is a citizen of the United States, or that he has declared his intention to become such. *Bohanon v. Howe*, supra.

And persons who located a mining claim and occupied the same previous to the act of Congress of 1866, who were not citizens and had not declared their intention to become such, did not acquire any vested right to possession under that act, and, having none thereunder, no rights were preserved to them by act of Congress of May 10, 1872, providing that nothing contained in this chapter should be construed to impair in any way rights or interests of mining property acquired under existing laws; since, prior to the act of Congress of 1866, the occupation and working of mining lands did not confer upon the occupant any right or title thereto as against the government of the United States or its grantees. *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.

The rights of a joint locator of a mining claim, who is a citizen, however, and of his grantees, are not affected by the fact that his collocator is not a citizen. *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893; *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641.

The whole claim is not thereby thrown open to relocation. *Providence Gold Min. Co. v. Burke*, supra.

Where several persons located a mining claim in common, and one of the collocators was an alien, but there is nothing to show that the others had any knowledge of his disability, the law is vindicated by holding that the alien's claim is void, but that the location is good as to the rest. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* supra.

And where a mining claim contained no more than one man is authorized to locate, and one or more of the locators were citizens, the validity of the title of a grantee of the locators is not affected by the fact that another of the locators was an alien. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Providence Gold Min. Co. v. Burke* and *Strickley v. Hill*, supra.

And a conveyance by the locators through an alien to another citizen conveys a complete title to the claim located. *Strickley v. Hill*, supra.

So, while proof of citizenship of the locator of a mine is essential to the case of a grantee in an action to quiet title thereto, it may be proved under a general allegation of title, and need not be specially pleaded. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047.

And an act of a territorial legislature, providing that, if any alien claims any right, title, or interest in, or to, any placer mine, the same may be forfeited to the territory in a proper action, is invalid as in

excess of territorial sovereign authority, and as contravening a provision of the organic act of the territory, prohibiting a territorial legislature from passing any law interfering with the primary disposition of the soil; since, upon such a forfeiture, the territory would acquire a possessory title which would directly interfere with the primary disposal of the soil to the citizen by the general government. *Territory v. Lec.* 2 Mont. 124.

And it cannot be upheld as in aid of an act of Congress excluding aliens from the grant of the right to locate mineral lands, since that act does not forfeit the right of title of aliens, and, if it did, the forfeiture would take place to the United States, and not to the territory. *Ibid.*

3. The more modern rule.

The more modern rule, and the one which is now practically universal, is that a location of a mining claim by an alien is voidable only, and not void. *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 46 L. ed. 331, 22 Sup. Ct. Rep. 84; *Stewart v. Gold & Copper Co.* 29 Utah, 443, 110 Am. St. Rep. 719, 82 Pac. 475; *McEvoy v. Megginson*, 29 Land Dec. 164; *Leary v. Manuel*, 12 Land Dec. 345.

And under it an entry upon mining land by an alien constitutes a segregation of the land, and a location thereafter on the land thus segregated confers no interest upon the locator as against the entry man or the government. *Leary v. Manuel*, *supra*.

And an alien who makes a discovery and takes proper steps toward the location of a mining claim, and then declares his intention to become a citizen, is entitled to the benefit and advantage of what he has previously done toward locating his claim, where no adverse interests have intervened. *Cresus Min. Mill. & Smelting Co. v. Colorado Land & Mineral Co.* 19 Fed. 78; *McEvoy v. Megginson*, *supra*.

His act of declaring his intention to become a citizen relates back to the date of his location, and, in the absence of adverse rights attaching prior to the date of the actual declaration of intention, it operates to validate the location. *Lone Jack Min. Co. v. Megginson*, 27 C. C. A. 63, 48 U. S. App. 452, 82 Fed. 89.

So, a location of a mining claim, made by an alien, may be cured by a grant by the alien to a citizen. *Stewart v. Gold & Copper Co.* *supra*.

And proof of citizenship of locators of a mining claim is not necessary upon the application for a patent; proof of citizenship of applicants for patents, or adverse claimants only, is necessary. *Re Cash Lode*, 1 Copp, Land Owner, 98, Mineral Law Dig. 104.

So, citizens uniting with an alien in the location of a mining claim cannot, after the alien has expended time, labor, and money in prospecting for and locating the mine, oust him therefrom because of his

alienage, or refuse him the right of participating in the proceeds thereof. *Billings v. Aspen Min. & Smelting Co.* 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338.

Nor is an agreement between two persons to explore the public domain and discover and locate mining claims for the joint benefit of the contracting parties rendered invalid or unenforceable by a court of equity by the fact that the parties thereto are aliens. *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263.

And a person, though not a citizen, who performs all the acts necessary to make a valid location of a mining claim, and does the work necessary to keep his claim good had he been a citizen, acquires such a right thereunder that he can convey a good and valid claim thereto to a citizen. *North Noonday Min. Co. v. Orient Min. Co.* *supra*; *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; *Sherlock v. Leighton*, 9 Wyo. 297, 63 Pac. 580, 934.

Under this view of the statute, the location of a mining claim by an alien is not subject to attack by anyone except the government. *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 46 L. ed. 331, 22 Sup. Ct. Rep. 84; *Tornanses v. Melsing*, 47 C. C. A. 596, 109 Fed. 710; *Billings v. Aspen Min. & Smelting Co.* 3 C. C. A. 69, 10 U. S. App. 322, 52 Fed. 250; *Stewart v. Gold & Copper Co. and Sherlock v. Leighton*, *supra*.

Or in a proceeding in which the government is a party. *Tornanses v. Melsing*, *supra*.

It cannot be attacked by a subsequent locator whose purpose is to appropriate the claim to himself. *Ibid.*

An alien locating a mining claim holds a right and title indefeasible against all the world save the sovereign, and defeasible by the latter only by direct proceedings for that purpose. *Billings v. Aspen Min. & Smelting Co.* *supra*.

Where the object of a suit is to adverse a party applying for a United States patent to a mining claim, however, it is necessary both to allege and prove that the plaintiffs, claiming under the location, are citizens of the United States, or have declared their intention to become such. *Allyn v. Schultz*, 5 Ariz. 152, 48 Pac. 960; *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708; *Keeler v. Trueman*, 15 Colo. 143, 25 Pac. 311.

But, in a contest between individuals as to the right of possession of a mining claim by way of ejectment, the question of alienage of a locator does not arise and cannot be considered; it is only where a party applies for a patent that the government is interested in the case, and the citizenship of parties must be shown before they will be entitled to a patent. *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

And it is not necessary to allege citizenship of a person owning or claiming an interest in a mining claim, in an ordinary

civil action, to recover damages from a wrongdoer. *McFeters v. Pierson*, 15 Colo 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

And, as against a mere intruder or trespasser, or one having no higher or better right than the occupant, possession of a mining claim is prima facie evidence of right of possession, whether the occupant is an alien or not. *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

Nor can the question of citizenship of the locator of a mining claim be first raised on appeal, in an action to quiet title thereto, where the location notices recited that he was a citizen, and there was no specification of the invalidity of his location upon the ground that he was not a citizen, and no objection was made to the introduction of notices on that ground. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 221.

And the rule that citizenship of a locator must be both alleged and proved in an action to adverse a claim to possession of government lands for mining purposes does not apply in an action brought for recovery of the possession of a mining claim based on title. *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708.

In the above case, *Bohanon v. Howe*, 2 Idaho, 453, 17 Pac. 583, supra, VI. a, 2, was disapproved, the court saying that no argument in support of the holding was presented in the opinion, and that the cases cited in support thereof were actions brought under the provisions of the Federal statutes.

4. Proof of citizenship.

Natural persons, residents of the United States, locating a mining claim, will be presumed to be citizens of the United States, or to have declared their intention to become such, in the absence of evidence to the contrary. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *Jantzon v. Arizona Copper Co.* 3 Ariz. 6, 20 Pac. 93; *Re Wandering Boy Lode*, 2 Copp, Land Owner. 2, Mineral Law Dig. 54.

The fact that a party was not a citizen before disposing of a mining claim must be affirmatively shown by an adverse claimant. *Re Kempton Mine*, 1 Copp, Land Owner, 178, Mineral Law Dig. 50.

If citizenship is alleged, and the allegation is not controverted, this is sufficient under the law. *Mono Min. Co. v. Magnolia E. & W. Co.* 2 Copp, Land Owner, 68, Mineral Law Dig. 50.

And the testimony of a locator of a mining claim who had parted with all his interest in the premises located, that he was not a citizen when he made the location, is not conclusive as against his grantee or those claiming under him. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

So, proof of birth within the United

States, in the absence of a showing of subjection to foreign power, is sufficient proof of citizenship of locators of a mining claim to sustain the location. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

And approval by officers of the Land Department, in the exercise of their jurisdiction, of an application for a patent, raises a presumption that the citizenship of the locator has been established; and the determination is conclusive on this question as against third parties. *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444, Reversing 2 Colo. App. 112, 29 Pac. 1020.

Likewise, the affidavit of the locator of a mining claim that he is a citizen is admissible in evidence to prove his citizenship. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 503, 11 Fed. 125.

And the oath of one of the locators of a mining claim, accompanying the recorded notice of location, as to the citizenship of the locators, is prima facie evidence of the fact, and will be deemed sufficient to sustain the location until doubt is thrown on the accuracy of his statement. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548, Affirming 6 Mont. 53, 8 Pac. 153.

It has been held, however, that the fact of naturalization, or of intention to become a citizen, by the locator of a mining claim, must be proved by the record of some court of competent jurisdiction, where the fact is of recent occurrence, and the locator's right has been contested from the very hour that it accrued. *Wood v. Aspen Min. & Smelting Co.* 36 Fed. 25.

And that testimony of a witness that he saw in the possession of the locator of a mining claim certain naturalization papers in which the locator swore to his citizenship is not competent on the question of the locator's citizenship, where full search had been made in the records of the proper county and elsewhere in the state, and no record of any declaration of intention to become a citizen, or of his naturalization, could be found. *Ibid.*

And that the citizenship of the locator of a mining claim is not sufficiently established by a record of entry of land by a person of the same name in another state on oath that he was a citizen of the United States, and by proof offered in support of the entry, showing that the person entering the land was the head of a family, with a wife and seven children, and that he resided with his family on the land between specified dates, where it appears that the locator of the mining claim had only six children, and that his wife and children were in Canada at the time. *Ibid.*

But evidence that the locator of a mining claim was born in Scotland, that he lived in the United States for many years, that he voted at territorial and state elections many times, and that he subscribed to and swore to a registration oath before voting, stating that he was a naturalized citizen; and

that he was a soldier in the war and was honorably discharged, and drew a pension from the United States government,—has been held to be sufficient to sustain a finding that he was a citizen, upholding the validity of his location, though no direct evidence of his naturalization was ever found. *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893.

And in *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641, it was held that evidence that the locator of a mining claim had made declarations of his citizenship to his friends and companions, and had voted at the elections held in the territory; and that his name appeared upon the register; and that he had located many mining claims through a long period of years under the declaration that he was a citizen of the United States,—is competent to show, and tends to show, his citizenship.

Whether a person attempting to locate a mining claim was at the time a citizen, or had declared his intention to become such, is a question of fact, to be determined by the evidence, on an issue as to the validity of the location. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

c. Corporations.

A corporation created under the laws of one of the states of the Union, all of the members of which are citizens of the United States, is competent to locate, or join in the location of, a mining claim upon the public land of the United States, in like manner as an individual citizen. *McKinley v. Wheeler*, 130 U. S. 630, 32 L. ed. 1048, 9 Sup. Ct. Rep. 638; *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019.

And a corporation of another state may locate a mining claim in the state through a resident agent. *Book v. Justice Min. Co.* 58 Fed. 106.

So, corporations are associations of persons, within the meaning of the act of Congress of March 3, 1873 (U. S. Rev. Stat. § 2350, U. S. Comp. Stat. 1901, p. 1441), authorizing only one entry of vacant coal lands by a person or association of persons, *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57, Reversing 37 Fed. 180.

A person claiming a right to a mine under an entry and location by a corporation must, however, before being entitled to recover, aver and prove that the corporation was organized under the laws of the United States, or some state or territory thereof, and that the members of such corporation were citizens of the United States and severally and individually competent to make a location. *Thomas v. Chisholm*, supra.

But the citizenship of stockholders of a corporation need not be proved for the purpose of establishing its right to a mining claim, otherwise than by showing it to have been organized under the laws of a state of

which its stockholders are conclusively presumed to be citizens. *Doe v. Waterloo Min. Co.* 17 C. C. A. 180, 44 U. S. App. 204, 70 Fed. 455, Affirming 55 Fed. 11.

And a properly authenticated certificate of incorporation, filed by a corporation applying for a mineral patent, is sufficient proof of citizenship under the statute. *Re Rose Lode Claims*, 22 Land Dec. 83; U. S. Rev. Stat. § 2321, U. S. Comp. Stat. 1901, p. 1425.

So, the act of Congress of March 3, 1897, omits, and thereby repeals, the restriction in the former act placed upon the acquisition of public lands by a corporation, a part of the stock of which is owned by persons, corporations, or associations, not citizens of the United States; and since that act a corporation organized under the laws of the United States, or of any state or territory thereof, may, under the United States mining laws, occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States. *Re Alien Act of March 2, 1897*, 28 Land Dec. 178.

An instruction in an action involving the validity of a mining location, however, that a corporation is not entitled to the privilege of making a mineral location of lands belonging to the United States, if erroneous, is not reversible error, in the absence of anything to show that the corporation made the location in question. *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 456, 21 Pac. 1040, Affirmed in 149 U. S. 787, 37 L. ed. 960, 13 Sup. Ct. Rep. 1052.

And the right to enter upon, explore, and possess mineral lands belonging to the United States is given to citizens and persons who have declared their intention to become citizens, and all others are excluded by necessary implication; and such exclusion applies to a state or territory as well as to an alien. *Territory v. Lee*, 2 Mont. 124.

Nor is a miners' relief and poor fund either a person or an association of persons authorized to locate a mining claim. *Terrible v. Gunboat, Copp, 80, Barringer & Adams, Mines & Mining*, p. 208.

d. Nonresidents, minors, etc.

A citizen of the United States who is a resident of one state may take up and locate mining claims in another state in his own name, or employ citizens and residents of the state to locate claims in their own names for his benefit. *Book v. Justice Min. Co.* supra.

In the absence of mining rules and regulations disqualifying nonresidents to locate mining claims, they stand in the same position as residents of the district; and a mining claim may be located by a third person for a nonresident. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

So, the fact that locators of a placer-mining claim were minors at the time does not

affect the validity of the location, there being no requirement that a citizen qualified to locate shall be of any particular age. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Davis v. Dennis* (Wash.) 85 Pac. 1079; *Re Stilson*, June 15, 1893; *Re Cunningham*, 7 Copp, Land Owner, 179, Mineral Law Dig. 49.

And a person in possession of unsurveyed government lands on which he had discovered a coal vein, and of which, during his temporary absence, another had taken possession, need not, in an action to recover possession, allege that he was of the age of twenty-one years, or that he had the necessary qualifications to enter government lands, since the prior peaceable possession is the only inquiry. *Davis v. Dennis*, supra.

Nor is any distinction on account of sex made on the question of the right to locate a mining claim. *Re Eureka Office*, Nov. 13, 1877, 4 Copp, Land Owner, 179, Mineral Law Dig. 49.

The disqualification of a deputy United States mineral surveyor, or other officer or employee of the Land Office, from locating or holding mineral lands, prescribed by U. S. Rev. Stat. § 452 (U. S. Comp. Stat. 1901, p. 257), providing that officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing, or becoming interested in the purchase of, any public land, however, is not removed by U. S. Rev. Stat. § 2319 (U. S. Comp. Stat. 1901, p. 1424), providing that all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such; it being the intention of Congress to prohibit, on the ground of public policy, the officers, clerks, and employees in the General Land Office from acquiring, directly or indirectly, any interest in the purchase from the government of any of the public lands of the United States. *Lavagnino v. Uhlig*, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, Affirmed in 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; *Floyd v. Montgomery*, 26 Land Dec. 122; *Re Maxwell*, 29 Land Dec. 76.

e. Agents, partners, etc.

1. Validity and effect of location by.

A mining claim may be located by an agent; it is not necessary that a party shall personally act in taking up a mining claim, or in doing the acts required to give evidence of appropriation, or to perfect it. *McCulloch v. Murphy*, 125 Fed. 147; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209; *Moore v. Hamerstag*, 109 Cal. 122, 41 Pac. 805; *Gore v. McBrayer*, 18 Cal. 582; *Murley v. Ennis*, 2 Colo. 300; *Schultz v. Keeler*, 2 Idaho, 568, 21 Pac. 418; *Dunlap v. Pattison*, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504.
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And an agent or attorney in fact may do everything necessary to perfect such location, including the making of the affidavit that he is acquainted with the mining ground described in the notice, and that the same has not, to the best of his knowledge, been before located, or, if so located, that the same has been abandoned, as required by Idaho Rev. Stat. § 3104. *Dunlap v. Pattison*, supra.

And including, also, other prospecting and discovery. *Walton v. Wild Goose Min. & Trading Co.* supra.

Nor is a contract by which one person agrees to furnish the money to make payment for, and the other to do the work required in, locating mineral lands, invalid as in violation of the act of Congress respecting the appropriation of such lands. *Lipscomb v. Nichols*, 6 Colo. 290.

U. S. Rev. Stat. § 2319 (U. S. Comp. Stat. 1901, p. 1424), sanctioned and continued in force all local laws and customs with reference to location of mining claims not inconsistent with the laws of the United States, including the rule authorizing location of a mining claim by an agent. *Schultz v. Keeler*, 2 Idaho, 333, 13 Pac. 481.

And U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), making express mention of co-owners of mining locations, without reference to whether they are upon placers or rock in place; and § 2330 (U. S. Comp. Stat. 1901, p. 1432), thereof, providing for joint entry and patent of contiguous placer claims,—recognize the right of parties to locate placer claims jointly. *Chapman v. Toy Long*, 4 Sawy. 28, Fed. Cas. No. 2,610.

And where two persons agree in writing to locate mining claims in partnership, mines located by one of them during the continuance of the relation become their common property, though located by one of the partners in his own name. *McMahon v. Meehan*, 2 Alaska, 278.

Nor does an agent who locates a mining claim for and in the name of his principal acquire an interest in the title thereto without an express prior agreement to that effect. *Ibid.*

So, when a location of a mining claim is made for another not present, all the title anybody can acquire by location vests in the person for whom the claim was so located, and he cannot be divested of it except by his own voluntary act, or by forfeiture in not complying with the prescribed rules and regulations. *Rush v. French* and *Moore v. Hamerstag*, supra; *Book v. Justice Min. Co.* 58 Fed. 106.

And a location by an individual in whom the possessory right apparently remains is sufficient to support the issue of a patent on the application of a company, where it is shown that in fact said location was made for and in behalf of the company. *Re Sold Again Fraction Min. Lode*, 20 Land Dec. 58.

And where a complaint alleges the location of a mining claim by an agent, and the answer admits it, the fact of location by an

agent is in the case as fully as it would have been had there been evidence to that effect. *Schultz v. Keeler*, 2 Idaho, 568, 21 Pac. 418.

So, one who locates a mining claim in his own name, pursuant to an agreement between two or more to explore the public domain and discover and locate mining claims for the joint benefit of the contracting parties, holds the legal title to the interests of the others in trust for them. *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 209; *Book v. Justice Min. Co.* supra; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Copper River Min. Co. v. McClellan*, 2 Alaska, 134.

And where several persons agree to prospect for and locate mines, and that all mines located in the name of either shall be owned in common by all; and they locate several mines, each in his own name,—the legal title is in the locator named for each mine, and the others have such interest with him as constitutes, under the mining laws, a holding in common,—to the extent, at least, of making work done for the development of all satisfy the law, if sufficient in quantity and value. *Eberle v. Carmichael*, 8 N. M. 169, 42 Pac. 95.

And one who, while prospecting under such an agreement, discovers and locates a valuable mine, may be compelled to convey a moiety thereof to his partner, or to account for his partner's share of the proceeds of the sale thereof. *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492.

Nor is it a fraud upon anyone for one man to locate another in a mine and receive back from the latter a deed to the property, where no misrepresentations were made to him as to the transfer. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

And a location of a mining claim by one person for and in behalf of another is not rendered invalid as to the absent locator because of a fraudulent intent upon the part of the person locating for him, unless he had knowledge of, and acquiesced in, such fraudulent intent, with the purpose of carrying it out. *Ibid.*

But where several persons united for the purpose of locating a placer-mining claim; and some of them merely permitted their names to be used as locators to enable the others to obtain possession of, and patents for, mineral lands to a greater extent than they were entitled to by law, with the understanding that, after possession and title were acquired, they would convey to the others,—the whole transaction is tainted with fraud; and a court of equity will not interfere to compel an equal division between the locators intended to be benefited by it. *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164.

And a court of equity will not adjudge the locator of a mining claim who is in peaceable possession under a clear record title, to be a trustee of that title for another upon an alleged oral agreement to locate it for him, except on full, clear, and satisfactory evidence. *Copper River Min. Co. v. McClellan*, 2 Alaska, 134.
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Nor can a party to a contract for a joint venture in locating mines, who fails to perform his part of the contract, enforce specific performance against the other. *McMahon v. Meehan*, 2 Alaska, 278.

And one who gratuitously stakes a mining claim for, and in the name of, another cannot enforce specific performance of an oral promise made by the principal that he will, after he acquires title by location, convey an interest in the claim to him in consideration for his services, since such a promise is within the statute of frauds. *Cascaden v. Dunbar*, 2 Alaska, 408.

Where the record owner of a mining claim engages in working it and extracting gold therefrom on joint expense with the one who located it for him as his agent, they are mining partners in the work and its profits, but not in the title to the claim. *McMahon v. Meehan*, supra.

2. Authority to act.

An agreement between several persons to engage in the business of prospecting for, and the development of, lode mining property, makes each the agent of the others in prosecuting the joint adventure. *Lawrence v. Robinson*, 4 Colo. 567; *Murley v. Ennis*, 2 Colo. 300.

And if two men enter into a prospecting agreement providing for their joint prosecution of the labor, the agreement will be taken to include the continuance of work until a valid location is made on a legal discovery. *McLaughlin v. Thompson*, 2 Colo. App. 135, 29 Pac. 816.

And, if the first occupant of a mining claim, while his right is still incipient, admits another into possession with him upon the agreement that the labor of development shall be performed by both for their common benefit, this amounts to an abandonment *pro tanto*; and, if the development is afterwards effected by their joint labors, the better right, which is thereby acquired, inures to the two jointly. *Murley v. Ennis*, supra.

Nor need authority to locate a mining claim for the benefit of another be in writing. *Book v. Justice Min. Co.* supra; *Gore v. McBrayer*, 18 Cal. 582; *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943.

The object of the statute of frauds is to guard the owner of an estate in lands against any new estate in the same property being created by another out of the estate of the owner, except by his own written consent; and it does not operate to prevent the location of a mining claim by one person for another without written authority. *Rush v. French*, supra.

And the statute of frauds has no application to an agreement by one person to locate a mining claim for the joint benefit of himself and another. *Moritz v. Lavelle*, supra.

Nor is an agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all within the statute of frauds; and it need not be evidenced by writing. *Meylette*

v. Brennan, 20 Colo. 242, 38 Pac. 75; Murley v. Ennis, *supra*; Hirsch v. Reeding, 3 Mont. 15; Eberle v. Carmichael, 8 N. M. 696, 47 Pac. 717; Raymond v. Johnson, *supra*.

And the same rule applies to such an agreement between two corporations. *Shea v. Nilima, supra*.

Where one person located a mining claim in the name of another, however, legal title to the claim vested in the latter; and when, at the time of the location, he did not occupy a fiduciary relation to the actual locator, and it was not made pursuant to any prior agreement to hold it for the actual locator, a subsequent parol promise by the person in whose name the location was made, to hold it in trust for the actual locator, was void under the statute of frauds. *Moore v. Hamerstag*, 109 Cal. 122, 41 Pac. 805.

In the above case, *Gore v. McBrayer* and *Moritz v. Lavelle, supra*, were distinguished upon the ground that in them the location was made under a prior agreement between the parties that it should be for the joint interests of both.

Nor is any authority at all, either express or implied, necessary to enable one to locate a mining claim for another; mere action for the benefit of another makes the actor the agent of the other. *Rush v. French, supra*; *Morton v. Solambo Copper Min. Co.* 26 Cal. 527.

And a notice of location of a 'placer-mining claim by a father in behalf of his children will not be deemed invalid for want of authority, where the children united in bringing the suit to quiet title to the claim. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

And one who joined with another in claiming ground as a discovery claim, and afterwards recognized the rights of the other, and accepted from him his proportionate share of money expended for work and labor, is estopped from subsequently relocating the claim in his own name, and from claiming that his colocator was an alien, and that the former location was invalid. *Sever v. Gregovich*, 16 Nev. 325.

Nor is it material whether or not the party for whose benefit the location was made had knowledge of it. *Gore v. McBrayer, supra*.

And when a location is made for an absent locator, whether with or without authority, or with or without his knowledge, whatever rights are given to him by such location vest in him at once; and even the person locating such absentee without authority cannot take down the name of such absentee and insert another, though he does it before the absent locator has knowledge of the fact that he has been located. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Morton v. Solambo Copper Min. Co.* and *Gore v. McBrayer, supra*.

To warrant the location of a mining claim by a partnership or association, however, the association between the parties must exist at the time of the alleged discovery and location in order to give the parties associated an interest in the property; if it does not

then exist, so that the person acting in the field making the discovery and location can be said to be acting for the others as well as for himself, no interest can be acquired by those who are not personally present. *Johnstone v. Robinson*, 3 McCrary, 42, 16 Fed. 903.

And the fact that prospective miners were partners imposes no duty upon any of them, where the partnership is dissolved by mutual consent, to go on and complete defective locations for the benefit of the others; and where a partner goes on and completes such a location in his own name, he is entitled to the benefit thereof, and is not chargeable as trustee of the others. *Page v. Summers*, 70 Cal. 121, 12 Pac. 120.

And if one of two men who entered into a prospecting agreement providing for their joint prosecution of the labor of locating a mining claim quits the work before a vein is found, and the other continues until he finds a vein, the reward is his, and does not inure to the benefit of his former coprospector. *McLaughlin v. Thompson*, 2 Colo. App. 135, 29 Pac. 816.

So, where four persons were owners in common of a mining claim, and one of them conveyed his interest to another, and he afterwards discovered that his claim was too wide, leaving a small fraction on one side not located, and called the attention of the others to it, who instructed him to locate it, saying nothing about doing so in trust, and he did so in his own name, marking the boundaries of the fraction and doing some work upon it, one of the other partners also doing some, the evidence being conflicting as to who sunk the discovery shaft, a finding that he located the fraction for himself, and not in trust for others, will not be disturbed. *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943.

And where a laborer, employed by a mine owner to excavate and grade a quartz-mill site on public land, discovers and extracts from the upper edge of a sloping rock left by the excavations a pocket of gold and gold-bearing rock not included in the mineral location, he is entitled to appropriate the same; and where it is wrongfully seized and converted by his employers, he is entitled to recover from them the value thereof. *Burns v. Clark*, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12.

VII. Discovery.

a. Necessity of.

In all legislation, whether by Congress or state or territory, and by all mining regulations and rules, discovery and appropriation are recognized as the source of title to mining claims. *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 350, 47 N. W. 290; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421.

The purpose of the requirement under the act of Congress requiring that no location of a mining claim shall be made until the dis-

covery of a vein or lode within the limits of the claim located, as well as under state legislation and miners' rules and regulations, is to prevent fraud upon the government by persons attempting to acquire a patent to land not mineral in its character. *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 801; *Lange v. Robinson*, 148 Fed. 799; *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037.

And the rule adopted to effectuate this purpose is that a proper discovery, is a prerequisite to the vesting in a competent locator of a complete possessory title to a lode-mining claim. *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, *Affirming*, 85 Fed. 905; *Book v. Justice Min. Co.* 58 Fed. 106; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Cheesman v. Shreeve*, 40 Fed. 787; *Van Zandt v. Argentine Min. Co.* 2 McCrary, 159, 8 Fed. 725; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863; *Daggett v. Yreka Min. & Mill. Co.* (Cal.) 86 Pac. 968; *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173; *Wolfley v. Lebanon Min. Co.* 4 Colo. 112; *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Foote v. National Min. Co.* 2 Mont. 402; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76; *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* supra; *Lockhart v. Farrell* (Utah) 86 Pac. 1077; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Golden Terra Min. Co. v. Mahler*, 4 Morrison, Min. Rep. 390; *Waterloo Min. Co. v. Doe*, 17 Land Dec. 111; *Etling v. Potter*, 17 Land Dec. 424; *Re Winter Lode*, 22 Land Dec. 362; *Bunker Hill, etc., Co. v. Shoshone Min. Co.* 33 Land Dec. 142; *Reins v. Raunheim*, 28 Land Dec. 526; *Redden v. Harlan*, 2 Alaska. 402; *Bulette v. Dodge*, 2 Alaska, 427; *Charlton v. Kelly*, 2 Alaska, 532.

The fact that land is returned as mineral by the surveyor general does not in any event avoid the necessity of a discovery of mineral; and a location made without a discovery is void without reference to such return. *Reins v. Murray*, 22 Land Dec. 409.

And a location of a mining claim is insufficient, and will not support a patent, where the lands upon which are situated the discovery shaft and improvements have been expressly excluded therefrom in favor of a subsequent locator, and the proof fails to show a discovery of mineral on the claimed ground. *Re Lone Dane Lode*, 10 Land Dec. 53; *Re Independence Lode*, 9 Land Dec. 571; *Re Antediluvian Lode*, 8 Land Dec. 602.

Nor will a record of a prior location and proof of marking it on the ground defeat a subsequent location, in the absence of proof of discovery by the prior locator; the record and the marking of the claim not being sufficient to authorize a presumption of a dis-

covery. *Smith v. Newell*, 86 Fed. 56; *Bulette v. Dodge*, supra.

And entries and patents of lode-mining claims, in proceedings in which a claimant of a tunnel site located across them prior to the entries was not, and was not required to be, a party, will not estop him from establishing by testimony of witnesses who knew, and by other customary evidence, the fact that no discoveries of mineral in rock in place had been made in the lode claims before the claim of the tunnel site was located across them. *Uinta Tunnel Min. Transp. Co. v. Ajax Gold Min. Co.* 73 C. C. A. 35, 141 Fed. 563.

Even in a controversy between two mineral claimants on the simple question as to who is entitled to priority, there must be such a discovery of mineral to sustain a location as gives reasonable evidence of the fact either that there is a vein or lode carrying precious mineral, or, if it is claimed as placer ground, that it is valuable for placer mining. *Chrisman v. Miller*, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468, *Affirming* 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

And the use of unclaimed ground by a mining company for buildings, and for the construction of a tunnel thereunder to aid in the working of the company's claim, does not initiate any right to the ground as an independent mining claim. *Waterloo Min. Co. v. Doe*, 56 Fed. 685.

Persons who locate a mining claim and record a location certificate thereof, however, cannot, as against one who purchases an interest in the claim, prove that the location is void for want of discovery of minerals in place. *McCarthy v. Speed*, 11 S. D. 362, 50 L.R.A. 184, 77 N. W. 590, 12 S. D. 7, 50 L.R.A. 190, 80 N. W. 135.

b. Prospecting for.

Prior to the discovery of minerals prospectors have equal rights. *Hibschle v. Gildersleeve*, 8 Copp, Land Owner, 65, *Mineral Law Dig.* 34.

A person who has made no discovery upon a mining claim, and has done no work to protect it, cannot be said to be in actual, bona fide possession thereof, developing it under the requirements of the statute; and in such case any other person has the right to enter and locate peaceably. *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Charlton v. Kelly*, supra.

But the entry of one prospector upon the possession of another must be peaceable, open, and above board, and made in good faith, or no right can be founded upon it. *Miller v. Chrisman*, supra.

One who in good faith makes a location of a mining claim, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, clandestine entry and intrusion

upon his possession. *Ibid.*; *Bulette v. Dodge*, *supra*.

A prospector on the public mineral domain may protect himself, as to land of which he is in actual possession, while he is searching for mineral; and his possession, so held, is good as a possessory title against all the world, except the government of the United States. *Crossman v. Pendery*, 2 McCrary, 139, 8 Fed. 693.

And one who makes a location before the discovery of a vein or ledge can hold the same while continuously and industriously seeking for one believed to exist therein, as against all persons having no better right thereto; and he may eject them therefrom if they intrude upon his possession. *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793; *Charlton v. Kelly*, *supra*.

But one who goes upon uninclosed and unimproved mineral land and prospects for veins of mineral-bearing rock is, previous to a discovery, simply a prospector upon the public domain, and his rights are confined to the ground in his actual possession only, and do not include the tract sought to be taken or located, so as to warrant a court in enjoining a trespass thereon. *Gemmell v. Swain*, 28 Mont. 331, 98 Am. St. Rep. 570, 72 Pac. 662.

And the act of a prospector on public mineral lands, of posting up notices of location at his shafts before making a discovery, does not enlarge his rights as against a trespasser upon portions of the tract claimed, not in his actual possession. *Ibid*.

Nor can competing prospectors who have made no discovery make use of a writ of injunction to secure priority of discovery or location thereon, or apparent superiority of the right to a mining claim; and the fact that one such prospector has been wrongfully enjoined from continuing his work does not entitle him to an injunction against the other against trespassing upon the tract claimed by him. *Ibid*.

And a prospector on the public mineral domain, previous to discovery, who stands by and allows another to enter upon his claim and first discover mineral, loses his right as against the actual discoverer. *Crossman v. Pendery*, *supra*.

Actual possession within these rules depends largely upon the character of the ground. Tents, houses, and actual residence therein, on the claim, are evidences of possession, though not necessary to constitute legal possession, and actual work constitutes possession; but merely placing a tent and a few tools and a small supply of provisions upon a claim do not alone and of themselves constitute actual possession thereof. *Charlton v. Kelly*, *supra*.

e. What constitutes.

1. Generally.

A discovery which will support the location of a mining claim within the meaning of U. S. Rev. Stat. § 2320 (U. S. Comp. Stat. 1901, p. 1424), providing that no loca-

tion of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, consists of the disclosure of a well-defined body of rock in place, carrying gold or other precious metal, which body afterwards proves to be continuous. *Golden Terra Min. Co. v. Mahler*, 4 Morrison, Min. Rep. 390; *Fox v. Myers* (Nev.) 86 Pac. 793.

It is the finding of ore or metalliferous rock in place in a defined vein. *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428.

The finding of rock in place containing mineral constitutes a discovery. *Book v. Justice Min. Co.* 58 Fed. 106.

The finding upon the public land, of a belt or zone of quartz or rock held in place by the adjacent country rock, containing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, is a discovery which will authorize the location of a lode claim. *Meydenbauer v. Stevens*, 78 Fed. 787.

And that there is gold and silver bearing rock showing upon the surface of a claim is a sufficient compliance with the requirements of the Federal statute. *Score v. Griffin* (Ariz.) 80 Pac. 331.

And when metallic vein matter appears on the surface a valid location of a ledge deep in the ground to which such vein matter leads may be made. *Hayes v. Lavagnino*, 17 Utah, 185, 53 Pac. 1029; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362.

2. The vein or lode discovered.

(a) Definitions.

"Lode" is a term in general use among the tin miners of Cornwall, and was introduced on the Pacific coast by miners from Cornish mines, and signifies a fissure filled either with metallic or with earthy matters. *Re Drummond*, Land Office, July 15, 1873, *Copp*, Min. Lands, pp. 50, 51, 1 Snyder, *Mines*, § 283.

In the language of miners, a lode is a vein containing ore. *Moxon v. Wilkinson*, 2 Mont. 421.

And veins, in mining parlance, are narrow plates of rock intersecting other rocks, and are the fillings of cracks or fissures. *Ibid*.

As used by miners before being defined by any authority, the term "lode" simply meant that formation by which a miner could be led or guided; it is an alteration of the verb "lead," and whatever a miner could follow, expecting to find ore, was his lode. *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, Affirmed in 103 U. S. 839, 26 L. ed. 557.

And in practical mining the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock, separated from the neighboring rock by well-defined boundaries; and the discoverer of such a deposit may locate it as a vein or lode. *Hayes v. Lavagnino*, *supra*.

So, a lode existed, within the meaning of the mining act of Congress of 1866, where-

ever miners could follow and find ore. *Harlington v. Chambers*, supra.

And the words "vein or lode," as used in the United States statute with reference to the location of mining claims (Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424), which superseded the act of 1866, are applicable to any zone or belt of mineralized rock lying within clearly defined boundaries, separating it from the neighboring country or nonmineral rock. *Book v. Justice Min. Co. and Meydenbauer v. Stevens*, supra; *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. Nos. 13,413, 13,414; *Eureka Case*, supra; *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 573; *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401; *Hayes v. Lavagnino*, supra.

And apply to any kind of a vein or lode of quartz, or rock-bearing mineral, in whatever kind, character, or formation the mineral may be found. *Book v. Justice Min. Co.* supra.

And they include all deposits of mineralized matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes. *Meydenbauer v. Stevens*; *Gregory v. Pershbaker*; and *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.*,—supra.

So, a vein or lode authorized to be located as a mining claim has been defined to be a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver, or other valuable mineral deposit. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Book v. Justice Min. Co.* 58 Fed. 106.

A belt or zone of quartz or rock held in place by the adjacent country rock, containing gold, silver, cinnabar, lead, tin, copper or other valuable mineral deposit, constitutes a lode. *Meydenbauer v. Stevens*, 78 Fed. 787.

And a quartz lode is defined to be a fissure or seam in the country rock filled with quartz matter bearing gold or silver. *Foote v. National Min. Co.* 2 Mont. 402.

So, a mineral-bearing vein, within the meaning of the statute, is a continuous bed of mineral-bearing rock in place in the general mass of the surrounding formation. *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

The definition of a lode as the term is used in the Revised Statutes must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. *Fox v. Myers* (Nev.) 86 Pac. 793.

(b) Distinguishing features generally.

A lead or lode, in mining parlance, is not an imaginary line without dimensions, or a thing without shape or form; before a thing can be legally and rightfully denominated a lead or lode, it must have length and depth; it must be capable of measurement, and it 7 L.R.A. (N.S.)

must occupy defined space and be capable of identification. *Foote v. National Min. Co.* supra.

And a lode or vein of mineral must be continuous in the sense that it can be traced through the surrounding rock. *Buffalo Zinc & Copper Co. v. Crump*, supra.

It is the finding of mineral in rock in place, as distinguished from float rock, that constitutes discovery of a lode, and warrants a prospector in making a location of a lode-mining claim. *Book v. Justice Min. Co.* supra.

A slight interruption of mineral-bearing rock, however, would not, alone, be sufficient to destroy the identity of the vein; nor would a short partial closure of the fissure have that effect, if a little further on it recurs again with mineral-bearing rock within it. *Buffalo Zinc & Copper Co. v. Crump*, supra.

And a quartz lode may be wide or narrow, varying in width from 1 inch or less to 100 feet or more, the sides of which are represented and defined by walls of the country rock. *Foote v. National Min. Co. and North Noonday Min. Co. v. Orient Min. Co.* supra.

And it is not required that well-defined walls shall be developed, or paying ore be found, within them, to constitute a vein; but something must be found in place, as rock, clay, or earth, so colored, stained, changed, or decomposed by the mineral elements as to mark and distinguish it from the inclosing country. *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

Nor is uniformity of structure in the formation of a zone of mineral required to constitute a good discovery. It may be thick or thin, and may narrow down and pinch out in places, and suddenly expand and swell out in others; and it is not necessary that the minerals or valuable deposits shall be evenly distributed. *Meydenbauer v. Stevens*, supra.

And a horizontal deposit of mineral, irregular in form, and in no wise resembling a fissure vein, and not capable of being traced by its outcrop, falls within the meaning of the descriptive terms "vein" and "lode," as used in the statute. *Re Breece Min. Co.* 3 Land Dec. 11.

So, a quartz ledge made a subject of location includes all the gold in detached or decomposing quartz so far as the general formation of the ledge can be traced; and it is immaterial whether the ledge has been thrown above the surface of the earth, and, having fallen, is lying flat upon it, or whether it is still standing perpendicular in the earth, or whether it is still one solid mass of quartz rock, or has become entirely decomposed, and of no greater density than the ordinary rock around it. *rown v.* 49 & 56 Quartz Min. Co. 15 Cal. 152, 76 Am. Dec. 468.

To warrant the location of a mining claim, however, it is not enough to discover detached pieces of quartz, or mere bunches of quartz, not in place. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

Nor is the mere discovery of mineral in a broken or fragmentary condition sufficient. *Terrible Min. Co. v. Argentine Min. Co.* 5 McCrary, 639, 89 Fed. 583; *Van Zandt v. Argentine Min. Co.* 2 McCrary, 159, 8 Fed. 725.

And a discovery which will support a location is not established by evidence that samples of porphyry rock taken from a hole made a year after the location were assayed and an appreciable amount of gold was found in every sample, in the absence of proof of anything like a continuous vein or lode of quartz or rock extending in any direction. *Ledoux v. Forester*, 94 Fed. 600.

Nor is land containing a ledge of limestone subject to location and entry as a lode claim; and the location of it as such is a nullity. *Wheeler v. Smith*, 23 Land Dec. 395; *Long v. Isaksen*, 23 Land Dec. 353.

And, while metalliferous rock in place, not in a fissure, may be found under such conditions, within clearly defined boundaries, as to require recognition as a vein or lode, a broad metalliferous zone having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may, itself, have boundaries which can be traced. *Mt. Diablo Mill & Min. Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886.

In the above case, the *Eureka Case*, 4 Sawy. 302, Fed. Cas. No. 4,548, supra, VII. c, 2, was distinguished upon the ground that in that case clearly defined boundaries were found, while in this case there are none; and the court limited that case, saying that it never was intended in that case that every metalliferous zone of country, to which boundaries can be found, must be regarded as one vein or lode, since this would reduce all mining districts to one lode.

(c) Rock in place.

"Rock in place," as used in the mining statutes, means rock that is inclosed and embraced in the general mass of the mountain, as distinguished from float soil and *débris* of the surface. *Jones v. Prospect Mountain Tunnel Co.* 21 Nev. 339, 31 Pac. 642.

The quartz rock designated as in place in the mineral laws must be suspended between, or lie within, or be inclosed by, walls of rock constituting the general mass of the earth's crust in the immediate vicinity of the zone or belt. *Meydenbauer v. Stevens*, 78 Fed. 787.

By the use of the phrase "rock in place," Congress intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of rock simply lying or resting upon the earth's surface without any walls, and also pieces of boulders detached from the earth's crust, commonly called "float," and usually found in mountain gulches and in the beds of streams in a mineral country. *Ibid.*

To constitute rock in place, as used in the mining statutes, however, it is not material where the rock or mineral was originally

formed or deposited, or that the vein matter is loose, or broken, or disintegrated. *Jones v. Prospect Mountain Tunnel Co.* supra.

And a vein or lode cannot be in place, within the meaning of those acts, unless it is within the general mass of the mountain; it must be inclosed within the general mass of fixed and immovable rock; if it comes to the surface and passes out of the rock in place, it ceases to be a lode. *Leadville Min. Co. v. Fitzgerald*, 4 Morrison, Min. Rep. 380, Fed. Cas. No. 8,158.

The term "rock in place," as used in the mining acts, should be given the most liberal construction that the language will admit of, and every class of claims that, according to either scientific accuracy or proper usage, can be classed or applied for as a vein or lode, may be patented under this law. *Re Boles*, July 20, 1871, *Sickels*, Min. Dec. 522, *Mineral Law Dig.* 9.

3. The question of value of the deposit.

When the controversy is between two mineral claimants, the rule respecting the sufficiency of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry. *Chrisman v. Miller*, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468, *Affirming* 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Lange v. Robinson*, 148 Fed. 799.

And when the locator of a mining claim finds rock in place containing mineral he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, and whether it assays high or low. *Book v. Justice Min. Co.* 58 Fed. 106; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Fox v. Myers* (Nev.) 86 Pac. 793.

And the locator of a mining claim need not show that he has made assays of the vein located when no one disputes a *prima facie* showing by evidence of the prospector that the vein is a good one, and appears to be sufficiently good to justify locating and subsequently working it. *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075.

A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; the test being willingness on his part, and not justification. *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Hayes v. Lavagnino*, 17 Utah, 185, 53 Pac. 1029.

And the discovery of a crevice or seam filled with mineral deposit, by means of which a prospector anticipates being led to an ore body or deposit of commercial value, is a sufficient discovery of a vein to support the location of a mining claim; the expectation need not be of finding paying mineral in the particular crevice, vein, or seam in which mineral-bearing rock in place is discovered. *McShane v. Kenkle*, 18 Mont. 208, 33 L.R.A. 851, 56 Am. St. Rep. 579, 44

Pac. 979; *Shreve v. Copper Bell Min. Co.* 11 Mont. 309, 28 Pac. 315.

In *Shreve v. Copper Bell Min. Co.* supra, *Davis v. Wiebbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628, supra, V. c. 2, (c), (1), was distinguished upon the ground that in that case the court was examining the status of the land at the time of the sale as a town site, and not at the time of a sale as a mining claim.

If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man, not necessarily a miner, in spending his time or money upon it, it is sufficient to constitute a discovery of a vein or lode within the meaning of the Federal statutes, as against a subsequent locator for mining purposes. *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428; *Book v. Justice Min. Co.* supra; *Cascaden v. Bartolis*, 146 Fed. 739; *Lange v. Robinson*, supra; *Castle v. Womble*, 19 Land Dec. 455; *Charlton v. Kelly*, 2 Alaska, 532.

The question of a valid discovery of a mining claim does not depend upon whether or not the facts are such as would cause a practical miner to feel justified in developing the claim, but upon the existence or non-existence of the required metal-bearing rock. *McShane v. Kenkle*, supra.

The finding of ore or metalliferous rock in place in a defined vein is sufficient although it does not contain ore in paying quantities. *Muldrick v. Brown*, supra; *Golden Terra Min. Co. v. Mahler*, 4 Morrison, Min. Rep. 390.

And it is not necessary that it should appear that for labor and capital expended in working the ground it would yield a reasonable profit. *Cascaden v. Bartolis* and *Book v. Justice Min. Co.* supra.

And that seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in character to the seams or veins of mineral matter which had induced other miners to locate claims in the same district, which, by continued development, had led to a well-defined lode or vein containing ore of great value, sufficiently complies with the provisions of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424 requiring a discovery of a vein or lode within the limits of the claim before a valid location thereof could be made. *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 801.

To constitute a good discovery, however, a belt or zone must bear some of the minerals or valuable deposits mentioned in the mineral laws. *Meydenbauer v. Stevens*, 78 Fed. 787.

Mere indications of the presence of minerals are not sufficient to satisfy the requirements of the statute. *Charlton v. Kelly*, supra.

There must be something more than a mere guess on the part of the miner, such as the discovery of precious metals in it, or in such close proximity to it as to justify a reasonable belief in their existence. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560. Reversing 3 McCrary, 19, 8 Fed. 860; *Waterloo Min. Co. v. Doe*, 7 L.R.A. (N.S.)

56 Fed. 685; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

Nor is mere willingness on the part of the prospector to further expend his labor and means sufficient. The question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, could not be satisfactorily proved. *Charlton v. Kelly*, supra.

And the term "lode," as used in the acts of Congress, does not include a bed of gravel from which particles of gold may be washed. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

So, the question whether, prior to the date of the location of a mining claim, the locators had made such a discovery of gold thereon as entitled them to locate the land, should be decided not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation is such as is usually found where these deposits exist in paying quantities. *Lange v. Robinson*, 148 Fed. 799.

And an actual discovery of gold upon a claim located, and the fact that the claim was situated near other lands presenting the same surface indications, which at the date of the location of the junior claim were known to be valuable for placer gold which they contained, constitute sufficient discovery of gold upon the lands in controversy to entitle the locator to make a valid location of the same as a placer-mining claim. *Ibid.*

And in such a case, where the location was made in good faith, it cannot be held to be invalid upon the ground that the claim was prospectively valueless, and that the lauds were not mineral lands, and the locator had no right to locate or explore them. *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54.

Nor does the fact that other matters than the existence of deposits of valuable mineral entered into the estimate of the worth of a mining claim invalidate it; and the existence of a valuable growth of timber on the land does not affect the applicant's claim to a patent therefor. *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195.

d. The apex with reference to discovery and holding surface.

The possession of a vein recognized and protected by the mining laws is that of one who holds the surface where the vein makes its apex. *Eilers v. Boatman*, 3 Utah, 159, 2 Pac. 66.

And the top or apex of a vein for the purpose of discovery and possession, within the meaning of the mining laws, is the highest point, or end, or edge where it approaches nearest to the surface of earth. *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. Nos. 13,413 and 13,414; *Iron Mine v. Loella Mine*, 2 McCrary, 121, 3 Fed. 368.

And this is so without regard to the depth from the surface at which it may be found.

If found at any depth, and the locator can define on the surface the area which will inclose it, he can hold it by location. *Iron Mine v. Loella Mine*, supra.

So, for the purposes of exploration, discovery, and purchase under the mining laws, the legal apex of a vein, in a case in which the actual apex is within a placer claim, and the United States has dealt with and disposed of the placer, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of. *Woods v. Holden*, 26 Land Dec. 198.

And, where a claim is located upon a broad horizontal or blanket lode covering the entire area within the limits of the side and end lines of the location, the apex of the lode must be regarded as coextensive with the distance between the side lines of the location and every part or point of such apex within these limits is as much the middle of the vein, within the intent and meaning of the mining laws with reference to discovery, as any other part, and the loss of the original point of discovery, by its inclusion in some other mineral claim, is immaterial as affecting the validity of the location. *Re Homestake Min. Co.* 29 Land Dec. 689.

Nor is the apex of a vein upon which a claim may be located necessarily a point. It is often a line of great length; and the disclosure of any portion of the apex on the course or strike of the vein, found within the limits of a claim, constitutes a sufficient discovery to enable the locator to obtain title. *Larkin v. Upton*, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, Affirming 7 Mont. 449, 17 Pac. 728.

But the dip or apex of a vein should be broken on its edge, so as to appear to be the beginning or end of a vein; if a vein at its highest point turns over and pursues its course downward, then such point is simply a swell in the mineral matter, and not a true apex. *Stevens v. Williams*, supra.

And a location of a mining claim based upon discovery on the dip or downward course of a vein or lode, whose top or apex lies inside the vertical lines of a prior subsisting valid location, is wholly illegal and void; and a charge that a location is so based imposes on the Land Department the duty to determine the question before the issuance of a patent. *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 33 Land Dec. 142.

In *Iron Mine v. Loella Mine*, 2 McCrary, 121, 3 Fed. 368, however, it was suggested that a location made on a dip of a vein would be valid as against a location of a later date, made higher up; and that, if a location is made upon the dip of a vein, the locator may pursue it in the downward course though he may not in the upward course, and he may hold the whole which lies within his location below it as against any person locating subsequently on a higher point in the same vein; but the case was decided upon other grounds.

Where there are surface outcroppings of 7 L.R.A. (N.S.)

the same vein within the boundaries of two claims, the one first located carries with it the right to work the vein. *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356.

What constitutes the top or apex of a vein is a question of law. *Illinois Silver Min. & Mill. Co. v. Raff*, 7 N. M. 330, 34 Pac. 544.

But its existence is a question of fact, to be passed upon in each case as it arises, under the law applicable to the state of facts as established. *Ibid.*; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289.

And it does not involve a Federal question within the meaning of the removal-of-causes act. *Blue Bird Min. Co. v. Largey*, supra.

e. By whom made.

It is not necessary under U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, providing that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, that the locator of a mining claim should be the first discoverer in order to make the location valid; if it appears that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it. *McMillen v. Ferrum Min. Co.* 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; *Hayes v. Lavagnino*, 17 Utah. 185, 53 Pac. 1029; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Book v. Justice Min. Co.* 58 Fed. 106.

It makes no difference who made the first discovery so long as it was in fact made by the first locator before his location. *Willeford v. Bell* (Cal.) 49 Pac. 6.

And, while a discovery is necessary to entitle a claimant to make a valid location of a mining claim, the locator need not do the actual manual labor of exposing the gold; he may, and usually does, employ others to do the work for him, and it may be done in his absence, or even without his knowledge. *Russell v. Dufresne*, 1 Alaska, 486.

To sustain a location of a mining claim based on a discovery made by another, however, the locator must not only have knowledge of the former discovery, but such discovery must be adopted and claimed by him. *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* and *McMillen v. Ferrum Min. Co.* supra.

And he must base his location upon it. *McMillen v. Ferrum Min. Co.* supra.

Under the early Spanish and Mexican laws, however, a new discovery could not be made on a vein known and worked in other places. *United States v. Castellero*, 2 Black, 17, 17 L. ed. 360.

f. Time of making.

While there can be no location of a mining claim before the discovery of a vein on unappropriated public land, the order in which

the acts requisite to a location are done is immaterial provided they are completed before the rights of others intervene. *Perigo v. Erwin*, 85 Fed. 904; *Heman v. Griffith*, 1 Alaska, 284; *Healey v. Rupp* (Colo.) 86 Pac. 1015; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209; *Golden Terra Min. Co. v. Mahler*, 4 Morrison Min. Rep. 390; *DWINNELL v. DYER*.

And a location of a mining claim is not invalid because the location was made before the discovery; the marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later one. *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, Affirming 85 Fed. 904; *Uinta Tunnel Min. & Transp. Co. v. Ajax Gold Min. Co.* 73 C. C. A. 35, 141 Fed. 563; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749; *Re Mitchell*, 2 Land Dec. 752; *SHARKEY v. CANDIANI*; *Redden v. Harlan*, 2 Alaska, 402.

U. S. Rev. Stat. § 2320, providing that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located, means nothing more than that no location shall be considered complete until there has been a discovery; and a discovery of a vein or lode before any other steps are taken to perfect a location is not thereby required. *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 286.

And where a location is properly made and marked on the ground, and notice thereof properly posted; and it is followed by actual possession of the ground by those claiming it; and a subsequent discovery of mineral within its limits is made,—the requirements of the mining laws in respect to the location are sufficiently complied with, where no rights of any third persons intervened before the discovery. *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673.

A location of a mining claim without a discovery is made valid by the subsequent discovery of a vein or lode within it, when made before any rights are acquired in the same claim by others. *North Noonday Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Brewster v. Shoemaker*, 28 Colo. 176, 53 L.R.A. 793, 89 Am. St. Rep. 188, 63 Pac. 309; *Re Mitchell*, supra; *Reins v. Raunheim*, 28 Land Dec. 526.

And in such case the location inures to the benefit of the locator, and his possessory rights become complete as of the date of such discovery. *Healey v. Rupp* and *Cedar Canyon Consol. Min. Co. v. Yarwood*, supra.

And where a mining claim is located without discovery, and is afterwards located by another person without discovery, after which the first locator makes a discovery and completes his location, the first locator

has the better title. *Barnette v. Freeman*, 2 Alaska, 286.

The validity of location of a mining claim depends primarily, however, upon the discovery of a vein or lode within its limits; and the location is valid from the time of the discovery only. *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428; *Redden v. Harlan*, supra.

While a previous location may be made valid by a subsequent discovery of mineral there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery. *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863.

And a prior locator of a mining claim without a discovery acquires no right as against a subsequent locator who first makes a discovery upon the ground in controversy. *Crossman v. Pendery*, 2 McCrary, 139, 8 Fed. 693; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522.

And where an attempted location was made, but there was no discovery of mineral for about two years, after which a relocation was made and a certificate filed, the original location certificate is not competent evidence on an issue as to the right to the claim. *Beals v. Cone*, supra.

Montana, however, has adopted the contrary rule, that a location void at the time it is made because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by subsequent discovery on the claim located. *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

And under that rule evidence as to the width and richness of the vein discovered, as shown by work subsequent to discovery, is incompetent. *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

g. Place of.

1. Generally.

To support the location of a mining claim, there must have been a discovery of a vein or lode on unoccupied and unappropriated mineral lands of the United States. *Lockhart v. Farrell* (Utah) 86 Pac. 1077; *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Golden Terra Min. Co. v. Mahler*, 4 Morrison Min. Rep. 390.

And it must have been upon land open to exploration. *Re Winter Lode*, 22 Land Dec. 362.

And, where a lode mining claim is partly embraced within the limits of a town site, to sustain an entry for a patent thereon the claimant must duly show the discovery of mineral upon the ground embraced within the location outside of the town site. *Re Laney*, 9 Land Dec. 83.

Nor can a valid location of a mining claim be made until the discovery of a vein or

lode, or other mineral, within the limits of the claim located. *Book v. Justice Min. Co.* 58 Fed. 106; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Tuolumne Consol. Min. Co. v. Maier, supra*; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Golden Terra Min. Co. v. Mahler, supra*; *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 33 Land Dec. 142; *Waterloo Min. Co. v. Doe*, 17 Land Dec. 111.

The top or apex of the vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title. *Larkin v. Upton*, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, *Affirming* 7 Mont. 449, 17 Pac. 728.

The lode is the principal thing in a mining location, and the surface ground is incident thereto; and a person making a location not embracing the lode he seeks to secure cannot be heard to complain that others have explored and occupied adjacent territory and discovered therein a lode which might have been embraced in his location. *Wolfley v. Lebanon Min. Co.* 4 Colo. 112.

And the exclusion of that portion of the claim which contains the discovery shaft renders it incumbent upon the locator applying for a patent to show the existence of mineral within the remainder of the claim, prior to the allowance of entry thereof. *Re Cayuga Lode*, 5 Land Dec. 703.

So, the central idea of a mining location under the provisions of the act of Congress of July 26, 1866, was that there must be a discovered lode within it, whose *locus* in its onward course or strike is embraced by its boundaries. *Wolfley v. Lebanon Min. Co. supra*.

The fact that only a portion of a discovery is within a claim sought to be located, however, and the rest of it is in another claim, does not invalidate the discovery and location. *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

In the above case, *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, *supra*, V. a., 2, was distinguished upon the ground that in that case the discovery relied upon was entirely within the boundaries of a claim that was patented after the location in question.

And a locator cannot follow a vein beyond his end lines; and beyond such end lines it is subject to further discovery and appropriation. *Larkin v. Upton*, 144 U. S. 20, 36 L. ed. 330, 12 Sup. Ct. Rep. 614.

So, any discovery will meet the requirements of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, providing that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, provided it is made before location and within its boundaries; and location need not be based upon and confined to what is found in the discovery shaft adopted and claimed as such. *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.

And that the discovery and improvements of a mining location were upon ground specified

in the public notice of application for a patent is not a good ground for objection, where, in adverse judicial proceedings, the ground so excluded has been awarded to the plaintiff. *Re Stranger Lode*, 28 Land Dec. 322.

2. Effect of discovery upon another claim.

A location of a mining claim based upon a discovery made within the limits of another existing valid location is void. *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863; *Sierra Blanca Min. & Reduction Co. v. Winchell (Colo.)* 83 Pac. 628; *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054; *Lockhart v. Farrell (Utah)* 86 Pac. 1077; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Gwillim v. Donnellan, supra*; *Golden Terra Min. Co. v. Mahler, supra*; *Branagan v. Dulaney*, 2 Land Dec. 744; *Hibschle v. Gildersleeve*, 8 Copp, Land Owner, 66, *Mineral Law Dig.* 107.

And a second discovery within the limits of a legal location does not affect the rights of the first locator. *Hibschle v. Gildersleeve*, 8 Copp, Land Owner, 65, *Mineral Law Dig.* 34.

Nor is the discovery of a lode within the limits of a prior patented lode claim of any effect, and it will not support a mineral entry. *Re Williams*, 20 Land Dec. 458.

So, a discovery within the boundaries of a mining claim will not authorize or support a location of another claim outside of such boundaries. *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428.

And a valid location cannot be made by the discovery of a vein upon an adjoining location, though the vein, if maintaining the same strike as at the point of discovery, would pass into the claim attempted to be located. *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429.

Nor can the same discovery point be used for the location of two or more mining claims; a single discovery, though made by more than one person, must be treated as an entirety. *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064; *Re Poplar Creek Consol. Quartz Mine*, 16 Land Dec. 1.

And one discovery of mineral by two persons cannot be used as the basis of two locations, one by each discoverer, having a common end line that bisects the discovery shaft. *Re Poplar Creek Consol. Quartz Mine, supra*.

In the above case, *Larkin v. Upton*, 144 U. S. 20, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, *supra*, VII. g, 1, was distinguished upon the ground that there were two adjoining claims, and each owner asserted that the discovery was made on his site, while in the case at bar no discovery had been made in either location, except in one shaft; and it is not a question as to which is entitled to the benefit of the discovery, but as to whether two locators, by combining, may initiate two claims.

So, where a junior claim is located across a senior claim, it is invalid where the only

mineral found within the limits of the junior claim is also within the limits of the senior claim. *Reynolds v. Pascoe*, supra.

In such case the entire claim based upon the discovery is void, and all of the location without the boundaries of the prior location remains unappropriated public lands subject to location; and the locator of the invalid claim has the right to discover a lode and locate a claim upon that portion of his former claim which remained unappropriated, as well as any other locator. *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, Affirming 85 Fed. 904.

And instructions in an action involving the validity of a location of a mining claim, based upon the theory that the defendant had located two claims upon the same discovery, placing the burden of proof on the plaintiff to show which of the two locations was invalid, and which part of the ground was subject to relocation, were improper. *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759.

Nor is a location of a mining claim upon ground then covered by a valid subsisting mining claim void only as to the subsisting claim. It is void *ab initio* as to the whole world, and the subsequent forfeiture of the subsisting claim does not inure to the benefit of the junior locator, or in any way validate his claim; and it remains void as against a subsequent locator conforming to the statutory rules and requirements. *Lockhart v. Farrell*, supra.

In the above case, *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716, supra, V, a, 3, (b), was distinguished upon the ground that in that case the court dealt with the question of a mere conflict of area, a case of overlapping claims between a senior and a junior location, predicated on the hypothesis that both were valid.

And where a person located a mining claim conflicting with a senior claim, and the discovery monument of both claims was at the intersection of the veins in each about 10 feet apart, and the discovery point of the junior claim was at the same blow-out where the discovery was made on the senior, and both discoveries were upon the same mineral and within the lines of the senior claim; and afterwards another locator located a third claim which crossed them both,—the third claim is good as against the second, since the second is invalid because the same discovery point was used for the location of the first and the second. *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064.

Where the location of a mining claim is attacked on the ground that the discovery was made on ground previously appropriated for mining purposes, however, the locator should be permitted to prove the invalidity of the alleged previous location. *Crown Point Min. Co. v. Buck*, 38 C. C. A. 278, 97 Fed. 463.

And two overlapping mining claims located and held by the same person, resting on separate discoveries of parallel veins, are 7 L.R.A. (N.S.)

sufficient to sustain an entry for a patent, notwithstanding the fact that the discovery forming the basis of one of the locations was made within the other, the earlier one, where the overlap is excluded from the earlier location; the later location being treated in such case as an abandonment of the earlier one to the extent of the overlap. *Re Golden Link Min. Leasing & Bonding Co.* 29 Land Dec. 384.

So, the action of the senior locator of a mining claim, of permitting a junior adverse applicant to include in his claim the land embracing the discovery on which the senior claim rests, under an agreement that the land in conflict will be deeded to the holder of such claim on his securing title thereto, does not work such a loss of the discovery on the part of the senior locator as will defeat his entire location, where the agreement was carried into effect, and the senior locator was at all times in possession of the grant in question, and the discovery and improvements were not made the basis on which patent was secured under the junior location. *Re Duxie Lode*, 27 Land Dec. 88.

And an instruction that a discovery within the limits of the claim located, of a vein or crevice of quartz or ore, with at least one well-defined wall on the lead, lode, or ledge of rock in place, containing gold, silver, or other valuable mineral deposits, is necessary to make a valid location, is not subject to the objection that the jury are thereby led to suppose that the original discovery would be sufficient, though it was upon ground which was afterwards patented to others, where the jury were also instructed that, although one may discover a vein within the limits of the ground claimed, yet, if the top or apex of such vein lies without his claim, he will acquire no title thereto. *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

Nor is the validity of a properly located mining claim affected by the fact that after such location part of it, including the discovery, was transferred to other parties; and such a transfer does not defeat the right of the locators to hold the portions not disposed of. *Little Pittsburgh Consol. Min. Co. v. Amie Min. Co.* 5 McCrary, 298, 17 Fed. 57.

And a location of a mining claim is not open to the objection that it is invalid because the discovery of ore was made by the locator while he was working in another mine, and that the same discovery cannot be used for two locations, and that a location cannot be based upon a discovery made within the limits of another existing and valid location, where the evidence as to the discovery is not confined to what the locator found in the supposed limits of an existing mine, but shows that he found quartz at different points, outside the tunnel in which he was mining. *Reiner v. Schroeder*, 146 Cal. 411, 80 Pac. 517.

3. Shifting discovery point.

While the location of a mining claim based exclusively upon the discovery of mineral

within the limits of another existing and valid location is void, where the two claims are not identical this fact would not vitiate the entire location, where mineral was found, and the discovery thereof made, within the undisputed limits of the conflicting location within the time allowed the locator thereof to perfect his location, and before conflicting rights of third parties attached; and in such case the claim is good as to land not conflicting with the first location, as against a subsequent conflicting locator. *Tonopah & S. L. Min. Co. v. Tonspah Min. Co.* 125 Fed. 408.

And where two mining locations conflict, and the discovery of the junior location is in the conflicting area; but the junior locator afterwards discovers a vein upon that portion of his location which is exclusive of the senior location,—the staking, recording, and improving thereof will inure to his benefit, and the validity of the junior location will date from the time of such discovery. *Golden Terra Min. Co. v. Mahler*, 4 *Morrison Min. Rep.* 390.

So, where a senior locator of a mining claim permits a junior location, including within its surface boundaries his original discovery, to go to patent without protest; but before such patent he makes a new discovery on his prior location without the boundaries of the junior location as patented, but within the surface boundary of his prior location as originally located, and prosecutes development work thereon in good faith,—his claim is valid, and includes all the grounds not included in the patent of the junior location, notwithstanding the loss of the original discovery. *Silver City Gold & S. Min. Co. v. Lowry*, 19 *Utah*, 334, 57 *Pac.* 11; *Perigo v. Erwin*, 85 *Fed.* 904.

And this is so though there was no notice of the new location, the location being complete as of the date of the second location. *Perigo v. Erwin*, *supra*.

So, where a mining claim is located with the point of discovery within another valid claim, the locator can treat his location as absolutely void, and make another location, placing his discovery upon a point where there is valuable mineral on ground subject to location. *Watson v. Mayberry*, 15 *Utah*, 265, 49 *Pac.* 479.

But where a locator of a mining claim placed the discovery point within another valid claim, and afterwards made another location placing his discovery at a point where there was valuable mineral outside of the other claim, to prevail over a junior conflicting discovery, his shifting of the point of discovery must have been made before the making of the junior location. *Ibid*.

h. Determination as to existence and discovery of ore.

Whether there is a vein or lode within the boundaries of a mining location is a question of fact for the determination of a jury from the evidence, under definitions and instructions given by the court. *Meydenbauer v.* 7 *L.R.A.* (N.S.)

Steves, 78 *Fed.* 787; *Book v. Justice Min. Co.* 58 *Fed.* 106.

And it is one arising under the laws of the United States, to try which a Federal court has jurisdiction. *Nevada Sierra Oil Co. v. Miller*, 97 *Fed.* 681.

So, whether the locator actually found mineral on or in the ground claimed is one for the jury. *Charlton v. Kelly*. 2 *Alaska*, 532.

And whether a vein, lode, or ledge is such a one as is referred to in the mineral acts of Congress is a question of fact, and not of law, and is to be determined from the use of those terms among practical miners. *Blue Bird Min. Co. v. Largey*, 49 *Fed.* 289; *Charlton v. Kelly*, *supra*.

But the decision thereof involves no Federal question within the meaning of the removal-of-causes acts. *Blue Bird Min. Co. v. Largey*, *supra*.

So, to sustain a lode-mining claim the evidence of discovery must show the place where and time when such discovery was made; the general direction of the lode or vein, and all the material facts in relation thereto, must be clear and positive and based on actual knowledge of the facts, and the witnesses' means of information must be clearly set forth. *Re Silver Jennie Lode*, 7 *Land Dec.* 6.

And a person claiming title to a mining location, based upon prior discovery and the performance of all the acts required to make and maintain a valid location thereon, as against one who had performed all the acts necessary to a valid location on his part, has the burden of proving his prior discovery; thus establishing that the ground was not unappropriated land of the government when the other's claim was initiated. *Sands v. Cruikshank*, 15 *S. D.* 142, 87 *N. W.* 589.

Evidence tending to establish a senior locator's discovery will be viewed in the most favorable light which it will reasonably justify, however, as between a prior and a subsequent locator of the same ground as a lode claim. *Ambergis Min. Co. v. Day* (Idaho) 85 *Pac.* 109.

And evidence that the locators of a mining claim were first on the ground, and tending to show an outcropping of mineralized rock in place thereon, and of work done by them to determine where to locate their discovery shafts, and that notices were posted, and a lode of mineral in place was discovered, and that the veins were apparent on the surface in places, and could be traced on the surface in places by outcroppings, is sufficient to establish a discovery, as against a person relying upon a conflicting location. *Columbia Copper Min. Co. v. Dutches Min. Mill. & Smelting Co.* 13 *Wyo.* 244, 79 *Pac.* 385.

So, evidence that there was an outcropping which probably carried value; and that a person attempting to locate a mining claim intended to base his claim of a discovery upon such outcropping; and that both of the two rival claimants sought to hold the ground in controversy under the same claim of discovery at the same point,—is suffi

cient to go to the jury on that question. *Fox v. Myers* (Nev.) 86 Pac. 793.

Nor is evidence of the actual existence of a gold-bearing lode upon a location; and that previous to the location the locator had done a great deal of work on it, and had sunk a shaft 25 or 30 feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump,—insufficient to sustain a finding of a discovery before the location. *Conway v. Hart*, 129 Cal. 483, 62 Pac. 44.

And a verdict upholding a location of a mining claim is sufficiently supported by the testimony of one witness describing the courses and stating that a discovery of gold was made on the claim before location, in the absence of anything tending to show the contrary. *Moore v. Steelsmith*, 1 Alaska, 121.

Nor can a negative finding that a discovery was not made upon a specified date be upheld as against uncontradicted evidence of the locator, corroborated by several witnesses, that he had sunk a shaft on the ground to a proper depth, and that on that day he discovered a lead about 14 inches wide in the bottom of the shaft, carrying silver, lead, and iron, and that there was a foot wall, and that he afterwards sunk 4 feet in the clear on the lead. *Walsh v. Mueller*, 16 Mont. 180, 40 Pac. 292.

But evidence of indications and conditions found in a particular mining property, which led up to a rich ore body over which a litigant has absolute control and from which he may exclude every other person, is not competent for comparison on the question whether or not a valid mineral discovery has been made, unless such litigant permits his adversary to examine and inspect such property for the purpose of introducing rebuttal evidence, if he so desires. *Ambergris Min. Co. v. Day* (Idaho) 85 Pac. 109.

And where the existence of mineral in a discovery shaft is sought to be shown, and, to meet the evidence, samples from the shaft, claimed to contain no mineral matter, are introduced, this evidence cannot be rebutted by other samples from the shaft containing mineral. *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

So, the issuance of a patent for a mining claim is conclusive as to the proper making of the location, including discovery of a lode. *Garson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658.

Due discovery of mineral, being a condition to the right of possession of a mining claim, is necessarily in issue in adverse proceedings brought to determine such right; and a judgment in such proceedings presupposes a finding upon that issue favorable to the claimant declared to have the right of possession; and this may be accepted by the department as against a subsequent allegation of nondiscovery on the part of a conflicting claimant. *Reins v. Raunheim*, 28 Land Dec. 526.

And a protest against the issue of a patent 7 L.R.A. (N.S.)

ent for a mining claim, alleging the absence of a valid discovery upon the part of the applicant, and that consequently the location is void, is unavailing, and presents no sufficient ground for action, where, prior thereto, by final judicial determination in adverse proceedings, the land embracing the claimed discovery of the plaintiff was awarded to him. *Re Hallett & Hamburg Lodes*, 27 Land Dec. 104.

And a claimant of a lode in placer ground is not entitled to attack the placer location on the ground that no discovery of any valuable mineral placer deposit was ever made upon the placer-mining claim, and that the same did not contain any valuable placer mineral deposit, where the entry of the placer claim was regularly allowed on satisfactory proof, and had been sustained in the courts, and it was not claimed that the existence of any veins or lodes claimed by the lode locator was known at the time of the placer application, and the location of the lode claim was made many years after the allowance of the placer entry. *Meaderville Min. & Mill. Co. v. Raunheim*, 29 Land Dec. 465.

So, where land has been located as a mining claim, it will be presumed that the locators complied with the law, and made a discovery of mineral prior to location. *Northwestern P. R. Co. v. Marshall*, 17 Land Dec. 545; *Tam v. Story*, 21 Land Dec. 440; *Fox v. Myers* (Nev.) 86 Pac. 793; *Vogel v. Warsing*, 146 Fed. 949.

And this presumption is particularly applicable in a summary proceeding instituted at the beginning of a suit, where the granting or the withholding of an injunction depends upon facts presented by evidence, and where a subsequent locator attacks the title of a prior locator, or that of his successor in interest. *Vogel v. Warsing*, supra.

And every reasonable presumption should be indulged in favor of a discovery of a lode by the locator of a mining claim after the claim has stood unchallenged for years, and work of importance has been prosecuted thereon at various points, and the claim has been transferred to an innocent purchaser. *Cheesman v. Hart*, 42 Fed. 98; *Vogel v. Warsing*, supra.

And where the original locators of a mine affirmed under oath that they discovered a vein, persons undertaking to show, a long time afterwards, by witnesses sent to the old openings to obtain evidence by inspection, that no vein was in fact found, must sustain such an attack by evidence so clear and persuasive as fully to satisfy the jury that the claimed discoveries were in fact false. *Cheesman v. Shreeve*, 40 Fed. 787.

So, whether or not there was such a vein or indication as a miner would be likely to follow with reasonable expectation of finding ore, which would warrant the location of a mining claim, may be proved by the opinions of practical, experienced miners. *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362.

And such opinions, offered in evidence on

an issue as to the validity of a mining location, are not subject to the objection that the witnesses are thereby required to state what the opinion of other miners would be. *Ibid.*

And the testimony of an assayer as to the result of assays of rock taken from a mining claim is competent as tending to prove a discovery of a vein, though the rock was taken long after the date of the location. *Southern Cross Gold & S. Min. Co. v. Europa Min. Co.* 15 Nev. 383.

But negative evidence of a large number of witnesses, that there was no vein in a discovery shaft at the time of the discovery of a mining claim, and that, if there had been, the witnesses would have seen it, and that the discovery shaft was in the top rock, and not in rock in place, is sufficient to support a finding of no discovery within the boundaries of the claim, as against the testimony of the locator and his witnesses that there was quartz in place in the discovery, and in a cut connecting therewith run after the location, and that of two witnesses, that they had assayed some quartz within the discovery and found silver. *Ormund v. Granite Mountain Min. Co.* 11 Mont. 303, 28 Pac. 289.

And the bare assertion of witnesses that a discovery had been made upon a claim, and that a vein extended into it, is not sufficient to establish such discovery, where a witness testified that the vein did not crop out on the surface, and the fact that it extends through the location cannot be determined without a great deal of additional development and large cost. *Re Silver Jennie Lode*, 7 Land Dec. 6.

Nor is proof of discovery confined to the discovery point; and testimony tending to show that there were also indications of ore or vein matter at other points on the surface of a mining claim may be given on issue as to the validity of a mining location, for the purpose of showing the continuity of the vein at the discovery point. *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362.

And for the purpose of strengthening testimony already in with reference to the indications at the point of discovery. *Ibid.*

And evidence of indications which miners had successfully followed in the same district and on contiguous ground in attempting to find a lode or mineral deposit is admissible in determining whether or not a valid mineral discovery had been made by one who attempted to locate a lode claim on similar indications and showing upon adjacent ground. *Ambergis Min. Co. v. Day* (Idaho) 85 Pac. 109.

1. Discovery in placer mining.

1. Generally.

Appropriate discovery is as necessary to the location of a placer-mining claim as to the location of a lode claim. *Steele v. Tanana Mines R. Co.* 148 Fed. 678; *Barnette v. Freeman*, 2 Alaska. 286.

U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 7 L.R.A. (N.S.)

1901, p. 1424, specifically providing that no location shall be made until the discovery of a vein or lode within the limits of the claim located, is applicable to placer claims, and to land containing petroleum and other oils. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936.

And the rule adopted by the earlier cases was that, under U. S. Rev. Stat. § 2331, U. S. Comp. Stat. 1901, p. 1432, providing that no placer location shall include more than 20 acres for each individual claimant, construed in connection with § 2329 (U. S. Comp. Stat. 1901, p. 1432), thereof, providing that placers shall be subject to entry and patent under like circumstances and conditions, and under similar proceedings, as are provided for vein or lode claims, and § 2320 (U. S. Comp. Stat. 1901, p. 1424), thereof, providing that no location of a mining claim shall be made until a discovery of a vein or lode within the limits of the claim located, there must be a discovery of mineral on each 20 acres, on a placer location of 160 acres, made by an association; and such a location, based upon a single discovery, is void except as to the 20 acres immediately surrounding the discovery. *Ferrell v. Hoge*, 18 Land Dec. 81; *Re Louise Min. Co.* 22 Land Dec. 663; *Re Union Oil Co.* 23 Land Dec. 222.

Where, however, under the rules of the Land Office in force at the time of the location of a placer-mining claim of 160 acres by an association, a single discovery was considered sufficient, and a patent is asked for on such a location based on a single discovery, opportunity should be given the locators for a further showing. *Ferrell v. Hoge*, 19 Land Dec. 568.

And the more modern and now existing rule is that a placer location, if made by an association of persons, may include 160 acres, and, whatever its area, it is but a single location, and but one discovery of minerals within its limits is required preceding its location. *Re Union Oil Co.* 25 Land Dec. 351, *Overruling Ferrell v. Hoge*, 18 Land Dec. 81, 29 Land Dec. 12; *Reins v. Raunheim*, 28 Land Dec. 526; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *McDonald v. Montana Wood Co.* 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668.

Under this rule, but one discovery of mineral is required to support a placer location, whether it is one of 20 acres by an individual, or one of 160 acres or less by an association of persons. *Ferrell v. Hoge*, 27 Land Dec. 129.

And a discovery, either single or on each 20 acres as the case may be, may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof. *Ferrell v. Hoge*, 29 Land Dec. 12.

And serves to except the whole location from selection as indemnity for deficit of school lands under the congressional grant of such lands. *Quigley v. California*, 24 Land Dec. 507.

But a single discovery upon which a placer-mining claim is based does not conclusively establish the mineral character of all the land included in the claim, so as to preclude further inquiry in respect thereto; the entire area that may be taken as a placer claim cannot be acquired as appurtenant to placer deposits which are shown to exist only in a portion thereof. *Ferrell v. Hoge*, 29 Land Dec. 12.

So, as in the case of lode-vein claims, the validity of the location of a placer mine is not dependent upon actual discovery of valuable minerals in the land previous to the location. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

And where a location of a mining claim has been made by associates, such associates have a right or title which they can convey before the location is perfected by discovery; and a conveyance, or attempted conveyance, by such associates to one of their number, does not work a destruction of the whole location. *Miller v. Chrisman*, supra.

2. For petroleum or mineral oil.

The rule that a discovery within the limits of land located is a condition precedent to the valid location of a mining claim applies to placer mining for petroleum or mineral oils. *Bay v. Oklahoma Southern Gas, Oil & Min. Co. and Miller v. Chrisman*, supra; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673.

And the location as an oil placer-mining claim of public lands upon which no discovery of oil has been made is invalid, and confers no rights upon the locator as against the United States, or as against a person purchasing from the United States, prior to a discovery. *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568.

A mining claimant is not permitted to make a location for the purpose of speculation, or of prospecting for oils. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* supra.

The vein or deposit from which the oil is drawn must be discovered before the location can be completed. *Ibid.*

The mere fact that other lands in the vicinity contain oil does not establish the character of the lands as mineral lands where such lands were returned as agricultural. *Roberts v. Jepson*, 4 Land Dec. 60.

And it has been asserted that mere surface indications of mineral oils do not constitute a discovery upon which a valid location may be based. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936; *Nevada Sierra Oil Co. v. Home Oil Co.* supra.

So, in *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444, it was said that while, perhaps, it would be stating it too broadly to say that no case could be imagined where a surface discovery could be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever 7 L.R.A. (N.S.)

been presented to our attention, and that in the nature of things such case will seldom, if ever, occur.

And it was held in that case that evidence that a prospector walked over the land in question at the time he posted his notice, and saw a spring with oil coming out and floating over the water in the summer time when it was hot, and that it was dripping over the rock, but there was no pool, is not sufficient to establish a discovery, within the meaning of the law with reference to location of mining claims; and that the act of one knowing that, at the time of his alleged discovery of oil, another was in possession of the territory where it was discovered, of entering upon the land and locating a claim at night, adopting existing boundaries, his discovery consisting in observing the oil from the occupant's well, cannot be made the basis of any right.

The rule is announced in a late case, however, that, if surface indications of oil are found sufficient to warrant a prospector in spending his time and money on the property with reasonable prospect of reaching deposits of greater commercial value, such indications will protect the prospector as against any new locator until he can follow up his indications and make the discovery; but the discovery is a condition precedent to a valid location. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* supra.

And if a competent locator of a placer-mining claim finds upon unappropriated public land petroleum, or other mineral, in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery to justify a location, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. *Nevada Sierra Oil Co. v. Home Oil Co.* supra.

And the question whether a particular piece of public land is more valuable for mineral than for agricultural purposes is one that does not arise in the case of a discovery of petroleum or other mineral in or upon ground upon which it is sought to base the location of a placer-mining claim. *Ibid.*

VIII. The notice of location.

a. When required.

The Federal mining law does not require the posting of a notice of location upon the claim sought to be located; it leaves this to the regulation of the local laws. *Book v. Justice Min. Co.* 58 Fed. 106; *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361; *Anderson v. Caughey* (Cal. App.) 84 Pac. 223; *Willeford v. Bell* (Cal.) 49 Pac. 6; *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675.

And it is only where the local customs and rules of miners of the district require these steps that they are necessary. *Anderson v. Caughey*, supra.

And in the absence of mining regulations upon the subject, locations are valid without notice of location, placed on the ground. *Book v. Justice Min. Co.* supra.

In all, or nearly all, the mining states and territories, however, the posting of a notice of claim upon the ground sought to be taken is required by statute or local regulation. *Deeney v. Mineral Creek Mill. Co.* 11 N. M. 279, 67 Pac. 724.

And state statutes providing for additional requirements for the location of a mining claim to those required by the acts of Congress in the way of posting location notices are not in violation of the United States Constitution, or of the acts of Congress with reference to the location of mining claims. *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Upton v. Santa Rita Min. Co.* (N. M.) 89 Pac. 275.

And compliance with provisions of this class is essential to the validity of a location. *Cheesman v. Shreeve*, 40 Fed. 787; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Upton v. Santa Rita Min. Co. supra*.

b. The purpose or object.

One of the main purposes of requirement of posting of notice on the claim is for the guidance and protection of other miners seeking to locate claims. *Gird v. California Oil Co.* 60 Fed. 531.

The object of putting a notice on a mining claim is that it shall speak for the owner in his absence, and give notice to parties coming on the premises that someone has claimed them. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

And to advise the public with reasonable certainty of the location and extent of the claim. *Seidler v. LaFave*, 5 N. M. 44, 20 Pac. 794.

And the posting of notice of claim is regarded as the real inception of the right of the locator. *Deeney v. Mineral Creek Mill. Co. supra*.

It is the first step in acquiring a mining right. *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174.

A locator erecting his location monument and putting his location notice thereon in effect declares that at that point he has made a discovery; and the fact that a notice was posted at a certain point establishes that at that point the locator claims discovery. *Fox v. Myers (Nev.)* 86 Pac. 793.

And a simple notice of a discovery, and of the intention to claim the vein discovered, constitutes a protection to the discoverer during the process of location. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037; *Pelican & D. Min. Co. v. Snodgrass*, 9 Colo. 339, 12 Pac. 206; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560.

Thus, in Colorado, the law gives a person locating a mining claim, according to the location statutes, possession of his entire claim for the period of ninety days from the date of discovery, provided he posts his discovery notice, and, within sixty days next after posting such notice, he sinks his discovery shaft. *Armstrong v. Lower*, 6 Colo. 581.

And in South Dakota the locator is also given sixty days after disclosing a lode to

sink a discovery shaft thereon. *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 350, 47 N. W. 290.

And, under such provisions, a location notice, properly made and posted upon a valid discovery of mineral, is an appropriation of the territory therein specified for a period of sixty days. *Sierra Blanca Min. & Reduction Co. v. Winchell (Colo.)* 83 Pac. 628; *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443; *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co. supra*.

And this is so though the boundaries of the claim are not marked. *Omar v. Soper, supra*.

And such notice takes precedence over and invalidates an overlapping claim on the same vein, made within such period, and based on the junior discovery. *Ibid.*; *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co. supra*.

And during that period no one can initiate a title thereto, which would be rendered valid by the mere failure of the first appropriator to perform the necessary discovery work within the time prescribed by law. *Sierra Blanca Min. & Reduction Co. v. Winchell, supra*.

So, while a notice of location of a mining claim is a mere declaration of intention to possess, it is evidence of possession, though alone it is not sufficient. *Thompson v. Lee*, 8 Cal. 276, 1 Morrison, Min. Rep. 610.

And it is proper evidence, in connection with a patent to mining lands, to show the claim to which the patent refers. *Kahn v. Old Teleg. Min. Co. supra*.

c. Posting.

Mining rules and regulations with reference to posting notices of location are to be liberally construed. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361.

And a substantial compliance in good faith is sufficient. *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.

The notice of discovery of a mining claim should be, and usually is, posted immediately at the discovery hole. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037.

And a recital in a notice of location offered as evidence for the purpose of proving the boundaries of a claim, of a location of 1,500 feet of "this vein or lode of gold-bearing rock," raises an inference that the notice as posted on the ground was placed on the croppings of the lode, or in such close proximity thereto that the croppings appeared or had been exposed. *Daggett v. Yreka Min. & Mill. Co. (Cal.)* 86 Pac. 968.

But, in order to hold a ledge of mineral, it is not necessary that the notice shall be placed on the ore or on any part of the lode or vein; it is sufficient if the notice is placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all corners what ledge is intended. *Phillpotts v. Blasdel*, 8 Nev. 61.

The mining law does not demand a marking of the lode. It is the surface land which

is to be marked and described; and a notice of location claiming 1,500 feet "on this vein" is not objectionable because no vein was exposed where the notice was placed. *Book v. Justice Min. Co.* 58 Fed. 106.

And a prior lode claim, in locating which all the Federal and state statutory requirements have been complied with, except a mere failure to place a discovery notice upon the ground at the point of the only valid discovery upon the claim, is good as against another and subsequent valid location, where such notice was posted at the point of a former, but invalid, discovery, as recited in the recorded location certificate, and the boundaries remain the same after as before the true discovery. *Treasury Tunnel, Min. & Reduction Co. v. Boss*, 32 Colo. 27, 105 Am. Dec. 60, 74 Pac. 888.

Nor is a mining location rendered invalid by the mere fact that the portion of the claim, upon which the notice is posted, by mistake overlaps or conflicts with a pre-existing claim; the location is good as to the area not in conflict. *Upton v. Santa Rita Min. Co.* (N. M.) 89 Pac. 275.

So, under a requirement by statute or local regulation, of the posting of a notice of claim, and later a record in some form, the locator of a mining claim is entitled to no appreciable time after discovery to determine whether he desires to locate and claim the benefit of his discovery. A discovery and posting notice of the claim must be practically contemporaneous, as against a subsequent appropriator of the same ground entering peaceably. *Deeney v. Mineral Creek Mill. Co.* 11 N. M. 279, 67 Pac. 724.

But the failure of the locator of a mining claim to comply with the local laws and regulations in the matter of posting location notices and sinking discovery shafts is material only in a proceeding where adverse claimants to the same land are endeavoring to establish the superiority of their respective claims to possession of the ground in conflict. It furnishes no argument for the cancellation of an entry in the absence of an adverse claim legally asserted. *Hughes v. Ochsner*, 27 Land Dec. 396.

And where a resident of the United States made a mining location and recorded a notice thereof at or near the time, reciting the facts, it will be presumed that he duly posted his notice of claim. *Jantzon v. Arizona Copper Co.* 3 Ariz. 6, 20 Pac. 93.

So, notice of location of a mining claim, placed in a small tin can and the can placed by the locators on a little shelf in a rock mound, more than 2 feet high, erected by them near a tree on the claim, was sufficiently posted where the corners or the claim were properly and conspicuously marked, and the boundaries were so marked upon the ground that they could be readily traced. *Gird v. California Oil Co.* 60 Fed. 531.

And a notice of location of a quartz-mining claim conforming to local mining customs is not invalid as not having been conspicuously posted, because it was written on one side of a sheet of paper which was folded with the writing inside, and placed upon a

mound of rocks 3 feet high, and upon it were placed two flat rocks, so that about $\frac{1}{4}$ of an inch of the margin of the paper was exposed to view, the rest of it being covered by the stones, where the notice was not so placed for the purpose of concealing it, but for the purpose of protecting it from the weather. *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.

Nor does the fact that a notice of location was recorded before it was posted render it invalid. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

And the posting of but one notice of a mining claim when the local regulation required two to be posted does not forfeit all claim to the location, in the absence of an express provision in the regulation of such forfeiture. *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036.

d. Contents.

1. Generally.

Statutes and mining rules specifying what notices of location shall contain are to be liberally construed, and a substantial compliance therewith is all that is required. *Zerres v. Vanina*, 134 Fed. 610; *Wells v. Davis*, 22 Utah, 322, 62 Pac. 3.

So, notices of location, required by mining rules and local regulations, or state laws, to be posted upon the ground, are subjected to an exceedingly liberal construction. *Book v. Justice Min. Co.* 58 Fed. 106; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209; *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869; *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832.

If, by any intendment, the proof can be recognized and made consistent with the statements made in them, the jury will be allowed to say whether or not, upon the whole proof, the identification of the claims is sufficient. *Bramlett v. Flick*, supra.

And where a location of a mining claim was evidently made in good faith, if by any reasonable construction in view of surrounding circumstances, the language employed in the description in the location notice will impart notice to subsequent locators, it is sufficient. *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* supra.

And generally a notice of location, describing a mining claim as situated in a certain county a certain distance from another claim, defining it by courses marked by substantial monuments, readily identified by marks thereon, when taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, sufficiently shows prima facie ownership of such claim, in an adverse action. *Bramlett v. Flick*, supra.

So, during the intermediate period from the discovery of a lode or vein to its excava-

tion, a general designation of the claim by notice posted on a stake placed at the point of discovery, stating the date of the location, and the extent of ground claimed, and the designation of the lode, and the name of the locators, will entitle them to such possession as will enable them to make the necessary excavations, and prepare the proper certificate for record, and to hold the premises as against trespassers. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 McCrary, 19, 8 Fed. 860.

A notice of location of a mining claim, offered in evidence, is properly rejected, however, where it does not conform to the statutes of the state. *Baker v. Butte City Water Co.* 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617.

And a location notice which on its face is uncertain cannot be evidence for any purpose in the absence of anything to show what land is occupied. *Reilly v. Berry*, 2 Ariz. 272, 15 Pac. 26; *Blackmore v. Reilly*, 2 Ariz. 442, 17 Pac. 72.

Nor is proof of posting a location notice at a certain point, containing a recital therein that a discovery had there been made, evidence, prima facie, of a discovery, where the statute does not require the making of such a declaration in the notice. *Fox v. Myers* (Nev.) 86 Pac. 793.

But, where a location notice is uncertain on its face, the uncertainty may be aided by evidence of possession or of monuments. *Reilly v. Berry* and *Blackmore v. Reilly*, supra.

Parol evidence is admissible to define the tract embraced in a mining location. *Re Prince of Wales Lode*, 2 Copp, Land Owner, 2, Mineral Law Dig. 98.

But whether a practical and experienced engineer and surveyor, familiar with the methods of locating mining claims and with surveys in mountainous countries, and having knowledge of the neighborhood, could take the description given in a notice of location, and, starting at the point of discovery, find the claim included in it, calls for an opinion, and is incompetent evidence. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

So, where the description in a notice of location of a mining claim is merely defective, the objection goes to its effect, and not to its admissibility in evidence; and it should be left to the jury with the other evidence in the case. *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384.

But the mere fact that a location notice sufficiently describes the claim to be admissible in evidence does not render it conclusive. It may be shown by extrinsic evidence that the description therein, when applied to the premises with reference to permanent monuments, is misleading, unintelligible, or impossible, or that the alleged monuments were not in fact such. *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725.

Whether a notice of location and a description of the claim were sufficient to apprise other prospectors of its precise location is a matter of fact for determination 7 L.R.A. (N.S.)

by the trial court. *Eilers v. Boatman*, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432.

2. Name, date, etc.

In most, if not all, of the mining states and territories requiring a notice of location of a mining claim the name of the locators, the name of the claim, and the date of location, are required to be stated therein.

Under such a requirement as to the name of the mine, placing a notice of location headed "Colfax lode" upon a lode is christening the lode by that name. *Phillipotts v. Blasdel*, 8 Nev. 61.

And the same ledge may have two names by which it may be known indifferently, especially where it is not known that the parts of the ledge to which the different names are applied are identical; and a ledge may become as well or better known under a name derived from an invalid and subsequent location than under that given it in the earlier or valid location. *Ibid*.

So, a change in a notice of location after it was recorded, by the erasure of one of the names of the locators and the insertion of another name, does not invalidate it as against outsiders. *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

And where a locator of a mining claim posted his notice and marked the boundaries, but was prevented from completing the location by sickness, and for a valuable consideration procured others to complete it, the fact that in completing it they posted a new notice on the ground, in which an addition of some descriptive terms was applied to the name originally given to the location, does not make it a new location. *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, Affirming 55 Fed. 11.

So, under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, providing that all records of mining claims hereafter made shall contain the date of location; the rights of the parties are defined by the fact of location of which the written date of the notice is at most but evidence, and error in the notice of location as to the date thereof must give way to the proved fact; and, where one person locates a claim upon October 20, and by mistake names the date in the notice as October 23, and another locates a conflicting claim on October 22, the former has the better right. *Webb v. Carlon*, 148 Cal. 555, 83 Pac. 998.

But a location notice omitting to state the date of the location when required by a state statute is invalid. *O'Donnell v. Glenn*, 9 Mont. 452, 8 L.R.A. 629, 23 Pac. 1018.

And an instruction on an issue as to the validity of a mining location, undertaking to tell the jury what the locator is required to do to make a location, telling them that he must post at the discovery shaft the usual notice, and place upon the corners and center of side lines stakes marked in the usual manner, is improper and erroneous in omitting to state that the sign at the discovery

shaft must contain the name of the lode, the name of the locator, and the date of discovery, and in omitting to describe the necessary markings on the corner and side-line stakes. *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413.

So, the dating back of a location notice for the purpose of defeating other claimants to land covered by it is a fraud upon the parties sought to be defeated, invalidating the location as to them. *Muldoon v. Brown*, 21 Utah, 121, 59 Pac. 720.

But one who seeks to avoid the effect of such notice, relying upon fraud, should plead the fraud; and, in the absence of such a plea, evidence tending to show it is inadmissible. *Ibid.*

And the admission of one of several locators of a mining claim, that he dated back the notice of location to a date previous to the time it was posted, for the purpose of defeating the claim of a prior locator, is inadmissible in evidence as against the other locators, where they were not present and did not make, or concur in the making of, the statement and admission. *Ibid.*

A location of a mining claim, made on Sunday, is not void if not prohibited by local law. *Re Dolly Varden Lode*, Departmental Decision July 17, 1879; *Re Cunningham*, March 29, 1880, *Mineral Law Dig.* 98.

3. Description of claim.

(a) Generally.

A common requirement is that the notice of location shall describe the claim, either generally, or in a specified manner, or with reference to some natural object or permanent monument, so as to identify the claim.

Compliance with such a requirement is necessary. *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174.

But miners should not be held to technical accuracy in the matter of description of their claims. *Re Prince of Wales Lode*, 2 Copp, Land Owner, 2, *Mineral Law Dig.* 101.

And the description of a mining claim in a notice of location is not rendered absolutely void by indefiniteness. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

And an objection to the admission in evidence of a location notice as being indefinite and uncertain in the description of the claim cannot be sustained, when it does not appear from the face of the notice that the circumstances and surroundings were such as to render the description impossible. *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725.

A notice of location of a mining claim is sufficient when, by reference to natural objects and monuments erected by the locator, it contains directions which enable a person of ordinary intelligence to find the claim and trace its boundaries. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

And one describing the claim by reference to an adjoining claim, as being on the southeast, and containing a description of its exterior as beginning at the southwest bound-

ary of such adjoining claim, is prima facie admissible in evidence. *Dillon v. Bayliss*, supra.

So, however defective in form a notice of location may be, it is admissible in evidence for the purpose of showing the time when the possession was taken, and to indicate the property of which possession was taken. *Bennett v. Harkrader*, supra.

Nor is a notice of location of a mining claim objectionable for not stating that the claim is within a specified district, where the notice was posted upon the vein or lode itself in that district, and stated that it was for a specified portion of that vein or lode. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361.

And where local mining regulations provide that notices of location shall contain a description of the claim or claims located, by reference to some natural object or permanent monument which will identify the claim, a notice sufficiently describing the center lines, and stating that the claim is for a certain number of feet on each side, is sufficient. *Ibid.*

So, the insertion of wrong legal subdivisions in a notice of a mining claim, used in describing it, does not invalidate the claim, where the remaining description sufficiently identifies the land. *Duryea v. Boucher*, 67 Cal. 141, 7 Pac. 421.

And a posted and recorded notice describing the land by adjoining tracts on the north, east, south, and on the west by unoccupied lands, is sufficient, where it designates the amount of land claimed. *Ibid.*

Nor need a location of a mining claim contain a description of the markings upon the ground. *Seidler v. LaFave*, 5 N. M. 44, 20 Pac. 789; *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832.

And it is not required to show the precise boundaries of the claim as marked upon the ground; it is sufficient if it contains directions which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace its lines. *Bonanza Consol. Min. Co. v. Golden Head Min. Co.* 29 Utah, 159, 80 Pac. 736.

So, a notice of location calling in some instances for stakes, whereas in fact instead of stakes trees were blazed and squared up and marked, does not constitute a material variance, since it has no tendency to mislead. *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480.

And a notice is not rendered invalid and inadmissible in evidence because it was therein declared that two corners of the claim located were marked by pine trees, when in fact they were sufficiently marked by stakes. *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

So, in determining the sufficiency of the description in a notice of location of a mining claim, the court will take judicial notice of those general methods and rules of locating and marking mines upon the public domain in a particular locality that are

so wide spread, and well known, and fixed in the mining system as to be familiar to all miners and in all mining districts, such as, that the first discovery is called and known as the discovery claim, and that when a discovery is within a gulch or on a stream the claims are marked or numbered from the discovery claim up or down the gulch or stream, and that claims are frequently numbered or marked by reference to one which is so definitely established as to be used by all the miners in the same course as the initial claim, and as a permanent monument. And a notice of a mining discovery, describing it as claim No. 3, located on a named stream in a named mining district and territory, beginning at initial stake at the east end of claim No. 2, thence following a plain line of stakes around the premises to the point of beginning, is sufficient when based upon a system of locating and describing boundaries of mines by numbers, in the absence of any evidence that a system beginning with discovery or No. 1 is not a well-known system of surveys and locations by which the mine in question can be easily and certainly located. *Butler v. Good Enough Min. Co.* 1 Alaska, 246.

(b) With reference to course of vein or lode.

Where statutory provisions or mining regulations require a description of a mining claim in a notice of location thereof, with reference to the general course or strike of the vein or lode, a notice naming the mining district, county, and territory, and stating that the claim is 600 feet in length along the vein or lode, and 300 feet on each side thereof, commencing at a stake and notice situated about 300 feet in a northwesterly direction from another named mine, and that it is an extension of a third named mine, and running thence along the vein or lode in a southerly direction to a similar stake or notice; and that the locators claim 600 linear feet in a southerly direction from this stake and notice to a similar stake and notice,—is in substantial compliance therewith. *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

And so is a notice claiming by right of discovery the ledge, lode, or deposit upon which it was placed, describing it as "350 feet in a northwesterly direction from this notice, and 300 feet on each side of this vein," properly dated and giving the name of the lode. *Columbia Copper Min. Co. v. Duchess Min. Mill. & Smelting Co.* 13 Wyo. 244, 79 Pac. 385.

So, a notice of location claiming 300 feet in width on each side of the middle of the lode at the surface, and all the veins, lodes, or ledges within the boundaries of said claim with their dips, angles, and variations, and 1,305 feet on the lode running a specified direction from the discovery post, and 195 feet running in another specified direction on the lode from the discovery post, is in substantial compliance with the 7 L.R.A. (N.S.)

provisions of Nev. Comp. Laws 1900, § 208, providing that a notice of location must contain the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side from the center of the vein, and the general course of the vein or lode as near as may be, and is sufficient. *Zerres v. Vanina*, 134 Fed. 610.

And a written notice posted on a stake at the point of discovery of a mineral-bearing lode or vein, which declares that the locators claim 1,500 feet on the lode, vein, or deposit, is, to the extent of 750 feet on the course of the lode or vein in each direction from the discovery point, a sufficient notice of discovery and original location. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 McCrary, 19, 8 Fed. 860.

And a notice of location, locating 1,500 linear feet on a lode or ledge, and describing it as commencing at this notice and running 750 feet in a southwesterly direction and 750 feet in a northeasterly, locates 750 feet from the notice in each direction, and is not subject to the objection that it simply goes 750 feet in a certain direction and back to the starting point. *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675.

Likewise, a notice of location of a mining claim, reciting a claim of 1,200 feet on the face of this hill, running 1,200 feet from a stake, with all its dips, angles, and spurs, and from thence to the center of the hill, manifests an intention of the locators to claim a lode therein with all its dips, angles, and spurs, and is not subject to the objection that it is a notice of a hill location under which no title to a lode can be taken. *Weill v. Lucerne Min. Co.* 11 Nev. 200.

A written notice of location posted at the point of discovery, not stating the number of feet claimed on each side of the discovery point, however, limits the location to 750 feet on the course of the lode or vein in each direction from that point. *Erhardt v. Boaro*, *supra*.

And where it is found, in an action for the recovery of possession of a part of a quartz-mining claim, that 1,500 feet running southerly along the ledge from the locator's northern stake and shaft, as described in his notice of location, would end a short distance north of what the locator claims to be his southerly end line, the court may properly confine his claim to the actual 1,500 feet. *Conway v. Hart*, 129 Cal. 483, 62 Pac. 44.

So, an attempted location of a mining claim, in which the notice does not contain the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of said vein or lode, and the general course or strike of the vein or lode as nearly as may be, as required by Oregon Laws 1898, § 1, p. 16, is void under § 10, p. 18, thereof, providing that locations, or attempted locations, of mining claims, not complying with the pro-

visions of this act, shall be void. *SHARKEY V. CANDIANI*.

(c) With reference to natural objects or permanent monuments.

Under the statutory provisions of a number of the states and territories, the notice of location of a mining claim is required to describe the claim with reference to some natural object or permanent monument. It is to be observed, however, that in these states and territories the record of the claim is required to be made by recording the notice of location, and the matter of description by reference to natural objects or permanent monuments seems to have been added to the other requirements for the purpose of fitting the notice for a record, rather than for fitting it for service as a notice. For this reason, and for the reason that description with reference to natural objects or permanent monuments is a general, if not universal, requirement in case of records of mining claims, cases arising under these provisions are considered, in connection with cases arising under similar provisions with reference to records of mining claims, in a subsequent division of this note. See *infra*, XII. e, 4.

In the absence of a state or territorial statute, or a mining regulation, requiring it, a notice of location of a mining claim is not defective because it does not contain a description of the claim by reference to some natural object or permanent monument; it is only the record of the claim which is required to contain such a description under the Federal statute. *Gleeson v. Martin* White Min. Co. 13 Nev. 442; *Brady v. Husby*, 21 Nev. 453, 33 Pac. 801; *Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659.

(d) Effect of mistakes in courses and distances.

Notices of location of mining claims are not rendered invalid because of mere mistakes therein as to courses and distances. *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209.

And the fact that a line of a mining claim as staked on the ground did not reach a lode claim to which it was stated in the location notice to run, but fell short by a few feet by a mistake of the locator as to where the true boundary of that claim was, does not render the location notice inadmissible. *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654.

So, a location notice is not too vague and indefinite to be admissible in evidence on an issue as to the right to a mine, on the ground that it failed to indicate the direction of the closing line, where, if the monument in the center of the claim is the point of beginning, the closing line would be a diagonal one from a particular corner to the center of the claim; and it is evident that the locator intended to describe his closing line to meet the center side-line monument on that side. *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641. 7 L.R.A. (N.S.)

And an alteration in a notice of location as recorded, by striking out "easterly and westerly" as to the course of the vein, and inserting the words "northerly and southerly," made without fraudulent intent, does not vitiate the notice. *Gleeson v. Martin* White Min. Co. *supra*.

So, the terms "easterly" and "westerly," used in a notice of location of a mining claim, without qualifying language, do not, as in a deed, denote due east or due west; in such a notice the terms denote the general direction of a vein or location running nearer toward the east or toward the west, as the case may be, than any other of the cardinal points of the compass. *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896.

Nor is the word "northerly," in a notice of location stating the direction of the claim, confined in meaning to due north, but includes, and may mean, any meridian line or course between north and northwest, where the direction is made certain by the posting of stakes, or the building of monuments, at the corners of the location or along the lines thereof, such stakes and monuments controlling the courses specified in the notice. *Book v. Justice Min. Co.* 58 Fed. 106.

And a notice of location which gives the course of the location as running westerly a specified number of feet, and easterly a specified number of feet, from a discovery shaft or point of discovery, must be held, until the boundaries are definitely located by the erection of monuments, to reserve from entry the surface area which might be located within any location so made that, if a line were drawn lengthwise from the center of said claim from the west center end through the point of discovery to the east center end of said claim, the line would lie at some point between east 45 degrees north and east 45 degrees south of the point of discovery. *Wiltsee v. King of Arizona Min. & Mill. Co. supra*.

And this rule is not affected by a statute requiring the locator to give the general course as near as may be. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037.

e. In placer mining.

In locating a placer-mining claim, as in lode mining, the Federal statutes do not require a preliminary notice of location; this is left to local legislation and regulation. A number of the mining states and territories, however, including Arizona, Colorado, Idaho, Montana, Nevada, Utah, Washington, and Wyoming, have made provision therefor by statute. These provisions differ but little in the different states and territories, and they substantially conform to the requirements with reference to lode claims, except that the number of feet or acres claimed is usually required to be stated, instead of the length and course of the vein; and it would appear that provisions with reference to notice of location of lode claims

have been treated as applicable irrespective of local legislation or regulation.

Thus, notices placed upon a stump in a creek, claiming 1,500 feet along the creek bottom, and 300 feet each way from the center of the creek, and stating that it is an extension of another named claim a stated distance from the first falls in said creek, sufficiently located a placer-mining claim. *McKinley Creek Min. Co. v. Alaska United Min. Co.* 183 U. S. 563, 46 L. ed. 331, 22 Sup. Ct. Rep. 84.

Nor is a notice "that we, the undersigned, have this day located this ground for borate mining purposes," describing the claim as 1,500 feet long and 600 feet wide, defective as a notice of a placer-mining claim. *McCann v. McMillan*, 120 Cal. 350, 62 Pac. 31.

And a placer mine described in the notice of location as commencing at the upper or north end of claim No. 4; thence running along the bed of a creek, 1,500 feet; thence 300 feet east and west from the center stake; there being two center stakes, one at each end,—is correctly located as a parallelogram 1,500 feet long by 300 feet in width on each side of a straight line drawn from one center stake to the other, and not along the sinuosities of the stream. *Steen v. Wild Goose Min. Co.* 1 Alaska, 255.

A notice of location of a mining claim, required by rules of a mining district, however, may refer to subdivisions of a United States survey for the boundaries of the claim; and such a reference is sufficient whether the survey from which the map was made was ultimately approved or not. *Gird v. California Oil Co.* 60 Fed. 531.

The above cases are merely illustrative of the application of rules with reference to notices of lode claims to placer claims, and are not given as covering the whole law of the subject. The whole subdivision with reference to preliminary notices of location should be read in this connection, and must be taken as authoritative on this subject.

IX. Discovery or development work.

a. Provision for.

Under the Federal mining laws, in the absence of state or local regulation, a location of a mining claim is complete upon proper discovery and marking the claim upon the ground. Nothing in the way of discovery or development work is required to complete it; and this applies to the existing conditions in California and Utah in which no such regulations have been adopted. In most of the other mining states and territories, however, Federal legislation on this subject has been supplemented by requirements for the performance of certain work in the way of development after discovery, which is a condition precedent to the completion of the location.

These requirements have usually taken the shape of a provision for the sinking of a discovery shaft upon the lode or vein discovered, or for an equivalent thereto. In 7 L.R.A. (N.S.)

the different states and territories they are substantially alike in principle and in their general trend, differing only in detail. The Colorado statute (*Mills's Anno. Stat.* §§ 3152, 3155), which is a fair sample of the trend and substance of all, is as follows: "Before filing such location certificate the discoverer shall locate his claim by . . . sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice." "The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon."

b. Purpose and validity.

Preliminary work is required to define and secure a located mining claim. The law protects the first discoverer in the possession of the claim until sufficient excavations and developments can be made so as to disclose whether a vein or deposit of such richness exists as to justify work, up to the time limited by the statute for doing such work. *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 350, 47 N. W. 290.

It is competent for the legislature of a state to require a reasonable additional amount of work over that required by the Federal laws to complete the location of a mining claim. *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829.

And statutes requiring the locator of a mining claim to sink a discovery shaft, or do other equivalent work, within a specified time from discovery, or the posting of the notice of location, do not conflict with the acts of Congress giving the locator of a mine one year after making his location to do the required amount of work in order to hold it. *Ibid.*

In *Flick v. Gold Hill & L. M. Min. Co.* 8 Mont. 298, 20 Pac. 807, however, it was said that Mont. Comp. Stat. § 1479, div. 5, requiring that there must be a discovery of a vein or crevice of quartz or ore, with at least one well-defined wall, before a declaratory statement or notice of location of a quartz lode can be recorded, is of doubtful authority when considered in connection with the prohibition of the organic act of the territory against the passage of any law interfering with the primary disposal of the soil; but that any doubt as to this point should not be construed as conflicting with the decision of *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, upholding the provisions of that act requiring a declaratory statement of a quartz location to be made on oath.

c. Effect of noncompliance.

Under provisions of this class, work in the way of sinking a discovery shaft, or the equivalent, is required to be performed as a prerequisite to the completion of location. *Sisson v. Sommers*, supra; *Strepey v. Clark*, 7 Colo. 614, 5 Pac. 111.

And failure substantially to comply with such requirements by sinking a discovery shaft, or doing the prescribed discovery work, invalidates and forfeits the location. *Sisson v. Sommers, supra*; *Wright v. Lyons*, 45 Or. 167, 77 Pac. 81.

And the claim becomes subject to location by any qualified locator. *Sisson v. Sommers, supra*; *Walsh v. Henry (Colo.)* 88 Pac. 449.

And a locator thus failing to comply with the statute cannot hold the claim as against a junior locator. *Sisson v. Sommers, supra*.

And this is so whether the laws and rules provide for a forfeiture for the noncompliance or not. *Ibid*.

So, where a person opens a tunnel and discloses a vein of mineral therein, but takes no further steps toward perfecting a mining location, he acquires no interest whatever in the ground in which the discovery was made as against intervening rights. *Pelican & D. Min. Co. v. Snodgrass*, 9 Colo. 339, 12 Pac. 206.

And where several persons located 1,500 feet on a lode, claiming to hold in severalty, and not as a company, one shaft upon the whole claim is not a sufficient compliance with the New Mexico statute requiring the sinking of a shaft within a specified time to perfect a location. *Zeckendorf v. Hutchison*, 1 N. M. 476.

So, until the provisions of N. M. Rev. Stat. § 4, p. 728, giving a miner twelve months in which to perfect his title by sinking a shaft of not less than 20 feet in depth, are complied with, the miner has only a contingent claim to his location; and, if he sells the same, the purchaser is required, before his claim can become valid, to comply with the requirements of that law within the period of one year from the time the claim was located; and, if he fails to comply, the right to the claim ceases at the expiration of the year. *Ibid*.

One who locates a lode or vein, and posts thereon a proper notice of location; but who, before being able to sink a discovery shaft as required by law, is driven away from the claim by threats of violence, and prevented from completing the work required to perfect his location and prepare a certificate for record, however,—is entitled to recover possession of such claim from the trespasser. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 McCrary, 19, 8 Fed. 860.

d. Location of shaft.

The statutory provision is for sinking the discovery shaft upon the lode.

Under this requirement, when a lode is discovered in a discovery shaft, and does not outcrop on the surface, it will be assumed that the shaft marks the middle of the vein, in the absence of a contrary showing. *Re Johnson*, 7 Copp, Land Owner, 35, Mineral Law Dig. 10.

And, in the absence of a contrary showing, it will be assumed that that portion of a vein on which a discovery shaft is sunk

is the middle of the vein, from which surface ground on each side is to be measured. *Re Hope Min. Co.* 5 Copp, Land Owner, 116, Mineral Law Dig. 147.

And, where a locator of a mining claim testifies that he discovered a vein within the surface lines of his claim, and sunk a discovery shaft upon it, and traced the vein in an easterly and westerly direction, he opens the door for any proper cross-examination relative to the location of the discovery shaft and course or strike of the discovery vein, and the location and character of the assessment work done upon the claim which might throw light upon the question of the course of the vein, and whether, as matter of fact, the discovery shaft was actually sunk upon the vein; and he may be asked on such cross-examination whether or not a second shaft was sunk upon the discovery vein. *Hickey v. Anaconda Copper Min. Co.* 33 Mont. 46, 81 Pac. 806.

Nor does a question asked a witness, as to whether or not a second shaft was sunk upon the discovery vein, call for expert or opinion testimony, since it has reference to a matter as to which any prospector or person familiar with the work done can testify. *Ibid*.

So, the discovery shaft must be sunk upon the claim located.

A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location. *Little Pittsburgh Consol. Min. Co. v. Amie Min. Co.* 5 McCrary, 298, 17 Fed. 57; *Armstrong v. Lower*, 6 Colo. 395; *Butte Consol. Min. Co. v. Barker (Mont.)* 89 Pac. 302.

And the fact that the locator of a mining claim sank his discovery shaft upon ground overlapping another mining claim is a matter which can be taken advantage of by the locator of the latter claim in any conflict that may arise as to the overlapping ground between the two claims. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 408.

Nor does the sinking of a shaft just outside of the ground in dispute give the person doing so any right to the ground in dispute, upon which he can maintain ejectment therefor, unless it appears that a lode was discovered in the shaft, and that such lode extends from that point to the territory in controversy. *Zollars v. Evans*, 2 McCrary, 39, 5 Fed. 172.

If, after sinking a shaft in one place and failing to find a lode, a miner sinks another and finds one, however, he may make the second his discovery shaft upon which location may be based. *Terrible Min. Co. v. Argentine Min. Co.* 5 McCrary, 639, 89 Fed. 583.

And, where a mining claim was located properly in all respects except that the discovery shaft was sunk and notice posted upon a prior patented claim; and afterwards, upon learning that the discovery shaft was on patented ground, the locator sank another shaft and discovered mineral in the same vein, but clear of the patented claim, and did the necessary assessment work, but

omitted to post any notice at the new discovery shaft, and to file an additional certificate of location, and to change the boundaries of the original location,—the location is good and valid as against conflicting claims located subsequent to the second discovery of mineral. *Treasury Tunnel, Min. & Reduction Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888.

So, a charge that the discovery shaft of a mining claim was sunk on ground embraced within a prior valid subsisting location is sufficiently answered by a determination in a judicial proceeding awarding the land, including the discovery shaft, to the junior locator. *Mitchell v. Brovo*, 27 Land Dec. 40.

And, where the line of conflict between two overlapping claims was agreed upon and adjusted by the locators thereof so as to leave the discovery shaft upon the claim located with reference to it, an adjoining junior locator of other ground, conflicting with the claim so located in another place, cannot complain or take advantage thereof upon the theory that the claim was originally invalid and the ground was open to location because the discovery had been upon another claim. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co. supra*.

e. The disclosure of mineral.

To constitute a good location of a mining claim under provisions of this class, the crevice or vein which the discovery shaft must show must contain mineral in rock in place. *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413; *Cheesman v. Shreeve*, 40 Fed. 787.

The locator must show in his discovery shaft a vein or lode of valuable ore in rock in place, as well as compliance with the statute in other respects. *Terrible Min. Co. v. Argentine Min. Co. supra*; *Van Zandt v. Argentine Min. Co.* 2 McCrary, 159, 8 Fed. 725.

The disclosure of mineral in fragmentary condition is not sufficient. *Ibid*.

And it must appear that the vein or lode was cut at a depth of 10 feet below the surface. *Dolan v. Passmore* (Mont.) 85 Pac. 1034.

So, the disclosure of mineral must be made in the discovery shaft. A discovery outside of the discovery shaft would not be sufficient for the purposes of location. *Fleming v. Daly*, 12 Colo. App. 439, 55 Pac. 946; *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; *Van Zandt v. Argentine Min. Co. supra*.

The disclosure of mineral must be at the point claimed and designated, or made the point of discovery by the locator, and so designated in the location certificate and relied upon in making the location. *Cheesman v. Shreeve, supra*; *McMillen v. Ferrum Min. Co.* 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461.

And he may not, after intervening rights have attached, abandon and disregard his discovery, and neglect to comply with the statutory requirements, and select another discovery upon which his location was not

originally predicated. *McMillen v. Ferrum Min. Co. supra*.

And, where a miner relocates an abandoned mining claim, and sinks his discovery shaft, and posts his notice several hundred feet from the discovery shaft of the abandoned claim, designating in his certificate his discovery as in the shaft sunk by him, but fails to make a discovery therein, his location is not rendered valid by the fact that he knew of a vein of ore on the claim, that had been found in the abandoned discovery shaft. *Ibid*.

In the above case, *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, *supra*, VI. g, 1, was distinguished upon the ground that no provision for a discovery shaft exists in either the Federal statutes or the statutes of Montana.

Nor can a prior locator of a mining claim, who bases his claim upon an alleged discovery of mineral in his discovery shaft, where it appears that no valid discovery has been made in such shaft, prove an underground discovery made through an adjoining claim, where such discovery was not followed by the filing of an amended location certificate, and was made after a subsequent locator had perfected a valid location of the same claim. *McMillen v. Ferrum Min. Co. supra*.

Where the evidence in an action involving the validity of such a location shows that, if a discovery was made, it was within the discovery shaft, however, an instruction submitting a claim of the discovery of a lode, but omitting to submit the claim of its discovery in the discovery shaft, is not reversible error. *Fleming v. Daly, supra*.

And, after entry for a patent, in the absence of evidence of fraud, and on a question between the government and the applicant only, mineral will be found to have existed in the discovery shaft, if necessary to sustain the applicant's claim, whenever there is a conflict of evidence on the question. *Wight v. Tabor*, 2 Land Dec. 738.

So, under state statutes requiring the sinking of a discovery shaft upon a lode to show a well-defined crevice, it is held in Colorado that the term "crevice" means merely a mineral-bearing vein. *Beals v. Cone, supra*.

And that the boundaries of a mineral-bearing vein may or may not be ascertained and visible. *Ibid*.

And that it does not require an exposure of the walls of the vein. *Fleming v. Daly, supra*.

But an instruction on an issue as to the validity of a mining location, that it must appear that a lode was located by sinking a shaft at least 10 feet from the lowest part of the rim at the surface, showing a well-defined crevice, is improper in not stating that the crevice must contain mineral-bearing rock in place. *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413.

It has been held under this statute, in Montana, however, that the sides of a lode represented and defined by walls of the country rock must be discovered, and the

lode identified thereby, before it can be located and held as such; and that, before a quartz claim can be legally located, at least one well-defined wall or side to the lode must be found. *Foot v. National Min. Co.* 2 Mont. 402.

But an instruction in an action involving an issue as to the validity of a mining location, that it is sufficient if, at the time of location, the vein or lode is exposed to view, and its existence known by the locator; and that it is not necessary that the work of exposure should have been done by the locators, is not subject to objection as not showing that the vein must have at least one well-defined wall rock, where an instruction to this effect has already been given to the jury. *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643.

f. Time of completion.

The laws of the United States do not prescribe any time in which excavations necessary to enable a locator of a mining claim to prepare and record a certificate shall be made; this is left to the state legislation and to mining rules. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, Reversing 3 *McCrary*, 19, 8 Fed. 860.

And, whenever there are statutory provisions fixing the time within which, after discovery, the prescribed work necessary to a valid location must be done in order to secure the claim, the discoverer has the full time provided in the statute to complete it. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

And a state statute providing that the discovery shaft of a mining location shall be sunk within sixty days, or any specified period, from the date of the discovery, fixes the question absolutely as to what shall be deemed a reasonable time within which such shaft shall be sunk; though a person, the validity of whose location is at issue, cannot be heard to complain of an instruction submitting the question of reasonable time to the jury, and fixing a limit permitting a finding of a period longer than the statutory one. *Patterson v. Hitchcock*, 3 Colo. 533.

So, where the statute provides that, before filing a location certificate with the county recorder, the discoverer shall locate his claim by sinking a discovery shaft upon the premises to a specified depth; and that the discoverer shall have ninety days from the date of discovering the lode and the posting of notices thereupon to perform the discovery work thereon, the discovery shaft may be sunk at any time within the ninety days from the date of the discovery of the lode and the posting of the notices thereon. *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896.

Failure of the locator of a mining claim to prosecute the development work within the time required by law, however, where he had fully complied with all other requirements of a valid location, does not prejudice his rights where he was prevented from completing his location and complying with

the statute by the act of a trespasser who forcibly ejected him. *Erhardt v. Boaro*, 3 *McCrary*, 19, 8 Fed. 860; *Miller v. Taylor*, 6 Colo. 41.

On this subject, see also *infra*, XIV.

g. Equivalent of the shaft.

Most, if not all, of the states and territories providing for a discovery shaft also provide for an equivalent. The provisions for an equivalent are substantially that any open cut, cross cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, is equivalent to the discovery shaft.

In the construction of these statutes the terms "open cut," "cross cut," "tunnel," and "adit" should receive such reasonable interpretation as will leave the provisions thereof practically operative. *Electro Magnetic Min. & Development Co. v. Van Auken*, 9 Colo. 204, 11 Pac. 80.

By them an open cut, a cross cut, and an adit are each made the equivalent of a discovery shaft. *Gray v. Truby*, 6 Colo. 278.

And an adit, in mining law, is an excavation in and along a lode. *Electro Magnetic Min. & Development Co. v. Van Auken*, *supra*.

And it denotes the opening by which a mine is entered, or by which water and ores are carried away, and it is also called the drift. *Gray v. Truby*, *supra*.

The statute contemplates that the 10 feet in length of the adit may be either open or under cover, or open in part and under cover in part, dependent upon the nature of the ground. *Electro Magnetic Min. & Development Co. v. Van Auken*, *supra*.

And it need not, at its face, have a depth of at least 10 feet; but it must always be such in its dimensions and character as to make it fairly equivalent to a discovery shaft. *Gray v. Truby*, *supra*.

Here, as in the case of a discovery shaft, however, it is essential to the validity of the location that a vein or lode be cut at a depth of 10 feet below the surface, or that an open cut be run at least 10 feet along the vein; and a statement not showing these facts is insufficient. *Dolan v. Passmore* (Mont.) 85 Pac. 1034.

And a cross cut intersecting the vein on a mining claim 132 feet below the surface does not comply with the provisions of the Montana Political Code, that a cross cut which cuts the lode at the depth of 10 feet below the surface is equivalent to a discovery shaft, where the only means of reaching the cross cut was down a shaft located upon a neighboring patented claim. *Butte Consol. Min. Co. v. Barker* (Mont.) 89 Pac. 302.

X. The surface area of the location.

a. Surface incident to lode.

Previous to the enactment by Congress of

the mining laws, in locating a mining claim the main thing was the vein. It was this that was intended to be taken up; and, as the exact direction of this could not be ascertained and accurately described until it was followed up or explored, a location was not rendered invalid because the vein, as subsequently ascertained, ran in a different direction from that of the surface claim, as indicated by the notice of location. *Johnson v. Parks*, 10 Cal. 447.

And, where a person located a mining claim on certain croppings, and another person located, shortly afterward, in the immediate neighborhood; and there was no objection upon the part of the former locator; and an opinion was expressed by him that there was no conflict between the two claims,—the former locator should be deemed to have admitted that, if there were two distinct ledges, the subsequent locator was entitled to the one upon which he located, and he had located but one ledge, and did not claim all the ledges outcropping at the place, though the outcroppings of the two ledges were mingled, confused, and blended upon or near the surface. *Van Valkenburg v. Huff*, 1 Nev. 142.

So, under the mining law as it stood prior to May 10, 1872, each locator of a mining claim was entitled to but one vein. *Blake v. Butte Silver Min. Co.* 2 Utah, 54.

And, under the Idaho quartz law, a prospector was allowed to hold but one ledge by location. *Atkins v. Hendree*, 1 Idaho, 95.

But the fact that other ledges existed within the limits of his location was required first to be established, before a subsequent claimant had any lawful right to pass within his boundaries or interfere with his apparent rights. *Ibid.*

And locations of mining claims, made under the act of Congress of 1866, the surface lines of which included more than one vein or lode, are recognized as valid by the mining acts of Congress of May 10, 1872. *Mt. Diablo Mill & Min. Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886.

Under that act, the location is of a piece of ground including the vein or lode. *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

And the locator is entitled to all veins having their top or apex inside his surface lines. *Blake v. Butte Silver Min. Co.* supra; *Patterson v. Hitchcock*, 3 Colo. 533; *Mt. Diablo Mill & Min. Co. v. Callison*, supra.

But the surface ground of a mining claim is an incident to the lode, and a location of the ground which does not include any part of the lode claimed to have been discovered therein is invalid. *Branagan v. Dulaney*, 2 Land Dec. 744; *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; *Wolfley v. Lebanon Min. Co.* 4 Colo. 112.

While in the location of a mining claim, the vein is the principal thing in the sense that it is for the sake of the vein that the location is made, and the surface is of no value without it, and no location can be made until a vein has been discovered within the limits of the surface claim, the loca-

tion is of a piece of land including the vein. *Gleeson v. Martin White Min. Co.* supra.

And, although the act of Congress of 1872 enlarges the rights of a locator of a mining claim by a grant of all veins, lodes, or ledges the top or apex of which lies within his surface lands, his right to the surface ground continues to be dependent upon his right to the principal lode; and his right to other lodes within his surface limits is equally dependent thereon. *Patterson v. Hitchcock*, supra.

A vein can be located in no other way than by means of a surface claim; and it can be held only to the extent that it is included within the surface lines. *Gleeson v. Martin White Min. Co.* supra.

The surface ground is taken by a location on each side and including the vein; and, when the locator locates and claims his surface, he locates and claims the vein or lode within it. *McCormick v. Varnes*, 2 Utah, 355.

And, if a location is extended beyond the limits of the lode upon which it is located, in so far as it goes beyond the lode it is invalid, since the location gives no right to the surface except in connection with the lode. *Terrible Min. Co. v. Argentine Min. Co.* 5 McCrary, 639, 89 Fed. 583.

So, if the lode or vein makes a material departure from the surface ground located, the location cannot be said to be on the lode or vein. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 L. ed. 253.

It is not necessary, however, that a lode or vein shall crop out upon the surface, in order that locations may be made upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure the right to the vein underneath. *Ibid.*

b. Location with reference to strike of vein.

1. Generally.

The provisions of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, that a lode-mining claim may equal, but shall not exceed, 1,500 feet in length along the vein or lode; and no lode-mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulations to less than 25 feet on each side of the middle of the vein,—contemplate that the location of a lode or vein mining claim shall be along the course of the vein. *Argentine Min. Co. v. Terrible Min. Co.* and *Flagstaff Silver Min. Co. v. Tarbet*, supra; *Doe v. Sanger*, 83 Cal. 203, 23 Pac. 365; *Armstrong v. Lower*, 6 Colo. 393; *McCormick v. Varnes*, supra.

The vein is the principal thing in the location of a mining claim, and the location should be made in conformity with the strike thereof. *Armstrong v. Lower* and

Gleeson v. Martin White Min. Co. supra; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 209, 131 Fed. 579.

And the rule was the same under the mining act of Congress of 1866. *Flagstaff Silver Min. Co. v. Tarbet*, supra.

And these statutes were founded upon the general practice of miners, previously existing, that the surface locations of such claims should be made lengthwise along the general direction of the lode or vein, with the side lines along the lode and the end lines across it. *Doe v. Sanger*, supra.

A mistake upon the part of a miner in locating a lode claim, however, by which he misapprehends the direction of the lode, and accordingly extends the length of his claim in a direction other than along it, is not fatal to the validity of his claim. *Water-vale Min. Co. v. Leach*, 4 Ariz. 34, 33 Pac. 418.

It operates only to diminish the extent of the lode that he might have included within the boundaries of his claim. *Ibid.*

If located otherwise than along the vein or lode, the location will secure only so much of it as it actually covers. *Flagstaff Silver Min. Co. v. Tarbet*, supra.

If a located lode terminates at any point within the location, or departs at any point from the side lines, the location beyond the point of termination or departure is defeasible, if not void. *Patterson v. Hitchcock*, 3 Colo. 533.

And a miner who asserts title to a full claim of 1,500 feet in length and 300 feet in width, as provided for by law, must prove a lode extending throughout the claim. *Zollars v. Evans*, 2 McCrary, 39, 5 Fed. 172.

The locator who does not locate in conformity to the strike of the vein pays the penalty by the loss of his surface ground, and also his lode beyond the point of departure thereof from his side lines. *Armstrong v. Lower*, supra.

The right of the locator of a lode-mining claim to follow the strike of the lode ceases at the point where the lode crosses the line of the location; and it makes no difference, on the question of the validity of the location, whether the lode crosses the end line or the side line. *Beik v. Nickerson*, 29 Land Dec. 662.

One who has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith performed all the subsequent acts essential to a valid location as provided by law, however, is entitled to the presumption that the lode extends through the full length of the claim; and another who, by subsequent and conflicting location, undertakes to hold a portion of his claim on the ground that the lode does not extend to the conflicting premises, has the burden of proving such fact. *Armstrong v. Lower*, supra.

And an instruction, in a suit to adverse a patent of a mining claim, that, if the plaintiff, with knowledge of the direction of his vein, fraudulently located his claim in disregard thereof for the purpose of appropriat-

ing surface ground to which he would not have been entitled had he located his claim along the line of the vein, the location would be void, though it was in other respects sufficient, is improper and erroneous in the absence of evidence of any such fraudulent purpose. *Walsh v. Mueller*, 16 Mont. 186, 40 Pac. 292.

The course of a vein longitudinally as it passes through the country is its strike, within the meaning of these rules; and, where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike. *Grand Central Min. Co. v. Mammoth Min. Co.* 29 Utah, 490, 83 Pac. 648.

And, in determining the location and strike of a vein, the geological features of the adjacent country are to be taken into consideration. *Ibid.*

The contiguity of ore or mineral matter constituting the length and breadth and extent of any particular lode is a question of fact to be determined by a jury. *Book v. Justice Min. Co.* 58 Fed. 106.

2. Effect of lode crossing or leaving claim.

The end lines of a mining claim as designated in the location certificate are not necessarily, in law, the end lines of the claim, unless they actually cross the actual outcrop of the vein. *Cheesman v. Shreeve*, 40 Fed. 787.

The side lines of the location of a mining claim become the end lines, and the end lines the side lines, where the course of the vein is across the claim instead of in the direction of its length. *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284; *New Dunderberg Min. Co. v. Old*, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. 598; *Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co.* 100 Fed. 910, 131 Fed. 339; *Cosmopolitan Min. Co. v. Foote*, 101 Fed. 518; *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 665, 109 Fed. 538; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 290, 131 Fed. 579.

In such case the end lines are those which measure the width of the claim as it crosses the lode, and the side lines are those which measure the extent of the claim on each side of the middle of the vein. *Argentine Min. Co. v. Terrible Min. Co.* supra.

And this is the rule where the side lines of a mining claim, as located, cross the vein, whether so intended by the locator at the time of the location or not. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* supra.

And in such case the end lines become the side lines in the sense that the locator may follow the dip of the vein outside of a plane

extending vertically down therefrom. *Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co.* 100 Fed. 910.

So, where a lode is discovered, and, by mistake, a claim is located thereon crossing it; and, after the completion of the location, another lode is discovered therein running lengthwise of the claim, the existence of the second lode does not prevent the side lines of the claim from being end lines, so as to cut off the extralateral rights of the second lode as well as the first. *Cosmopolitan Min. Co. v. Foote*, supra.

Where the end lines of a mining claim have been established they remain the end lines as to all veins found within its surface boundaries. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 56 L.R.A. 725, 44 C. C. A. 120, 104 Fed. 664.

Where a mining location is placed along the strike of a vein, however, and one end line thereof is placed within the limits of a prior location for the purpose of securing the locator's underground rights attaching to possession and ownership of the surface, so that one corner of the claim as located is cut off by the side line of the senior claim, and the apex of the vein crosses one end of his location and passes out of his location at the other end through the side lines of the senior claim, thus cutting off the corner of his claim, the side line of the senior claim is not the end line of his claim. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

In the above case, *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, supra, V. a, 3, (a), and *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, supra, V. a, 2, were distinguished upon the ground that the question presented in them was whether a second location is effectual to appropriate territory covered by a prior subsisting valid location.

So, where a lode located in its true course lengthwise crosses one of the side lines of the location, the locator may abandon his right to the surface beyond the point where the lode thus passes out, and draw his end line parallel with his location at that point, so as to include only the ground in which the lode extends lengthwise within the side lines of the location. *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 613, 15 U. S. App. 456, 61 Fed. 557, 71 Fed. 848.

And in such case the locator may follow the dip beyond his side line, the same as if one original end line had been drawn in at such crossing parallel to the other end line. *Tyler Min. Co. v. Sweeney*, supra; *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 848.

In *Tyler Min. Co. v. Sweeney*, supra, *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 208, 30 L. ed. 102, 6 Sup. Ct. Rep. 1177, infra, X. c, 2, was distinguished upon the ground that in that case the exterior lines of the claim formed a figure resembling a horseshoe, and the court held that the lines marked as end lines were not such; while in the case in hand the location was 7 L.R.A. (N.S.)

made in the form of a parallelogram along the course of the lode or vein.

An issue as to whether or not the apex of the vein of one mining claim is cut by the end or side line of another mining claim is one of fact, to be determined by the evidence, and is not a Federal question within the meaning of the removal-of-causes acts. *Blue Bird Min. Co. v. Largey*, 49 Fed. 289.

c. Form.

1. Of lode claims.

The provision of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, providing that a lode-mining claim may equal, but shall not exceed, 1,500 feet in length along the vein or lode, and no claim shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface,—contemplates the location of a lode claim in the form of a parallelogram. *Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co.* supra; *Meydenbauer v. Stevens*, 78 Fed. 787; *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, Affirming 55 Fed. 11; *Book v. Justice Min. Co.* 58 Fed. 106.

The theory is that the claim should have its side lines equidistant, and not exceeding 300 feet from the center of the lode as it outcrops on the surface, and not exceeding 1,500 feet in length, and with end lines parallel to each other. *Meydenbauer v. Stevens*, supra.

And when the strike of the vein passes perpendicularly through the end line of a mining location, the mere meanderings of the outcrop between the end lines, caused by the surface influences, or slides and *débris* on the mountain sides, do not control the question of the parallelism of the side lines; the spirit and reason of the statute require that the settled and permanent course of the vein or strike as nature fixes it shall control, the zigzagging being restricted to slight variations from the general trend and direction of the strike. *Cheesman v. Hart*, 42 Fed. 98.

But, while the statutes contemplate a parallelogram in form, they do not prescribe the shape of a lode claim, so as to render a departure from the contemplated shape a ground of invalidity. *Re Breece Min. Co.* 3 Land Dec. 11.

And, under the act of Congress of 1866, it was immaterial on the question of extralateral rights whether the claim was in the form of a parallelogram or not. *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658.

The formation of the mineral deposit must govern. *Re Breece Min. Co.* supra.

The primary purpose of the statute is to grant the mineral, and, if a fissure vein deviates from a straight line, it is proper that the location should deviate with it. *Ibid.*

And an irregular location of a horizontal

deposit of mineral, irregular in form, and in no wise resembling a fissure vein, and not capable of being traced by its outcrop, is authorized as well as in the case of a fissure vein. *Ibid.*

And a location of a claim running a part of its length in a certain direction, thence at right angles to its former course, and thence the remainder of the distance parallel to its original course, is properly sustained where it appears that the underlying mineral consisted of a comparatively level deposit, irregular in form, in no wise resembling a fissure vein, and not capable of being traced by its outcroppings. *Ibid.*

Nor does the fact that a mining location is not in the form of a parallelogram affect the extralateral right of the locator in any vein or lode whose apex is found within its boundaries. *Carson City Gold & S. Min. Co. v. North Star Min. Co. supra.*

So, while the rule is that, where a vein crops out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, the act of Congress requires that this course shall be substantially followed in locating claims and locations upon it, and the end lines should cross the vein at right angles, the extralateral rights conferred upon a locator by statute exist without regard to the angles at which the end lines cross the general course of the vein. *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 299, 131 Fed. 579.*

To secure such rights it is not necessary that the end lines shall be limited to 45 degrees, or to any other particular variation from the true dip. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Iaho Min. & Developing Co. 134 Fed. 268.*

Tracts of land which merely corner on each other, however, do not constitute a piece of land which may be located under U. S. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429. *Re Tomera Placer Claim, 33 Land Dec. 560.*

And a mining claim in the form of an isosceles triangle, no two sides of which can be parallel to each other, does not conform to the statute with relation to parallelism of the end lines, and is good as a surface claim only. *Montana Co. v. Clark, 42 Fed. 626.*

2. Parallelism of end lines.

As we have seen, previous to the Federal mining laws, the lode or vein was located, and not the surface, and only such rights to the surface were acquired as were necessary to the proper working of the lode.

So, the act of Congress of 1866 contained no requirement that the end lines of a lode-mining claim should be parallel. *Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 302, Fed. Cas. No. 4,548, Affirmed in 103 U. S. 839, 26 L. ed. 557; East Central Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 266, 51 L. ed. —, 27 Sup. Ct. Rep. 258.*

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Though under that act the end lines of a lode-mining claim were required to be straight. *Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.*

The act of Congress of 1872 (U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424), however, expressly provides that the end lines of each claim shall be parallel with each other.

The purpose of this requirement is to bound the underground extralateral rights which the owner of the location may exercise. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.*

And the rule of the earlier cases was that it was directory only, and that a substantial compliance was all that was necessary. *Doe v. Sanger, 83 Cal. 203, 23 Pac. 365; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197; Eureka Consol. Min. Co. v. Richmond Min. Co. supra.*

And that no consequence attached to a deviation from its direction. *Eureka Consol. Min. Co. v. Richmond Min. Co. and Horswell v. Ruiz, supra.*

And that a location made in substantial compliance with the intent of the statute, having two side lines running along the course of the vein, and two shorter lines running across it, so that the two sets of lines were distinct and apparent, was not void, but gave the right to follow the vein laterally, although the original end lines were not exactly parallel. *Doe v. Sanger, supra.*

The rule is established by the later cases, however, that parallelism of the end lines of a surface location is essential to the existence of any right in the locator or patentee of a surface lode-mining claim to follow the vein outside of the vertical planes drawn through the side lines. *Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, Affirming 4 McCrary, 279, 14 Fed. 377.*

And, under it, if a location is so laid out that its end lines are absent, or if they are so placed as not to define the right of the locator to the exterior parts of the lode, or so that no part of the lode lies between them, the defect cannot be supplied; and, while the location may be valid for all that can be found within the surface lines, it does not enable the locator to follow the lode beyond his side lines. *Ibid.*

Nor does a mining claim in the form of an isosceles triangle, which has but three sides, no two of which can be parallel to each other, conform to the statutes with relation to parallelism of end lines; and it confers no extralateral rights upon the locator. *Montana Co. v. Clark, supra.*

But the requirement of parallelism of the end lines of lode-mining locations, made by the act of Congress of May 10, 1872, cannot be deemed to apply where the location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866, had then so far advanced as to exclude adverse claims; the purpose of the act of 1872 being to protect all rights

previously acquired under existing laws. *East Central Eureka Min. Co. v. Central Eureka Min. Co. supra.*

And where the end lines of a location are not parallel, and the date of the location does not appear, it will be deemed to have been made under the act of Congress of 1866, not requiring such parallelism, and not under the act of 1872, requiring it. *Eureka Consol. Min. Co. v. Richmond Min. Co. supra.*

So, where a mining claim as located does not have parallel end lines, a corner of the claim as originally located may be drawn in in order to make the end lines parallel, thus saving the extralateral rights. *Doe v. Waterloo Min. Co.* 54 Fed. 935; *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284.

And where the end lines of a mining claim converge in the direction of the dip of the vein, the owner of an adjoining claim cannot complain of the lack of parallelism, since the effect is to limit the extralateral right so as to give less of the vein or lode in depth than at the surface. *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658.

In the above case, *Lakin v. Dolly*, 53 Fed. 333, and *Lakin v. Roberts*, 4 C. C. A. 438, 7 U. S. App. 539, 54 Fed. 462, *infra*, X. d. 2, (a), were distinguished upon the ground that they did not involve any construction of the law appertaining to extralateral rights in a lode; but that the question there was whether, by virtue of the surface ground, the owner of a mining claim could include real estate within the surface boundaries situated more than 300 feet from the lode.

Whether or not the end lines of a mining claim were substantially parallel is a question of fact for a jury under all the evidence. *Cheesman v. Hart*, 42 Fed. 98.

But a patent of a mining claim showing parallel lines is conclusive, and the patentee's right to follow the dip of the lode therein cannot be defeated by showing that in the original location of the claim the end lines were not parallel. *Doe v. Waterloo Min. Co. supra.*

3. Of placer claims.

Prior to the act of Congress of July 9, 1870, there were no provisions fixing the form of placer-mining claims, except such as were imposed by the miners by their local rules and regulations. *Price v. McIntosh*, 1 Alaska, 286.

But by that act it was provided that, where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands; and that no further survey or plat in such case shall be required.

The express requirement of this act, that placer locations shall conform to the lines of the public surveys, however, was found to be unreasonable, a hardship, and in contravention of the established custom, and therefore L.R.A. (N.S.)

fore was modified by the act of May 10, 1872, requiring conformity to legal subdivisions as near as practicable, so as to provide for exceptional cases where reason and common sense required a different regulation. *Re Rablin*, 2 Land Dec. 764.

This act makes practicability the test; the conformity need be only as near as practicable. *Re Pearsall*, 6 Land Dec. 227.

And, where part of a legal subdivision is nonmineral, and the gold deposit is in a ravine, a placer location that follows the mineral deposit conforms to the public survey as near as practicable. *Re Esperance Min. Co.* 10 Copp, Land Owner, 338, Mineral Law Dig. 110.

So, where the entire placer deposit in a canyon within certain limits is clay, and the adjoining land on either side is totally unfit for mining or agriculture, an exceptional case arises under that act, in which a placer location need not conform to the lines of the public surveys. *Re Rablin, supra.*

An irregular location will not be sustained, however, in the absence of any showing of reasons for the irregularity. *Southern Pacific R. Co. v. Griffin*, 20 Land Dec. 485.

A placer-mining claim not conforming to the legal subdivisions on surveyed land is *prima facie* illegal, in the absence of evidence as to the impracticability of such conformity. *Re Pearsall, supra.*

And every feature of the conditions relied upon to entitle the location of a placer-mining claim to be made without conforming it to the system of public-land surveys as required by the mining laws should be explicitly and directly set forth, and, if reasonably obtainable, a report under oath with respect to physical conditions should be procured from the deputy mineral inspector who surveyed the claims; and such other evidence should be required as may be deemed necessary satisfactorily to establish the existence of proper and requisite conditions. *Re Wood Placer Min. Co.* 32 Land Dec. 363, 401.

And a mere affirmative showing that a creek which flows through a placer-mining location runs through a narrow canyon between steep and rugged mountains devoid of placer-mining deposits, and valueless for any purpose, is not sufficient to establish the existence of conditions necessary to warrant omission to conform to the system of public land surveys, where much of the showing with respect to the situation and scope of the claims themselves, the depth and abruptness of the canyon, or gorge, etc. is more by way of implication than by direct averment. *Re Wood Placer Min. Co.* 32 Land Dec. 363.

Nor can a placer location of a narrow strip 12,000 feet long, extending through three sections, be held to conform as near as practicable to the rectangular subdivisions of the public surveys, unless the adjoining lands had been previously appropriated or reserved. *Re Rablin*, 10 Copp, Land Owner,

3, Reversed in 2 Land Dec. 764, Mineral Law Dig. 331.

But when a placer-mining claim does not conform to the legal subdivisions upon surveyed land, upon application for a patent, the applicant will be allowed a reasonable time within which to file evidence showing legality thereof. *Re Pearsall, supra.*

So, the rule has been asserted by the Land Department that the placer-mining act, as amended, requires placer-mining claims to conform in shape and size to the system of public-land surveys and the rectangular subdivisions thereof, whether the locations are upon surveyed or unsurveyed lands. *Re Miller Placer Claim, 30 Land Dec. 225; Re Wood Placer Min. Co. 32 Land Dec. 198, 32 Land Dec. 363.*

But in *Price v. McIntosh, 1 Alaska, 286*, it was held that all placer-mining claims in Alaska in which the public-land surveys have not been extended may be located, surveyed, platted, and patented without regard to the public surveys, and need not conform thereto in any particular. And that U. S. Rev. Stat. § 2320 (U. S. Comp. Stat. 1901, p. 1424), fixing the length and width of lode claims; not to exceed 1,500 feet in length along the vein or lode and 300 feet on each side of the middle of the vein at the surface, does not apply to placer claims; and, unless some rule, regulation, or custom of miners within the district limits the locator, he may locate his claim to follow the pay strike in any form he chooses, not to exceed 20 acres in extent.

Tracts of land which merely corner on each other, however, do not constitute a piece of land which may be located under U. S. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429. And a locator, cannot, by virtue of a discovery of mineral within the limits of one parcel of ground, embrace within his location another and entirely different parcel lying wholly without such limits, having separate and distinct boundaries, merely because the two parcels corner with each other. *Re Tomera Placer Claim, 33 Land Dec. 560.*

So, in *Price v. McIntosh, supra*, it was held that no miners' rule, regulation, or custom can limit the miner in the form of his claim to a placer mine; and that a rule or custom of a mining district, that a placer-mining claim should be 1,320 feet by 660 feet, no more and no less, is void for unreasonableness, since to enforce it would frequently require a miner, desiring to locate 1 acre of placer deposit, fraudulently to include 19 acres of agricultural or nonmineral land in his location.

In the above case, *Rosenthal v. Ives, 2 Idaho, 205, 12 Pac. 904*, holding that a custom limiting all placer-mining claims in a locality to 80 rods in length is reasonable and in harmony with the spirit of the laws, and in no way in conflict with the acts of Congress or the laws of the territory, was disapproved; the court saying that its conclusion is in direct opposition to the construction given for many years by the Land Department, and approved by every other

authority having occasion to pass upon it.

Under a general custom of miners in Alaska, by which the boundaries of a mining location are marked by one center stake at each end of the claim, the boundaries are formed by end lines at right angles to a center line drawn from center stake to center stake, and by side lines parallel to and equidistant from the center line, and far enough therefrom to embrace 20 acres of land within the parallelogram. *Loeser v. Gardiner, 1 Alaska, 641.*

d. Size.

1. Under act of 1866.

By the act of Congress of 1866 it was provided that no location hereafter made shall exceed 200 feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode. The object of this act was to encourage the location and development of mining claims by rewarding the adventurous and enterprising prospector, who had explored mineral regions in search of minerals, by an additional claim for discovery; the mineral lodes in many mining districts being concealed from public view. *Rose v. Richmond Min. Co. 17 Nev. 25, 27 Pac. 1105.*

And the right to an additional 200 feet was, of course, confined to the original discoverer of the lode. *Rose v. Richmond Min. Co. 17 Nev. 25, 27 Pac. 1105, Affirmed in 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055.*

But where a person located an interest for discovery upon a lode previously discovered, but not known to be upon the same lode at the time the location was made, the location was not entirely void under that act; and, if voidable at all, it was so only as to the extent of the discovery interest. *Rose v. Richmond Min. Co. 17 Nev. 25, 27 Pac. 1105.*

And the right of the locator of a mining claim to hold 200 feet additional as discoverer under the statute will be sustained after five years of unquestioned possession, though there was a mistake as to his discovery of a new vein or lode; no one having been injured at the time the claim was made. *Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055, Affirming 17 Nev. 25, 27 Pac. 1105.*

2. Under act of 1872.

(a) Generally.

The act of Congress of 1872 (U. S. Rev. Stat. § 2320), superseding the act of Congress of 1866, provides that a lode-mining claim may equal, but shall not exceed, 1,500 feet in length along the vein or lode; and no claim shall extend more than 300 feet on each side of the middle of the vein at the surface. Nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface.

In the absence of any mining rule or custom in force at the time of the location of a mining claim, the location may extend, under this act, to the distance of 300 feet on each side of the middle of the vein at the surface, and may be 1,500 feet in length along the vein by 600 feet in width. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Book v. Justice Min. Co.* 58 Fed. 106; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. ed. 906, 9 Sup. Ct. Rep. 511; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714.

But the Land Department has no jurisdiction, power, or authority, under this act, to issue a patent for a quartz lode to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode; and a patent for more than that amount of surface is absolutely void as to the excess. *Lakin v. Dolly*, 53 Fed. 333; *Lakin v. Roberts*, 4 C. C. A. 438, 7 U. S. App. 539, 54 Fed. 461.

And the provision of that act, that no mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface, is not confined in its application to claims located under it, but extends, also, to claims located under the act of July 26, 1866, under which a location can be extended in width to conform to local laws and customs. *Lakin v. Roberts*, supra.

The provision of this act, that no mining claim shall be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface, however, authorizes miners, by implication, to adopt rules and regulations or customs limiting the width of mining claims to not less than 25 feet on each side of the middle of the vein at the surface. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* and *North Noonday Min. Co. v. Orient Min. Co.* supra.

And, where a mining claim was located to the full width allowed by the act of Congress when a limitation by a miner's rule to 50 feet on each side of the vein was in force, the location is valid to the extent of the 50 feet, and no more. *Ibid.*

But a local mining regulation or custom adopted after the location of a claim cannot be applied to limit the extent of that claim. *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387.

And any defect in a mining claim caused by noncompliance with the district regulations through excessive width of location is cured by a formal annulment of the local laws prior to entry of a claim for patent. *Re Childs*, 10 Land Dec. 173.

But the disregard or disuse of a miners' rule or regulation with reference to the width of a mining claim, which will render it inapplicable, must be something more than a mere violation by a few persons; it must have become so extensive as to show that in practice it is generally disused. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* supra.

And the fact that a rule limiting the width of mining claims was adopted and 7 L.R.A. (N.S.)

kept on foot in the laws of miners for a considerable period of time is prima facie evidence, nothing to the contrary appearing, that it was in force; upon which a presumption would arise that it continued in force until something appears tending to show that it had been repealed. *Ibid.*

Whether a valid regulation existed and was in force in a mining district, limiting the size of a mining claim, is a question of fact for the jury on an issue as to the validity of a location. *Ibid.*

(b) The measurement.

The measurement of the location of a mining claim must be from the middle of the point of discovery, unless the vein has been actually established and run. *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 456, 21 Pac. 1040, Affirmed in 149 U. S. 787, 37 L. ed. 960, 13 Sup. Ct. Rep. 1052.

And a person locating a mining claim is entitled, under the statutes, to 300 feet on each side of the middle of the vein at the point of discovery, and no more. *Ibid.*

And, where a notice of location of a mining claim is indefinite in not stating the number of feet in width claimed on each side of the point of discovery, or monuments referred to therein, the claim should be limited to an equal number of feet on each side. *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832; *Mt. Diablo Mill & Min. Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886.

So, posting a notice of location at a point of discovery, in which is stated a claim of 1,500 feet in length on the lead, gives the prospector a right for the statutory period to 1,500 feet along the lead; but his right is limited to 750 feet on each side of the point of discovery. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

And, under Mills's Anno. Stat. (Colo.) § 3148, permitting the length of a vein to be 1,500 feet along the vein, and § 3149 thereof, providing that the width of the lode claims in named counties shall be 75 feet on each side of the center of the vein or crevice, neither side line of a location may be distant from the vein or discovery shaft more, though it may be less, than 75 feet; and, where a claim is located in violation of this rule, such parts of the surface as lie outside of a line parallel to the side lines, and 75 feet from the discovery shaft, are located without authority, and as to such excess the location is void. *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505.

The side lines of the location, however, need not be equidistant from the shaft. *Ibid.*

And an innocent mistake in marking a mining claim, including within the claim 400 feet on the easterly side line, and 200 feet on the westerly, 40 feet on the northerly end line, and 50 feet upon the southerly, in excess of the amount allowed by law, does not render the whole location void; the ex-

cess may be rejected and the claim held good for the remainder, where previously acquired rights are not interfered with. *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480.

And a mining claim marked easterly of the discovery point about 150 feet longer than the calls of the notice, and considerably wider than allowed by law, while the westerly 1,000 feet were marked substantially correctly in size, is not invalid as against subsequent locators, where the ground was such that accuracy in measurement could not be expected, and the conflicting location was mostly on the westerly end, where it was correctly marked; since in such case it cannot be presumed that subsequent locators were misled. *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

Nor does the fact that, in making a location, a person who became entitled by his notice to 750 feet each side of the point of discovery, in marking his location thereafter, included within his boundaries ground not legitimately covered by his notices, affect the validity of the location if this was done in good faith as the result of ignorance or inadvertence. *Bramlett v. Flick*, supra.

So, where the end lines of a lode claim are not at right angles with the side lines, their length does not represent the distance between the side lines, and the width of the claim is the distance between the side lines measured at right angles; and a claim not wider than the law permits, when thus measured, is not rendered invalid by the fact that the end lines are longer than the distance prescribed by law for the width of a claim. *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57.

The act of the legislative assembly of Montana, of December 26, 1864, giving the locator of a lead, lode, or ledge of gold or silver 50 feet on each side of the lead or lode for working purposes, however, means 50 feet from each wall or side of the lead or lode; the 50 feet cannot include any of the lead or lode; whether it be wide or narrow the discoverer is entitled to his full lead and 50 feet on each side thereof. *Foote v. National Min. Co.* 2 Mont. 402.

(c) Effect of excess in size.

A mining claim excessive in size, made so with fraudulent intent, is void. *Burke v. McDonald*, supra.

And a mining claim made so much larger than the law allows that it cannot be deemed the result of innocent error will be presumed to be fraudulent and void. *Ibid.*

And a mining claim made so large, and with such indistinct markings, that its boundaries cannot be readily traced, is invalid as against a subsequent location in good faith by persons who, in the use of reasonable diligence, could not find the former location. *Ibid.*

So, in *Pratt v. United Alaska Min. Co.* 1 Alaska, 95, while the question was not passed upon, it was said that a mining notice which includes by its terms more land than is permitted by the mineral laws of 7 L.R.A. (N.S.)

the United States is clearly a violation of the law, and invalidates the location.

To claim more than the law allows in the location of a mining claim, however, is not of itself an attempted fraud, invalidating the whole claim; in such case the location is void only as to the excess. *Atkins v. Hendree*, 1 Idaho, 95; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480.

And where an excessive location of a mining claim, not affecting accrued rights, has been made through mistake in good faith, as, where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess. *Gohres v. Illinois Min. Co.* 40 Or. 516, 67 Pac. 666; *Taylor v. Parenteau*, supra; *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 456, 21 Pac. 1040, Affirmed in 149 U. S. 787, 37 L. ed. 960, 13 Sup. Ct. Rep. 1052; *Richmond Min. Co. v. Rose*, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1035, Affirming 17 Nev. 25, 27 Pac. 1105.

Unless the excess is so large as to give rise to an inference of bad faith. *Gohres v. Illinois Min. Co.* supra.

And a mining claim staked 650 feet in length in excess of the amount allowed by law is void only as to the excess, where there was no fraud on the part of the locators in including such excess. *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428.

Nor is a mining claim staked in excess of the length prescribed by law thereby rendered invalid as against a junior conflicting location, where the defect was corrected before the junior location became a valid mining claim. *Ibid.*

And a mining claim, defective because when located it contained 650 feet in length in excess of the amount allowed by law, is cured as against a subsequent locator of a conflicting claim, where, before discovery of ore by the junior locator within the boundary lines of his claim, and outside the boundary lines of any other valid location, the senior locator had his claim resurveyed and the excess located under other names, and the boundaries properly marked as prescribed by law. *Ibid.*

But a location of a mining claim, shown by the stakes and boundaries thereof to be 2,000 feet in length, is no protection to the locator as to the 500 feet in length more than the law authorizes. *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714.

And, while a location in other respects in conformity to law, which is greater in length or width than the law permits, is not, for the mere error in that respect, void, except as to the excess, if a location is so excessive in length that a person measuring from the stakes at one end of the claim the required distance in the direction indicated by the notice does not find the other end stakes, or anything else to guide him to the place where the stakes may be found, he may reasonably conclude that such other corner stakes have not been set; and in such case the location is void. *Ledoux v. Forester*, 94 Fed. 600.

So, the act of the locator of a mining

claim which was greatly in excess of the statutory limit, who, on attempting to sell the same, discovered the excess, of procuring a third person to locate a part of the original tract in his own name for the purpose of making the conveyance, constitutes a positive assertion on his part unequivocally indicating where the excess of the original location was, which precludes him from shifting it to another segment thereof; so that, on its appearing that the location by the third person was void, a subsequent locator is entitled to claim that portion of the original location as excess. *Gohres v. Illinois Min. Co. supra.*

3. Of placer claim.

Prior to the act of Congress of July 9, 1870 (U. S. Rev. Stat. §§ 2330, 2331. U. S. Comp. Stat. 1901, p. 1432), there were no limits to the area of placer mines, except such as were imposed by the miners by their local rules and regulations. *Price v. McIntosh*, 1 Alaska, 286.

By that act it was provided that no location of a placer-mining claim shall include more than 20 acres for each individual claimant, and that no location of a placer-mining claim shall include more than 160 acres for any one person or association of persons.

The policy of the government, in the enactment of that law, was to make a general distribution among as large a number as possible of those who wished to acquire such lands for their own use, rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such lands. *Durant v. Corbin*, 94 Fed. 382.

And under it a placer location cannot exceed 20 acres for each individual locator. *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164; *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633; Re Regulations Circular June 24, 1899, ¶ 35, 28 Land Dec. 599; Re Mineral Land Circular, ¶ 35, 25 Land Dec. 573.

And a location by two persons cannot exceed 40 acres, and one by three persons cannot exceed 60 acres, and so on. *Ibid.*

And it cannot exceed 160 acres in any one claim. *Kirk v. Meldrum, supra.*

Nor can one person be permitted to locate more than 20 acres of placer ground by one location, by the device of using the names of his employees and friends. *Durant v. Corbin, supra.*

And the statutory prohibition limiting the amount which can be located to 20 acres of land applies to a location made by three persons for and in the interest of a company. *Gird v. California Oil Co.* 60 Fed. 531.

An excess over 20 acres in a placer-mining location, however, does not invalidate it, but merely renders it voidable as to the excess. *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209; *Pratt v. United Alaska Min. Co.* 1 Alaska, 95.

Unless the excess is very great. *Pratt v. United Alaska Min. Co. supra.*
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And, if an individual becomes the purchaser and possessor of separate mining claims of 20 acres each or less, he may be permitted to include in his application for a patent any number of such claims contiguous to each other, not exceeding in the aggregate 160 acres. Re Circular of Instructions, 1 Land Dec. 695.

But, under the act of Congress of March 3, 1873 (U. S. Rev. Stat. § 2347, U. S. Comp. Stat. 1901, p. 1440), giving every person who is a citizen, or who has declared his intention to become such, a right to enter by legal subdivisions any quantity of vacant coal lands of the United States, not otherwise appropriated or reserved by competent authority, and under U. S. Rev. Stat. § 2350 (U. S. Comp. Stat. 1901, p. 1441) thereof, authorizing only one entry by the same person or association of persons,—where members of a corporation and its employees were its agents in obtaining from the government for it coal lands that could not rightfully have been entered in its own name, the corporation having already entered the full amount allowed by law, the lands obtained by the members and agents were fraudulently obtained, and patents therefor are void. *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57, Reversing 37 Fed. 180.

And a corporation which has violated that act by procuring through its agents more than one entry of vacant coal lands can be required to surrender them before being reimbursed the amount expended by it in procuring the legal title. *Ibid.*

And where a person or company has entered as much coal land as the statute permits, a contract whereby another person is to enter additional coal land and obtain title and convey it to the other is invalid as contrary to public policy. *Johnson v. Leonard*, 1 Wash. 564, 20 Pac. 591.

A miners' rule, regulation, or custom limiting one in the area of his claim to a placer mine, or in its width or length, however, has been held to be void as in conflict with both the spirit and the letter of placer-mining law. *Price v. McIntosh*, 1 Alaska, 286.

e. Fixing boundaries; swinging claim.

The Federal statutes, in the absence of mining rules and regulations, allow a prospector, after discovery of a vein, a reasonable time in which to develop its course, and then mark accordingly the boundaries of his claim. *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49; *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 55 Fed. 11, 70 Fed. 455.

The surface claim is not required to be defined immediately upon the discovery of the vein. The locator is allowed a reasonable time for that purpose; and, in the meantime, he is protected in his claim to 1,500 feet of the vein. *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Patterson v. Hitchcock*, 3 Colo. 533.

And a notice of location posted at the

discovery point, claiming 1,500 feet on the lode, vein, or deposit, is not subject to objection for indefiniteness previous to opportunity to disclose the direction of the lode by excavation. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560.

But a location is not complete until the surface claim is defined. *Gleeson v. Martin White Min. Co. supra*.

So, in *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, it was said that, where a vein has been discovered, the rules of miners and the legislative regulations of mining states and territories generally allow some specified time for explorations, before the location is definitely marked.

What is a reasonable time within which to define the surface claim under this rule depends upon the circumstances affecting the ability of the locator to ascertain the course of the vein. *Doe v. Waterloo Min. Co.* 70 Fed. 455.

And illness of the locator is not such a circumstance. The circumstances must be such as pertain to the ground to be located, its character, and the means of properly working it. *Ibid*.

And, in the absence of mining rules or regulations fixing the time within which the locator of a mining claim must establish the exterior boundaries thereof, thirty days is a reasonable time. *Doe v. Waterloo Min. Co.* 55 Fed. 11.

So, under state statutes providing that any citizen who discovers a mineral-bearing vein or lode may locate a claim thereon by posting notices of such location at the point of discovery, which notice must contain the number of linear feet taken in length along the course of the vein or lode as near as may be; and, that before the expiration of a specified period from the date of posting such notice, there must be filed in the office of the county clerk of the county in which the lode or claim is situated a declaratory statement which must contain such a description of the location as will identify the claim,—the locator may, within the statutory period after his discovery and the posting of such notice, swing his claim in any direction required to include the vein within its boundaries, so as to take in ground not embraced in the notice of discovery, and this though the notice laid the course to the points of the compass; no bad faith being shown. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037.

And, under Mont. Comp. Stat. div. 5, § 1477, providing that the discoverer of a mining claim shall have twenty days in which to complete the location and make the necessary record, a discoverer who posted a notice of location claiming 1,500 feet "on this lead with twenty days for prospecting," in good faith and with an intention to complete the location within the prescribed time, thereby acquired a right to all the ground along the lead legitimately covered by the notice; and one subsequently locating thereon did not acquire a superior title, though he filed his statement and record within 7 L.R.A. (N.S.)

twenty days, and the former did not. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

So, the object of the Colorado statute requiring a discovery shaft or other discovery work is to ascertain the true course of the lode discovered so as to enable the locator to mark the boundaries of the location, and the claim is protected during the statutory period provided therefor. *Omar v. Soper*, 11 Colo. 388, 7 Am. St. Rep. 246, 18 Pac. 443.

Where the location of a mining claim has been completed, however, the locator thereof cannot afterwards change the lines of his claim so as to take in other ground when such change will interfere with the rights acquired by others in the meantime. *Cresus Min. Mill. & Smelting Co. v. Colorado Land & Mineral Co.* 19 Fed. 78.

And, under the Federal statutes with reference to the location of mining claims unaided by any local rules, the locator of a mining claim is bound by the marking out of a surface claim and the working of the lode within its boundaries; and the lines fixed by the monuments on the ground cannot be changed so as to interfere with other claims subsequently located. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

And a locator who, at the time of posting his notice, in addition to giving the general course of his vein, places monuments at the center of each end line, thus definitely giving notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, is bound by the location thus made and defined; and he may not thereafter, and during the ninety days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights. *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896.

Nor can a prospector who has made a discovery after posting his notice leave his claim incomplete, and go in quest of other claims, and post his notices here and there over the country to the exclusion of other prospectors, and at his leisure prospect and mark out his claims. *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

And the location of a vein or lode as running in a certain direction, not marked or developed for years, but simply indicated by the notice, is invalid as against a claim subsequently located on ground different from that indicated, after a development of the latter claim without objection, although subsequent explorations of the first location disclose the fact that the vein in its true course covers the subsequent claim. *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 221.

So, Mont. Pol. Code, § 3610, providing that any discoverer of a mineral deposit may locate a claim on a vein, lode, or deposit by posting a certain notice showing the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side from the center of the vein, and the general

course of the vein or lode as near as may be; and § 3611 thereof, as amended by Sess. Laws 1901, p. 140, requiring the locator, within sixty days from the posting of the notice, to do certain discovery work on the claim,—do not empower a locator, by posting his notice, to withdraw absolutely from the public domain and appropriate for a period of sixty days an area thereof equal to a circle whose radius is the longest distance claimed along the lode from the point of discovery, so that any other location made on any part of this area during this period is invalid; they only preclude trespassers from the acquisition of rights within such area which would interfere or conflict with the right of the prior discoverer to swing his claim so as to lay it along a lead after his explorations demonstrate the strike; and, after the first discoverer has completed his work and located his claim, a junior discoverer is secure in any location made by him in the meantime upon other portions of the area, not in conflict with the rights of the first discoverer; and where, in such case, the first discoverer fails to fulfil the conditions subsequent by the completion of his location after posting his notice, such failure does not cause lands within his circle, located by the junior discoverer, to revert to the public domain, so as to defeat the junior location. *Helena Gold & I. Co. v. Baggaley* (Mont.) 87 Pac. 455.

The purpose of these statutes, together with § 3612 thereof, providing that within ninety days there must be filed in the office of the county clerk a statement showing the number of linear feet claimed in length of the lode along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein, the dimensions and location of the discovery shaft, or its equivalent, is that the claim may be identified by the notice, so that one going on the ground with it may find the claim and know from the evidence there found that the statute has been complied with, and to do away with the practice, previously prevailing, whereby one person, with little labor, could make a number of locations in the same locality, and thus withdraw from exploration by other prospectors a large area of the public land. *Ibid.*

In the above case, it was said that, if *Sanders v. Noble*, 22 Mont. 115, 55 Pac. 1037, and *Bramlett v. Flick*, *supra*, are to be understood as declaring the law to be that the posting of the preliminary notice effects for the time being an absolute withdrawal of the whole area of the circle for exploration, they are in conflict with the decision of *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716, *supra*, V. a., 3, (b), and that they must be construed as modified so as to conform to this decision.

So, in *Adams v. Crawford*, 116 Cal. 496, 48 Pac. 488, it was held that persons completing the location of a mining claim in a proper manner were entitled to hold it as against another who had previously made a discovery thereon, the case appearing to 7 L.R.A. (N.S.)

turn on the question of priority of marking the ground.

And in *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76, the opposing rule, that a discoverer is not entitled to a reasonable time in which to continue his explorations, and trace the course or strike of the vein or lode, in the absence of local rules or regulations governing the matter; but that he must immediately mark the claim upon the ground in order to hold it against a subsequent location peaceably made,—was announced and acted upon.

In the above case, *Gleeson v. Martin White Min. Co.* 13 Nev. 444, *supra*, was explained, the court saying that there was a *dictum* in that case to the effect that a discoverer of a vein might have a reasonable time to trace its course before being compelled to define his surface claim, but that no such question was presented by the record. And *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, and *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, *supra*, were distinguished upon the ground that they both arose under the laws of Colorado, which allowed the discoverer a specified time for exploration before marking the boundaries of his claim. And *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793, *supra*, VII, b, was distinguished on the ground that in that case the party in possession was held to have a right to hold the surface while he was seeking for a vein or lode believed to exist thereon, as against all parties not having a better right thereto; which is simply an application of the general doctrine that one in possession of real property may hold the possession as against all persons except those who can show a better right.

Marking boundaries on the ground evidences, and logically follows, and is clearly connected with, the location of the boundaries of a mining claim; and the subdivision of this note with reference to time of marking boundaries on the ground, *infra*, XI, c, should be considered in this connection.

f. Laying over adjoining claims.

1. Right to overlap.

A locator of a mining claim may, for the purpose of conforming to the Federal statute by making his end lines parallel, and in order to include all the unoccupied surface to which he is entitled, with all the underground and extralateral rights which attach to possession and ownership of the surface, lay any of his lines or corners within, upon, or across the surface of a valid senior location, or of other private property, where he claims only unoccupied ground; and this can be done without objection on the part of the owner. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co.* 106 Fed. 471, *Reversed on other grounds* 52 C. C. A. 219, 114 Fed. 417; *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min.*

& Developing Co. 134 Fed. 268; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; Re Stranger Lode, 28 Land Dec. 322; Re Hallett & Hambur Lodes, 27 Land Dec. 104; Re Hidden Treasure Lode, 29 Land Dec. 156; Re Grassy Gulch Placer Claim, 30 Land Dec. 191.

And an objection by the owner of a mining location to the act of another in locating a mining claim, of overlapping his claim for the purpose of securing extralateral rights, to be effectual, must be made at the time of the location of the overlapping claim; subsequent objections are of no effect. Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 134 Fed. 268.

Though a mining location is laid largely upon previously appropriated ground, where the discovery shaft is located, and the discovery is made, not within the boundaries of any other claim, but upon unappropriated land, the location vests in the locator all the unappropriated public land within its limits, and every vein whose apex is found in such unappropriated public land within the surface lines of the claim thus secured, extended downward vertically, whether it is all or only part of the tract within the boundary lines of the claim. Crown Point Min. Co. v. Buck, 38 C. C. A. 278, 97 Fed. 463.

And this is the rule though the unclaimed ground occupied by the apex is but 10 feet, and the overlap is 1.490 feet. Bunker Hill & S. Min. Concentrating Co. v. Empire State-Idaho Min. & Developing Co. supra.

Where the end lines of a mining claim are substantially parallel with each other the requirements of the law are satisfied; and the fact that one end of the claim extends beyond, or is intercepted by, another claim, may be disregarded. Cheesman v. Shreeve, 40 Fed. 787.

And locating a mining claim so that one corner thereof is cut off by a senior claim does not make it a five-sided figure without parallel end lines, which will give the locator no extralateral right to follow his lode or vein on its dip; in such case an end line may be drawn at the point where the vein or lode passes out of the junior location into the senior one. Tyler Min. Co. v. Sweeney, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284.

Nor does the requirement of the Federal statute that a location must be distinctly marked on the ground so that its boundaries can be readily traced make it necessary that the marks should be upon the actual ground included within the mining claim; they may be upon any ground adjoining, near enough readily to designate the boundaries. West Granite Mountain Min. Co. v. Granite Mountain Min. Co. 7 Mont. 356, 17 Pac. 547.

And the facts that a stake of a mining claim was placed on another existing claim, and that a portion of the claim sought to be located is included within the existing claim as marked on the ground, do not invalidate the location, where the locator in-

tended to claim only that portion of the premises not in conflict with the other claim. Perigo v. Erwin, 85 Fed. 904; Doe v. Waterloo Min. Co. 55 Fed. 11; West Granite Mountain Min. Co. v. Granite Mountain Min. Co. supra.

In West Granite Mountain Min. Co. v. Granite Mountain Min. Co. supra, Hauswirth v. Butcher, 4 Mont. 307, 1 Pac. 714, supra, X. d, 2, (c), was distinguished upon the ground that in that case the stakes were set beyond the limits fixed by the statute, while in this case they were set within the statutory limits, but on adjoining claims.

Nor is the rule affected by the fact that the senior conflicting claim has been patented; and any of the location lines of a lode claim may, if established openly and peaceably, be laid within, upon, or across the surface of patented lode-mining claims for the purpose of embracing and including the discovery vein, and all other veins apexing within the free and unappropriated ground within such location lines, and the ground itself as well, and of defining and securing extralateral underground rights upon all such claims. Re Hidee Gold Min. Co. 30 Land Dec. 420, Apparently Overruling, though not mentioning, the contrary holding in Re Grassy Gulch Placer Claim, supra.

And the same rule applies to laying lines within, upon, or across the surface of patented agricultural lands. Re Alice Lode Mining Claim, 30 Land Dec. 481.

And a mining claim legally located may be surveyed according to the lines of the location as marked on the ground, though the survey lines may, in part or in whole, fall upon patented lands, where sufficient data are furnished thereby, or by the records of the surrounding or overlapping patented claims, considered in connection therewith, to enable the government in issuing its patent to make proper exclusion from the patent of all previously patented lands embraced within the exterior lines of the survey, and such a survey is regular and lawful as a basis for a patent. Re Mono Fraction Lode Mining Claim, 31 Land Dec. 122.

Nor does the fact that a location was made in the nighttime, and that by mistake its marks and boundaries were placed over and upon adjoining claims, affect the validity of the location, so far as the ground attempted to be located was vacant. Doe v. Tyler, 73 Cal. 21, 14 Pac. 375.

The lateral rights of the locator of a mining claim are not saved by the fact that his claim as located had parallel end lines, however, where he set his stakes upon another claim, and claimed some of the ground belonging to it, and, when compelled to relinquish such ground, his end line was destroyed. Montana Co. v. Clark, 42 Fed. 626.

And the junior locator's rights do not extend beyond an end line passing through the point where the lode in its strike or onward course intersects the exterior line of the senior location. Re Consolidated Min. Co. 11 Land Dec. 250; Re Stranger Lode, 29

Land Dec. 322; Re Engineer Min. & Developing Co. 8 Land Dec. 361.

And a land-office regulation to this effect is not in conflict with, but is in conformity to, and in aid of, Federal statutory provisions restricting locations on veins or lodes to the public domain, and giving exclusive right of possession and enjoyment of all the surface included within the lines of the locations, and withholding from a locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim the right to enter upon the surface of a claim owned or possessed by another. Re Correction Lode, 15 Land Dec. 67.

And in such case it is proper to require the end lines to be readjusted so as to be parallel. Re Engineer Min. & Developing Co. supra.

The surface right of a mining claim is simply an adjunct to the lode, and cannot extend beyond the point where the lode intersects the exterior line of a senior location. Re Plevna Lode, 11 Land Dec. 236; Re Correction Lode, supra.

Nor does the provision of U. S. Rev. Stat. § 2336, U. S. Comp. Stat. 1901, p. 1436, for a right of way through a space of intersection, which divides the two sections of an intersected vein or lode for the purpose of conveniently working the mine, have any application to a case where the end of the lode claim is made to project into the surface of another prior claim. Re Correction Lode, supra.

So, where a person locates two mining claims which interfere with each other, the junior location includes only so much ground as is exclusive of the senior one. Golden Terra Min Co. v. Mahler, 4 Morrison, Min. Rep. 390.

A location of a mining claim conflicting with another prior location based upon a proper discovery, however, is valid against all persons except the prior locator; and, if the claim of the prior locator is abandoned, forfeited, or any part of the claim in conflict is not rightfully held by the prior locator, the subsequent location attaches to so much of the ground, not legally held by the prior locator, as is within the lines of the subsequent location. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428.

And when part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of the junior claim, whose possession thereof is not interrupted, the location will continue to include the land in conflict. Cheesman v. Hart, 42 Fed. 98.

So, where a person located a mine so that one corner overlapped another's location, the fact that he did not contest the latter's right to the overlapping piece, and thereby allowed him to take it, does not deprive him of his right to draw the end line of his location so as to leave out the overlapping piece at or near the point where the lode actually passes out of the part retained by him, and thus save his extralateral rights to that

point. Tyler Min. Co. v. Sweeney, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284.

2. Effect of intersection by senior claim.

Where a mining location is intercepted by another valid claim going through its perpendicularly or obliquely, the line of intersection becomes the end line of the location, where the location extends beyond the intersecting claim. Cheesman v. Hart, supra.

A person having a discovery on a small tract of land, in which there is a vein or lode, cannot make a valid location on that vein or lode of a portion of the land not contiguous, and separated therefrom by lands held and owned by others. Re Griffin, 2 Land Dec. 736; Re Silver Queen Lode, 16 Land Dec. 186. And see Re Tomera Placer Claim, 33 Land Dec. 560, supra, X. c. 1.

A lode claim which is divided into two parts by an intersecting patented mill site is good only as to that part which contains the discovery shaft and improvements. Re Andromeda Lode, 13 Land Dec. 146; Re Howard, 15 Land Dec. 504; Re Mabel Lode, 26 Land Dec. 675.

And a lode-mining claim intersected by a mill site can stand for only one of the two parts, and the discovery of mineral must appear on the part sought to be sustained. Re Paul Jones Lode, 28 Land Dec. 120.

And, where there is a conflict between a mining claim and a prior pre-emption claim the lands embraced within the mining claim, that lie beyond the point where the lode or vein intersects the pre-emption claim, must be excluded from the mineral survey. Re Bi-metallic Min. Co. 15 Land Dec. 309.

Nor does the provision of U. S. Rev. Stat. § 2336, relative to the priority of title upon the intersection of two or more veins, have any application to, or affect, a lode claim divided into two parts by an intersecting patented mill site, so as to save the part not containing the discovery shaft and improvements. Re Andromeda Lode, supra.

But, where two veins intersect, the junior location has, by the provision of that act, a right of way through the space of intersection for the purpose of convenient working of a mine; and an entry based upon such subsequent location might be allowed for noncontiguous portions of ground. Re Silver Queen Lode, supra.

And, where a lode-mining claim is located across a mill-site claim so that the mill-site claim divides it into two parts, if the same lode or vein, upon the discovery of which on one side of the mill site location was based, has also been discovered in the ground on the other side of the mill site, the patented mill site furnishes no valid objection to the validity of the location. Re Paul Jones Lode, 31 Land Dec. 359.

So, in a proper case a location of a mining claim may be extended to include land properly subject to location, entirely across a prior excluded location and the end line established at a point within a junior excluded location. Re War Dance Lode, 29 Land

Dec. 256; *Re Hustler & New Year Lode Claims*, 29 Land Dec. 668.

And a lode-mining claim so located as to cross and overlap a prior valid location entitles the locator to the lode throughout its entire depth, up to the point where in its onward course or strike it intersects the side lines of the prior location and passes within it; and confers upon him the exclusive right of possession and enjoyment of all the surface included within the lines of the location, except the parts within the excluded conflicts, and of all veins and lodes and ledges throughout their entire depth the top or apex of which lies within such surface lines. *Re Hustler & New Year Lode Claims*, supra.

And where a placer and a lode mining claim were so located that the placer claim cut the lode claim in two parts; and, on an application for a patent for the lode claim, the Land Department refused to patent the whole because of its division, but gave the locator the right to elect which of the two tracts should be patented,—the decision did not cancel the entry made by the plaintiff for the patent on the whole, and so long as no allegation was made by the locator and no further action taken by the Land Office, neither part of the location was restored to the public domain and reopened to location. *Gurney v. Brown*, 32 Colo. 472, 77 Pac. 357.

Where a lode-mining location is made across a patented mill site, and no vein or lode is shown to exist in the ground on the one side of the mill site, however, it cannot be presumed, merely from the discovery of the vein in the land on the other side of the mill site, in view of the fact that the mill site was patented as nonmineral ground, that the vein so discovered passes through the mill site and extends into the ground on the other side thereof. *Re Paul Jones Lode*, supra.

XI. Marking upon the ground.

a. Provision for and purpose of.

It is provided by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, that the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced.

And this proposition has been announced in words, or in substance, in many cases, among which are, *Elgin Min. & Smelting Co. v. Iron Silver Min. Co.* 4 McCrary, 279, 14 Fed. 377, Affirmed in 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *Book v. Justice Min. Co.* 58 Fed. 106; *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, Affirming 55 Fed. 11; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, Affirming 85 Fed. 905; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Reilly v. Berry*, 2 Ariz. 272, 15 Pac. 26; *Blackmore v. Reilly*, 2 Ariz. 442, 17 Pac. 72; *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856; *Daggett v. Yreka Min. & Mill. Co.* (Cal.) 86 Pac. 968; *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752; *Gilpin County Min. Co. v. 7 L.R.A. (N.S.)*

Drake, 8 Colo. 586, 9 Pac. 787; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713; *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480.

In *Doe v. Waterloo Min. Co.* supra, it was said that it cannot be asserted that *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361, overruled earlier California cases asserting this requirement, since the question presented in that case was the sufficiency of a location notice under the local rules of the district, and not as to the markings of the boundary of a claim.

The object of the law in requiring the location of a mining claim to be marked upon the ground is to fix the claim and prevent swinging or floating, so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations, may be able to ascertain exactly what has been appropriated, in order to make their locations upon the residue. *Book v. Justice Min. Co.* and *Daggett v. Yreka Min. & Mill. Co.* supra; *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037; *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

This provision has been repeated in words, or in substance, by the statutes of a number of the mining states and territories; and a number of them have supplemented the requirement of the Federal statute by specifying the particular manner in which a claim shall be marked, and such supplementary provisions have been acted upon and sustained by both the local and the Federal courts, see *infra*, XI. d, 2.

The right of a state to pass acts supplementing the Federal mining law with reference to marking boundaries is recognized by U. S. Rev. Stat. § 2324. *Copper Globe Min. Co. v. Allman*, 23 Utah. 410, 64 Pac. 1019.

And local rules and regulations with reference to marking mining claims have been widely adopted, and their validity has been sustained. *Myers v. Spooner*, 55 Cal. 257.

b. Necessity of compliance.

Compliance with the requirement that the location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced, is necessary to its validity. *Sanders v. Noble*, supra; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Gelcich v. Moriarty*, 53 Cal. 217; *Redden v. Harlan*, 2 Alaska, 402; *Bulette v. Dodge*, 2 Alaska, 427; *Charlton v. Kelly*, 2 Alaska, 532.

It is a prerequisite to the vesting in a competent locator of a complete possessory title to a lode-mining claim. *Erwin v. Perego* and *Sweet v. Webber*, supra.

The ultimate fact in determining the validity of location of a mining claim is the placing of such marks upon the ground as to identify the claim. *Eaton v. Norris*, supra.

And evidence of the staking of a mining location is competent, in an action of forcible entry and detainer brought by the loca-

tor, to show the extent of the claimant's possession. *Boardman v. Thompson*, 3 Mont. 387.

A location is not complete until it is distinctly marked on the ground, so that its boundaries can be readily traced. *Gleeson v. Martin White Min. Co.* supra.

And failure so to mark off the boundaries invalidates the claim. *White v. Lee*, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363; *Anthony v. Jillson*, 83 Cal. 293, 23 Pac. 419; *Gelcich v. Moriarty*, supra.

Since the passage of the act of Congress (Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426), providing that the location of a mining claim must be definitely marked on the ground, so that its boundaries can be readily traced, a party can show a right to the possession of a mining claim when no patent has been issued, only by showing actual possession, as against a mere wrongdoer, or a compliance with the regulations of that act. *Funk v. Sterrett*, 59 Cal. 613.

Nor is the failure to mark the location of a mining claim upon the ground cured by an admission, upon the trial of an action involving the issue of location, that the boundaries of the claim were identical with those of the ground sued for, the objection going to the regularity of the location. *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752.

The boundaries of a mining claim are fixed by the original location, consisting of recording a notice, planting stakes, etc., and not by subsequent recognition of different boundaries. *Overman Silver Min. Co. v. American Min. Co.* 7 Nev. 312.

Though evidence of the erection of a compromise monument along the alleged line between two disputed claims, offered not for the purpose of establishing a boundary, but to show that the parties ran lines by agreement, so as not to interfere with each other, and placed the monument for the purpose of showing that they had done so, and for the purpose of showing where the location was as it was understood by all the parties, is not subject to objection as an attempt to establish the location of a mining claim by parol. *Stemwinder Min. Co. v. Emma & L. C. Consol. Min. Co.* 2 Idaho, 456, 21 Pac. 1040, Affirmed in 149 U. S. 787, 37 L. ed. 960, 13 Sup. Ct. Rep. 1052.

Nor is a location of a mining claim valid where local rules and regulations requiring the boundaries to be marked with a ditch and with stakes placed at the corners were not complied with. *Myers v. Spooner*, supra.

And the circumstance that ground located as a mining claim was extremely rough and mountainous does not relieve the locator of the obligation imposed upon him by law so to mark the boundaries that the location can be readily traced. *Gird v. California Oil Co.* 60 Fed. 531.

A subsequent locator of a mining claim cannot object that a prior location thereof was not sufficiently marked on the ground at the time of its location, however, where such prior location was sufficiently marked before the subsequent locator made any location or acquired any rights. *North Noon-* 7 L.R.A. (N.S.)

day Min. Co. v. Orient Min. Co. 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

And the failure of a locator of a mining claim to mark the location upon the ground so that its boundaries can be readily traced does not prevent a successor in interest, entering into possession of part of the claim under a deed conveying the whole property by metes and bounds, from having constructive possession, which will entitle him to maintain ejectment against an intruder who subsequently attempts location, but fails to mark the boundaries of his location upon the ground. *Neubaumer v. Woodman*, 89 Cal. 310, 26 Pac. 900.

Nor is it necessary that the marking of the location of a mining claim on the ground be done by the locator in person; it may be done by his agent or employees. *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209.

And a finding, in a suit to quiet title to mining claims, that the marks of location were of such a character that it is evident that the boundaries can be readily traced, is sufficient; and in such case, if there is, in addition to the special finding, a general finding to the contrary, the general finding will be disregarded or set aside. *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856; *Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841.

c. Time of.

Where the time within which a location must be marked upon the ground is expressly prescribed by a state statute, a proper marking within the prescribed time is sufficient. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560. Reversing 3 McCrary, 19, 8 Fed. 860; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

And the rule has been asserted that, under U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, providing that no location of a mining claim shall be made until the discovery of the lode or vein within the limits of the claim located; and that the location must be distinctly marked on the ground so that its boundaries may be readily traced,—a locator has a reasonable time after discovery in which to mark the boundaries of his claim. *Union Min. & Mill. Co. v. Leitch*, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829; *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

Under this rule, where a prospector discovered mineral on the 16th day of September, and set discovery stakes then, and partially staked and marked his claim on the 17th, and on the 18th completed the staking and marking according to law, the discovery and location date from the 16th of September, and take precedence over any other discovery or location made after that date on the same, or part of the same, ground. *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

And eight days in which to mark the boundaries of a mining claim upon the

ground after discovery is not an unreasonable time, where, after discovery, the provisions of the locator and his party ran out, and they were compelled to go to the nearest supply station to renew their supply. *Union Min. & Mill. Co. v. Leitch*, supra.

In the above case, *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409, and *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76, supra, were disapproved as overlooking the general rule, that, when no time is limited for the doing of an act, a reasonable time therefor is impliedly given.

But, even under this rule, the law does not permit a discoverer, after having posted his notice, to leave his claim incomplete and go in quest of other claims, and post his notices here and there over the country, to the exclusion of other prospectors, and at his leisure prospect and mark out his claims. *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

What constitutes a reasonable time after discovery within which to mark the boundaries of a mining claim upon the ground in this connection is a question of law, depending upon the circumstances of each particular case. *Union Min. & Mill. Co. v. Leitch*, supra.

On the other hand, however, the contrary rule has been asserted, that a person locating a mining claim must, under the act of Congress of May 10, 1872, in the absence of any organized mining district governed by miners' rules, as soon as the claim is discovered, mark off its boundaries on the ground; and that he is not entitled to a reasonable time after the discovery in which to continue his explorations and trace the course or strike of the vein or lode before being required to mark his boundaries on the ground. *Patterson v. Tarbell*, supra.

And that, where two parties claim to have made locations of a mining claim in themselves valid, and the question is, Which of the two has made the prior location?—the prior actual or constructive possession, evidenced by posting a notice and marking the boundaries in the manner required by statute, must prevail, at least unless there has been unreasonable delay in recording the notice. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

This rule is based upon the theory that the act of Congress authorizing the location of mining claims is, in effect, an offer by the government to grant to its citizens and to those who have declared an intention of becoming such a certain definite portion of the public mineral lands, on condition that a discovery of a mineral-bearing lode or vein is made thereon, and the surface of the ground claimed along such vein or lode is distinctly marked on the ground so that its boundaries can be readily traced; and, until these conditions are complied with, no right is conferred as against another valid location. *Patterson v. Tarbell*, supra.

And under it, it is held that a notice posted on the ground, with reference to location of a mining claim, gives no information, and is of no effect, unless it appears that

the party posting it is proceeding to indicate with reasonable diligence, or is about to indicate, the boundaries by marking them. *Gregory v. Pershbaker*, supra.

Where a person is on the ground actually engaged in making a location, however, another cannot locate over him. *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409.

And where a discovery of mineral has been made, and a proper notice of location filed, the claim is good and valid if the boundaries are marked on the ground before intervening rights have accrued. *Brockbank v. Albion Min. Co.* 29 Utah, 367, 81 Pac. 863.

A subsequent locator of a mining claim cannot object that a prior location was not marked in time, provided it was sufficiently marked before his location. *Crown Point Min. Co. v. Crismon*, 39 Or. 364, 65 Pac. 87.

And this is so though the statute prescribes certain conditions which must be performed in order properly to locate a mining claim, and provides that a failure to comply therewith shall annul every attempted location. *SHARKEY v. CANDIANI*.

But a locator of a mining claim, who delays marking the boundaries thereof, delays at his peril, since he thereby assumes the risk of intervening rights of third persons. *Brockbank v. Albion Min. Co.* supra.

On this question, see also supra, IX. f, and infra, XIV. a.

d. Sufficiency of.

1. Under the Federal statute.

(a) General rules.

Any marking upon the ground, whether by stakes, monuments, mounds, or written notices, whereby the boundaries of a mining claim can be readily traced, is a sufficient compliance with U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, requiring that the location shall be distinctly marked on the ground. *Oregon King Min. Co. v. Brown*, 55 C. C. A. 626, 119 Fed. 48; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

The statute does not require that the boundary lines shall be indicated by physical marks or monuments. *Oregon King Min. Co. v. Brown*, supra.

The marking on the ground may be by any physical marks placed upon the ground, or natural objects already there, which of themselves, or in connection with writings, signs, or other things upon the ground, will tend to inform one seeking to identify the claim as to the quantity and identity of the land claimed. *Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777.

And the physical marks or natural objects which may be used to mark a mining claim may be stakes driven in the ground, stone monuments, blazed trees, confluences of streams, mining shafts, mountain peaks, crossings of roads, or streams. *Ibid.*

Nor, in determining whether the marking

of a location is sufficient, is the court confined to the monuments placed at the corners of the claim at the inception of the location for the purpose of marking it; it may consider, also, all other objects placed on the ground, either then or subsequently, prior to the inception of the conflicting claims, for the purpose of serving either as monuments, or otherwise. *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856.

And a location of a mining claim by the adoption of stakes already upon the ground, which so distinctly mark the location that the boundaries can be readily traced, is not open to the objection that the locator should have actually put up new stakes. *Conway v. Hart*, 129 Cal. 483, 62 Pac. 44.

So, the locator of a mining claim, in marking his claim on the ground so that its boundaries can be readily traced, need not be exact in running the lines or in fixing the corner or other posts; substantial compliance with the law is sufficient. *Eilers v. Boatman*, 3 Utah, 159, 2 Pac. 66.

To be valid, however, a mining locator must so mark his claim upon the ground that any person of reasonable intelligence can go upon the ground, either with or without a copy of the notice of location, and readily trace the claim out and find its boundaries and limits. *Willeford v. Bell* (Cal.) 49 Pac. 6.

The requirement that the location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced, is intended to require that the boundaries shall be so designated by marks that they can be ascertained by an inspection of the ground without the aid of a surveyor, and can be readily traced thereby. *Worthen v. Sidway*, supra.

And whether a witness found the boundaries of a claim without assistance, and whether the blazing upon the posts appeared to be old or new, and whether the marks on the boundaries of the claim appeared to be old or new, and whether he could readily find the blazes on the trees along the end line, and whether they could be traced or observed from one to the other,—are questions of fact, and not objectionable as calling for the opinion of the witness. *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869.

In the above case, *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725, supra, VIII. d. 3, (a), was distinguished and explained upon the ground that in that case the question whether the opinions of engineers or prospectors can be admitted for such a purpose was reserved for the court.

The question as to the sufficiency of the marking of a mining claim to enable the location to be traced always depends, to a great extent, upon the conformation and condition of the ground located. *Book v. Justice Min. Co.* 58 Fed. 106; *Charlton v. Kelly*, 2 Alaska, 532.

If the condition of land upon which a mining location was made was such that a person passing over the land could see nothing to indicate that another had made a location; or if whatever had been done toward

such a location at some prior time was so hidden that persons honestly looking for mineral lands upon which to locate could not be expected to observe it, it would not be such a location as the statute contemplates, and as would sever the particular tract from the mineral lands of the United States; and it would not avail against a person in good faith, making a subsequent location according to law. *Moore v. Steelsmith*, 1 Alaska, 121.

And a location of a mining claim on a hill covered with a dense forest might require more definite marking than a location on a bald mountain, where the stakes, wherever placed, could be readily seen. *Book v. Justice Min. Co.* supra.

So, where the country is broken, and the view on a mining location from one corner to another is obstructed by intervening gulches and timber and brush, in marking the location it is necessary to blaze trees along the lines, or cut away the brush, or set more stakes at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines, so that the boundaries may be readily traced. *Ledoux v. Forester*, 94 Fed. 600; *Charlton v. Kelly*, supra.

And a mining claim the locators of which marked their boundaries with stakes so as to include 1,763 feet in length, the statute limiting a lode location to 1,500 feet in length, is not sufficiently marked on the ground within the meaning of the statute, and is void for uncertainty. *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320.

But a mining claim is sufficiently marked on the ground where the stakes and monuments are set at accessible places, and the inaccessible parts are distinctly referred to by courses and distances, which are sufficient to point out, to anyone honestly endeavoring to ascertain, where the lines of the claim run. *Eilers v. Boatman*, supra.

Whether or not a mining claim is so marked upon the ground that its boundaries can be readily traced is a question of fact to be determined from proof *aliunde*. *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832.

And it is one for the jury in ejectment. *Charlton v. Kelly*, supra.

(b) Particular marking.

Fencing a mining claim is not necessary to the possession thereof if its boundaries are sufficiently marked in some other way. *Rogers v. Cooney*, 7 Nev. 213; *Garrard v. Silver Peak Mines*, 82 Fed. 578, Affirmed in 36 C. C. A. 603, 94 Fed. 983.

And as a general rule stakes and stone monuments placed at each corner of a mining claim, and at the center of the end lines, is a sufficient marking of the boundary lines under the Federal statutes. *Southern Cross Gold & S. Min. Co. v. Europa Min. Co.* 15 Nev. 383; *Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841.

Nor need corner stakes of a mining lo-

cation be marked with the name of the claim, unless the boundaries could not be readily traced without it. *Smith v. Newell*, 86 Fed. 56.

And where the relative position of stakes of a mining claim showed their connection and indicated a parallelogram, and the discovery notice nailed on the discovery stake and placed within the parallelogram gave all the information that the markings on the stakes would have given, and there is no difficulty in seeing the corner stakes, the claim is sufficiently marked on the ground, though its name was not marked on the corner stakes. *Ibid*.

So, where two claims adjoin each other, and each is marked at the corners by four oak stakes about 1½ feet in length, flattened on two sides and driven into the ground 4 or 5 inches, two of them being at the ends of the dividing line and common to both claims; and some of the stakes are in brush and others in open ground; and in the middle of the dividing line is an oak tree blazed on two sides, on which the notices of location are posted; and in these the claims are described respectively by courses and distances, running from the tree to a stake, and from stake to stake to the point of beginning; and there is also opened up and uncovered a ledge a considerable distance from the tree each way; and a house is built upon one of the claims near the common boundary,—the marking is sufficient. *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856.

And proof that monuments were erected at the center of each end of mining claims, and also at each of the four corners of the claims; and that notices of location were posted on the initial monument of each; and that the notices were duly recorded, and that they appeared to be sufficient in every respect,—is sufficient to sustain the location, as against the evidence of adverse claimants that they saw no other than the initial monuments, though they looked for them. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488.

But the requirement of the mining laws that mining claims must be so marked upon the ground that the boundaries thereof can be readily traced is not fulfilled by simply setting a post at or near the place of discovery, and setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground is such that a person accustomed to tracing the lines of mining claims could, after reading the description of the claim in the posted notice of location, by a reasonable and bona fide effort to do so, find all the stakes and thereby trace the lines. *Ledoux v. Forester*, supra; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594.

And whether or not the conformation of the land was such that monuments or stakes placed at the center of each end, and at each corner, of a mining claim, were such that the boundaries thereof might be readily traced, is a question for the jury on an issue as to the validity of a location. *Taylor v. Middleton*, supra.
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So, where the corners of a mining location, only, are marked, and no side lines are laid down, the question whether or not the boundaries can be traced therefrom is one of fact for the trial court, in an action involving that issue. *Du Prat v. James*, 65 Cal. 555, 4 Pac. 562.

And where a mining claim upon a comparatively barren hillside was marked with stakes 2 by 4 inches and 4 feet long, posted one at each of the four corners, upon which stakes were letters or numbers designating the corners of the claim where the stakes were posted, and, at places where the stakes could not be driven in the ground because of the snow, monuments of rock were placed around them to hold them in place, and in the spring they were renewed, it was so marked that its boundaries could be readily traced, within the meaning of the statute. *Book v. Justice Min. Co.* 58 Fed. 106.

So, evidence, in an action to quiet title to a mining claim, that the locator marked the corners by placing a stake or blazing a tree at each corner of the claim, and in places brushed out the lines so that a person could get through, and placed a notice in the center of the claim defining its boundaries, is sufficient on the question of marking the location on the ground. *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183.

Nor is the mere fact that locators of a mining claim did not place a monument at a certain corner of the claim they intended to locate fatal to the location as a matter of law; it would still be good if it was so distinctly marked on the ground that its boundaries could be readily traced. *Anderson v. Black*, 70 Cal. 226, 11 Pac. 700.

The omission to stake one corner of a mining location does not invalidate it where the other three corners, the center of the two end lines, and the point of discovery were appropriately marked. *Warnock v. DeWitt*, 11 Utah, 324, 40 Pac. 205.

And evidence that a marked stake existed at a point other than that at which an adverse claimant claimed that it was located warrants evidence in rebuttal, that no such stake stood at such place. *Chamberlain v. Raymond*, 3 Utah, 117, 1 Pac. 850.

Whether or not the omission to mark a corner of a mining location is fatal, is a question for the jury, in an action involving the validity of the location. *Anderson v. Black*, supra.

So, the statutory requirement that the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced was not insufficiently complied with, as matter of law, because the corners only were established, and no side or end lines were in any way laid down; if the stakes or mounds at the corners were prominent and permanent monuments, by which, and the descriptions in the notices, the claims could be identified, it is sufficient. *Du Prat v. James*, supra.

Nor is a mining claim marked by means of two stakes at the ends of the claim on the lines of the croppings, and by a location monument at the point of discovery, without

stakes at the corners, insufficiently marked on the ground so that its boundaries cannot be readily traced, where the claim is required to be in the form of a parallelogram with parallel ends, and to extend an equal distance each side of the vein. *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

And, if the center line of the location of a lode claim lengthwise along the lode is marked by a prominent stake or monument at each end thereof, and upon one or both is placed a written notice showing that the locator claims the length of said line from stake to stake and a certain specified number of feet in width on each side of said line, the claim is so marked that the boundaries may be readily traced, within the requirement of the statute. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522.

But posting a notice on a tree at each end of a mining claim is not a sufficient compliance with the Federal statute. *Holland v. Mt. Auburn Gold Quartz Min. Co.* 53 Cal. 149.

Nor is the placing of a monument upon a vein in a mining claim, and the posting of a notice thereon claiming a certain number of feet each way, and a specified number on each side thereof, a sufficient marking of the boundaries thereof. *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, *Affirming* 55 Fed. 11; *Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777; *Gelcich v. Moriarty*, 53 Cal. 217.

Though this was sufficient previous to the enactment of the mineral law of 1872. *Doe v. Waterloo Min. Co. supra*.

And a location of a mining claim, made by posting a notice on a house on lands sought to be appropriated, without marking the location on the ground so that its boundaries can be readily traced, is insufficient, and confers no legal claim. *Malecek v. Tinsley*, 73 Ark. 610, 85 S. W. 81.

But, while posted notices of location of a mining claim cannot be substituted for the marking, they may be an aid in determining the situs of the monuments, and they constitute a part of the marking, as does every other object placed on the ground, if it in fact does help to mark it; and this may be of particular significance where the location is followed up by actual and continued working of the claim. *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856.

2. Under local statutes and miners' regulations.

In Colorado and Wyoming a mining claim is required by statute to have its boundaries so marked upon the surface as to be easily traced by means of six substantial stakes at the corners of the claim, and one at the center of each side line thereof, which stakes must be of substantial character, and sunk in the ground, and newed on the two sides of the corner stakes which are in toward the claim, and the side stakes on the sides which are toward the claim. *Cheesman v. Shreeve*, 7 L.R.A. (N.S.)

40 Fed. 787; *Sherlock v. Leighton*, 9 Wyo. 297, 63 Pac. 580, 934.

Statutory monuments substantially complying with these requirements control courses and distances; so that, where there is a variation between the course and distance given in the certificate of location and the monument on the ground, the latter will prevail. *Pollard v. Shively*, 5 Colo. 309.

And a stump of sufficient size and stability, standing at a point where a statutory post should be located in locating a mine, may be hewed, marked, and adopted as a location post; but the descriptive survey should give both its real and assigned character, otherwise it will not satisfy the call of the location certificate. *Ibid*.

But cutting a letter into the solid rock, either at the corner of a mining claim, or at a given distance therefrom, is not equivalent to a stake planted in the ground, or in a pile of stones, within the meaning of *Mills's Case*. Anno. Stat. § 3153, providing that the surface boundaries shall be marked by six substantial posts sunk in the ground; or, where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones. *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505.

And the provision of that act, that, when one or more of the posts which must be erected for the purpose of marking the surface boundaries of a mining claim fall upon precipitous ground, and the proper placing of them is impracticable, or dangerous to life or limb, it shall be legal to place the post or posts at the nearest practicable point suitably marked to designate the proper place, cannot be invoked when the setting of the stake at the true corner is merely difficult or inconvenient. *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; *Cresus Min. Mill. & Smelting Co. v. Colorado Land & Mineral Co.* 19 Fed. 78.

Nor does it apply where the place where the stake should be placed can be reached by a circuitous route, or by waiting until later in the season for the snow and ice to pass away. *Cresus Min. Mill. & Smelting Co. v. Colorado Land & Mineral Co. supra*.

And the fact that a corner of a mining claim falls upon a railroad embankment 12 or 15 feet in height does not excuse a failure to place a corner post at its proper place, unless it would be in such close proximity to the rails as to be interfered with by the passage of trains. *Beals v. Cone, supra*.

The requirement that the side posts of a mining location be placed in the center of the side lines, however, is satisfied if they are substantially in the center; but, where there is a discrepancy of 150 feet, they cannot be said to be in the center. *Pollard v. Shively, supra*.

And, where a mining claim is otherwise marked as required by statute, failure to place the side posts in the center of the side lines does not necessarily invalidate the location; it may still be good if the traceability of the side lines is not substantially impaired by the omission. *Ibid*.

And evidence of the marking of the boundaries of a mining claim located a number of years previously by setting posts in the ground at the four corners, and that each post was marked so as to indicate the particular corner which it represented, is sufficient to establish the proper marking of the claim, notwithstanding an uncertainty as to the placing of posts on the side lines. *Sherlock v. Leighton*, supra.

Omission to establish the center end posts or monuments is fatal to the location of a mining claim, however, under *Bellinger & C. Or. Anno. Codes & Statutes*, § 3975, providing that the boundaries of a location shall, within thirty days after the posting of notice, be marked by six substantial posts projecting not less than 3 feet above the surface of the ground, and not less than 4 inches square or in diameter, or by substantial mounds of stone and earth at least 2 feet in height; and that one of such posts or mounds shall be established at each corner and one at each center end of the claim. *Wright v. Lyons*, 45 Or. 167, 77 Pac. 81.

But a mining claim at the discovery shaft of which a notice of location was posted, and the boundaries of which were defined by blazed trees, stakes, and stumps of small trees, the tops of which were cut off 4 to 6 feet above the ground and the stumps squared, is so marked that its boundaries can be readily traced, within the meaning of the statute. *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675.

And a finding that monuments marking a mining location were originally constructed in conformity to the requirements of local rules requiring them to be 2 feet high is warranted by evidence that the locator of the claim was seen at work building them, and that he was engaged long enough in making the location to have built the monuments the required height, and that they had withstood the storms of fourteen years, which were heavy in that locality, and that some of the monuments still stood at the height of 7 or 8 inches. *Gird v. California Oil Co.* 60 Fed. 531.

Nor does the fact that a center side line and stake of a mining location was fastened to a tree by small twigs, instead of being firmly set in the ground, as required by S. D. Comp. Laws, § 2002, invalidate the location as against a junior conflicting location, where it was properly staked before the junior conflicting location became a valid claim. *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428.

So. N. M. Sess. Laws 1889, chap. 25, § 2, requires the surface boundaries of all surface claims to be marked by four substantial posts, or four monuments of stone, at each corner, such posts or monuments to be plainly marked so as to indicate the direction of such claim from each; and omission to refer to this requirement in instructing on an issue as to the sufficiency of the marking of a mining location is error. *Deeney v. Mineral Creek Mill. Co.* 11 N. M. 279, 67 Pac. 724.
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And the phrase "stake off," in the mining regulations of a district requiring the locators of lode claims to post stakes, or otherwise indicate upon the surface the ground or the vein appropriated; and that no claim shall be regarded as valid unless staked off with the owner's name, giving the direction, length, width, and date when the same was made,—refers to marking the boundaries of the claim by stakes, or, at least, to the posting of stakes along the vein or its croppings, so as to indicate to other prospectors the ground intended to be appropriated; and the requirement is not satisfied by the erection of a single stake, denominated the discovery stake, containing a notice of discovery. *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906.

e. Marking placer claims.

The provisions of the Federal statutes with reference to the marking of a location of a mining claim upon the ground so that its boundaries can be readily traced refer to placer as well as to lode claims. *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752; *Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777.

And the necessity of marking off the boundaries of a mining claim so that they can be readily traced is not dispensed with by the fact that the public surveys have been extended over the land, and the claim is for the whole of a legal subdivision. *White v. Lee*, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363; *Worthen v. Sidway*, supra. *Contra*, *Reins v. Murray*, 22 Land Dec. 409.

And merely posting a notice on a tree on lands sought to be appropriated as a placer-mining claim is not a proper location. *Worthen v. Sidway*, supra.

But where a person locating a mining claim cut off a standing tree some 6 feet above the earth, hewed the side thereof, and wrote a notice upon the tree, claiming a certain number of feet up the creek and 330 feet on each side, making a claim of 20 acres as described in the notice; and at the upper end of the claim a tree was cut in the same way, hewed on four sides, and a notice posted thereon, showing this to be the upper end of the claim, its width, the names of the claimants, etc., the location is so marked that the boundaries may be readily traced, in compliance with the Federal law. *Moore v. Steelsmith*, 1 Alaska, 121.

Nor is a placer-mining claim, marked by a blazed tree at a point where the notice of location was posted, and on one of the boundary lines, and by three corner stakes placed at specified distances from the notice and from each other, the distance of the lines leading to and from a corner at which no stake was placed being accurately stated, insufficient, within this requirement. *Waleh v. Erwin*, 115 Fed. 531.

And evidence showing that a quarter section of land located for oil-mining purposes was surveyed out carefully by a competent surveyor employed by the locator; and that the northwest corner of a certain section was the northwest corner of the quarter section constituting the location, and was found by

the surveyor as it had been located and monumented with a pile of rocks by the government surveyor; and that the lines of the quarter section were run, and stakes 2 to 3 inches in diameter and standing 1 foot above the ground were set at each corner.—is sufficient to show a substantial compliance with the requirement as to marking on the ground, though some of the monuments had rotted away and were gone, where they were originally placed about nine years before. *Temescal Oil Min. & Development Co. v. Salcido*, 137 Cal. 211, 69 Pac. 1010.

In the above case, *White v. Lee*, supra, was distinguished upon the ground that in that case no attempt of any kind had been made to monument the claim, but the claimant relied solely on the government survey as sufficient to mark the boundaries of his claim.

So, a location of a placer-mining claim of 160 acres, by an association of persons, based upon but one discovery upon the entire tract, and marked as one tract, is proper under U. S. Rev. Stat. § 2330, U. S. Comp. Stat. 1901, p. 1432, providing that no location of a placer-mining claim shall exceed 160 acres for any one person or association of persons; it is not necessary that there shall be a discovery on each 20-acre tract contained in the land sought to be located, and that each 20-acre tract shall be marked upon the surface thereof, or that a separate location of each 20-acre tract shall be made. *McDonald v. Montana Wood Co.* 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

Where the monuments put upon the ground to indicate the exterior boundaries of a placer-mining claim were few, and placed at great intervals, whether a compliance with the requirements of the Federal statute is shown is a question of fact for the jury. *McKay v. McDougall*, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669.

f. Controlling character of marks.

If the calls as to the distances and courses set out in the description of a mining claim in the notice thereof vary from the markings actually made on the ground, the latter will prevail, since it is the markings on the ground which establish the boundaries of the claim in contemplation of the statute. *Meydenbauer v. Stevens*, 78 Fed. 787; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209; *Steen v. Wild Goose Min. Co.* 1 Alaska, 255; *Upton v. Santa Rita Min. Co. (N. M.)* 89 Pac. 275.

Mining locations distinctly marked on the ground, so that their boundaries can be readily traced, are sufficient, under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, as against subsequent locators, irrespective of the posting of notices. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

And a mistake in a notice of a location, as to the direction of its lines, does not af-

fect the validity thereof, where it was described and staked off in such a manner that it could easily be identified by any prospector or other person who was desirous of ascertaining the boundaries of the particular ground that had been located. *Book v. Justice Min. Co.* 58 Fed. 106.

So, where a miner discovered a vein containing minerals, and placed a discovery stake in the ground near the vein, and commenced to mark its boundaries, and erected two stone monuments thereon, when he was compelled to suspend work by sickness, after which others went upon the ground in his behalf and completed the location, but not in precise accordance with the discovery notice put up by him, or with the subsequent monuments put up by him, subsequent conflicting locators cannot claim that they were misled by the two monuments put up by the discoverer, where the location, as finally completed, was such as to embrace the ground included between them. *Newbill v. Whitfield*, 63 Cal. 81.

Nor is a placer location void for a discrepancy between the courses and distances mentioned in the notice, and the stakes and monuments set by the locator to mark the boundaries of his claim; where there is such a conflict the stakes and monuments must prevail. *Price v. McIntosh*, 1 Alaska, 286.

So, where monuments are found upon the ground, or their position or location can be determined with certainty, the monuments govern as to the mining claim, rather than the location certificate or declaratory statement. *Treadwell v. Marrs (Ariz.)* 83 Pac. 350; *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156.

And a defective description in the record of a declaratory statement of a mining location may be cured if the stakes or monuments on the ground identify the claim. *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713.

The boundaries marked upon the ground, however, should substantially conform to the location indicated by the discovery monument and notice of location. *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

And the rule applying to the location of mining claims, that monuments should control the courses and distances, is recognized only in cases in which the monuments are clearly ascertained; if there is doubt as to the monuments, as well as to the courses and distances, there can be no reason for holding that the monuments should prevail. *Thallman v. Thomas*, 102 Fed. 935.

And, where the courses and distances of a mining location are not defined with certainty by monuments or stakes, the calls in the location notice are controlling. *Treadwell v. Marrs*, supra.

So, marking the boundaries of the surface claim, as required by statute in making a mining location, operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights; and, where the record fails in its constructive notice, the

statutory monuments must perform their statutory duty of giving actual notice; and a claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous, when the rights of an intervening locator, without notice, will be prejudiced. *Pollard v. Shively*, 5 Colo. 309.

And a map introduced in evidence for the purpose of showing the lines of a mining location is of little value in the absence of supporting evidence of a person knowing the position of the monuments which defined the lines, and where it departed from data established by the best evidence which could be produced as to the original location. *Daggett v. Yreka Min. & Mill. Co.* (Cal.) 86 Pac. 968.

Where it is sought to establish the location of a mining claim by monuments upon the ground, as against differing statements in a location certificate, the person thus seeking to establish the location must show the existence and location of these monuments. *Treadwell v. Marrs*, supra.

And the fact that the lines and monuments of an official survey on a mining location did not correspond and run identical with those of the original location affects the location, and renders it invalid, only as to the excess. *Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841.

g. Removal or obliteration of marks.

When the location of a mining claim is once sufficiently marked upon the surface so that its boundaries can be readily traced, and all the other acts of location are performed as required by law, the right of possession becomes fully vested in the locator, and cannot be divested by the removal or obliteration of stakes, monuments, marks, or notices, without the act or fault of the locator, during the time he continues to perform the necessary work upon the claim, and comply with the law in all other essential respects. *Book v. Justice Min. Co.* supra; *Smith v. Newell*, 86 Fed. 56; *Moore v. Steelsmith*, 1 Alaska, 121.

And a locator of a mining claim conflicting with a senior claim is not entitled to assert that the senior claim was not so monumented and marked that the boundaries could be readily traced, merely because the corner thereof had been moved by others, where it was originally established and marked by a monument and stake, and had never been moved by the owner, and the subsequent locator, at the time of locating, made no attempt to ascertain its lines. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 408.

Nor does the act of one of two discoverers of a mineral lode, of acquiring the interest of the other therein, and then erasing the name of the other from the notice of discovery, and changing the date thereof from the time of discovery to the time of acquiring the whole interest, and continuing in possession, developing the lode and claiming in good faith to be the owner, constitute an abandonment; and he does not lose or forfeit any rights acquired by the previous discovery by such act. *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443.

Proof of the original markings cannot be dispensed with, however, and the presumption indulged in, of their former existence and removal or destruction, though the claim was an old one which had been worked for years. *Daggett v. Yreka Min. & Mill. Co.* supra.

And, where the locator of a mining claim, who set up the monuments, afterwards died, testimony by a collocator who assisted him in making the location, but was otherwise occupied when he set up the corner monument in question, but to whom deceased afterwards pointed it out, that the monument so pointed out determined the corner of the claim, and that the monument was on a ledge of marked peculiarities easy to be remembered, is sufficient, in the absence of any reason for doubting the truthfulness of the witness, to establish that the monument had not been moved after it was first set up. *Doe v. Waterloo Min. Co.* 55 Fed. 11.

So, the testimony of witnesses that they did not see monuments when they looked for them on a location for mining purposes, some years after they were placed there, raises no presumption that they were not so placed, as against evidence that they were so placed. *Temescal Oil Min. & Developing Co. v. Salcido*, 137 Cal. 211, 69 Pac. 1010.

XII. Record.

a. Necessity of, under the Federal statute.

It is provided by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, that all records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.

Under this statute, no record of the location of a mining claim is necessary unless the laws of the state or territory, or the rules and regulations of the mining district in which the claim is located, require it. *Peters v. Tonopah Min. Co.* 120 Fed. 587; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; *Juniper Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Moore v. Steelsmith*, 1 Alaska, 121; *Anthony v. Jillson*, 83 Cal. 206, 23 Pac. 419; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Southern Cross Gold & S. Min. Co. v. Europa Min. Co.* 15 Nev. 383; *Deeney v. Mineral Creek Mill. Co.* 11 N. M. 279, 679, 67 Pac. 724; *Payton v. Burns*, 41 Or. 430, 69 Pac. 134.

It is necessary only when made obligatory by local regulations. *Southern Cross Gold & S. Min. Co. v. Europa Min. Co.* supra.

And, except in jurisdictions or districts in which a record of a mining claim is made

an act of location, or one of the acts necessary to constitute location, a location properly made is complete and perfect, though not recorded. *Jupiter Min. Co. v. Bodie Consol. Min. Co. and Payton v. Burns*, supra.

The mining laws of Congress do not require a record, but provide what a record shall contain when it is required by local rules. *Jupiter Min. Co. v. Bodie Consol. Min. Co. supra.*

b. Provisions for, by state and territorial statutes.

1. Summary.

By statute, in most, if not all, of the mining states and territories, a record of a mining claim is required. This is required to be made within a specified time from the date of discovery, by a location certificate containing specified statements, in a number of the states, among which are Colorado, Nevada, North Dakota, South Dakota; and Wyoming, Montana, and Washington require practically the same thing, but in Montana it is called a declaratory statement, and in Washington a notice. In Alaska the requirement is for the filing of the notice of location, and in a number of the other states and territories, among which are Arizona, Idaho, New Mexico, Oregon, and Utah, it is provided that a copy, or a substantial copy, of the notice of location, shall be recorded or filed for record within a specified period after the location or discovery. In states and territories in which a copy of the notice of location is required to be filed, the contents of the notice of location are prescribed by law in substantial accord with the prescribed contents of certificates of location and declaratory statements, in states in which they are required. It will be seen, therefore, that these various provisions, though giving the instrument to be recorded a different name, and though differing in detail and to some extent as to the period of time within which the record is required to be made, are substantially the same, consisting, in most of them, of a requirement for the record within a specified number of days after discovery or posting notice of location, of an instrument containing the name of the lode or claim, the name of the locator, the date of location, the number of feet claimed along the lode, each way from the point of discovery, the width on each side of the lode, the general course or strike of the vein as near as may be, and such a description by reference to natural objects or permanent monuments as will identify the claim.

Thus, to constitute a valid location of a mining claim under the Colorado statute, a certificate of location must be filed within three months from the discovery, for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each

side of the center of the discovery shaft, the general course of the lode, and such a description of the claim by reference to some natural object or permanent monument as will identify it with reasonable certainty. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560. Reversing 3 McCrary, 19, 8 Fed. 860; *Cheesman v. Shreeve*, 40 Fed. 787.

And omission substantially to comply with any of the provisions of *Bellinger & C. Anno. Codes & Statutes*, §§ 3975-3977, providing for the location of a mining claim by posting a notice of discovery, and the marking of the lines thereof upon the ground, and the recording of a copy of the notice duly verified as provided for therein, and the sinking of a discovery shaft or its equivalent, is fatal to the valid initiation of title. *Wright v. Lyons*, 45 Or. 167, 77 Pac. 81.

In New Mexico the notice of location is positively required to be in such form that a copy thereof may be recorded; it must be such a notice as will, when recorded, answer all the requirements of a valid location notice, elsewhere called a location certificate. *Deeney v. Mineral Creek Mill. Co. supra.*

Under Nev. Comp. Laws, § 210, providing that, within twenty days of posting the location notice upon a mining claim, the locator shall record his claim with the mining district recorder, and the county recorder of the mining district or county in which such claim is situated, by a location certificate; and providing for the contents of the certificate of location, several of the requirements being the same as those for a notice of location; but providing, in addition thereto, that it must contain other matters, such as the dimensions and location of the discovery shaft, or its equivalent, sunk upon the claim, and the location and description of each corner with the markings thereon,—the certificate of location is separate and distinct from the location notice, and it is the certificate of location, and not the notice of location, of the claim, which is required to be recorded. *Peters v. Tonopah Min. Co. supra.*

A location of a mining claim is not required to be recorded, however, by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, providing that the miners of each mining district may make regulations regarding the recording of claims, and *Hill's (Or.) Anno. Laws*, § 3831, providing that, when a mining district has been organized, the claims therein shall be recorded, where the locality in which it is situated is not organized into a district. *Payton v. Burns, supra.*

And the effect of the repeal of Cal. act March 27, 1897, prescribing certain particulars that a location notice must contain, and requiring the recording of such notice within certain limited periods, by the act of February, 1900, was to make the validity of mining regulations solely dependent, from that time forward, upon a compliance with the laws of the United States, and such valid

regulations as the miners themselves may have adopted in their respective districts. *DWINNELL v. DYER*.

But that repeal does not affect the right or duty of the county recorder to record notices and proofs of a mining location under the California county government act, prescribing his duties and providing that a notice of location of mining claims may be recorded. *Kern County v. Lee*, 129 Cal. 361, 61 Pac. 1124.

In the above case, *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659, *infra*, XII. h, 1, was distinguished upon the ground that that decision was based upon the fact that the statute concerning county recorder, as it then stood, made no provision for the recording of notices of location of mining claims.

So, the act of Oregon of October 14, 1889, requiring the locator of a mining claim to file a copy of the notice of location posted by him upon the lode claim, within a specified time, with the clerk of the county, or with the recorder of conveyances, if there be one, does not make it essential to the validity of the location that the record shall be a literal copy of the notice posted; it is sufficient if it is a substantial copy. *Oregon King Min. Co. v. Brown*, 55 C. C. A. 626, 119 Fed. 48.

2. Legality.

Provisions of this class requiring a record of a mining claim are in addition to, and in aid of, and not repugnant to, the provisions of U. S. Rev. Stat. § 2334, U. S. Comp. Stat. 1901, p. 1435, providing that all records of mining claims hereafter made shall contain the names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. *Wright v. Lyons*, *supra*; *Van Buren v. McKinley*, 8 Idaho, 93, 66 Pac. 936; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302. And see *DWINNELL v. DYER*.

And the provision of the Montana Political Code, requiring a declaratory statement of a mining location, which must contain a description of each corner, and the markings thereon, is within the legislative power of the assembly. *Purdum v. Laddin*, 23 Mont. 389, 59 Pac. 153.

So, the provision of Mont. Anno. Codes, § 3612, that the declaratory statement of a mining location, filed in the office of the clerk of the county in which the lode or claim is situated, must contain the dimensions and location of the discovery shaft, or its equivalent, sunk upon the lode or placer claims, and the location and description of each corner with the markings thereon, is not invalid as too stringent, and therefore in conflict with the liberal purposes manifested by Congress respecting mining claims. *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211, Affirming 28 Mont. 222, 104 Am. St. Rep. 686, 72 Pac. 617.

Nor are state statutes providing for the record of a mining claim in conflict with U. 7 L.R.A. (N.S.)

S. Rev. Stat. § 2324, prescribing the contents of such a record when one is required, because they require verification, which is not required by the Federal statute. *Hickey v. Anaconda Copper Min. Co.* 33 Mont. 46, 81 Pac. 806; *Wright v. Lyons*, *supra*.

And the provisions of Utah Laws 1897, chap. 36, § 8, requiring county recorders to perform the duties performed by district mining recorders, and requiring the latter to deposit the books and records of their offices with the county recorders of their respective counties, are not in conflict with the statutes of the United States regulating the disposition of the state mineral lands. *Re Monk*, 16 Utah, 100, 50 Pac. 810.

So, in the title of the Utah act providing for the manner of locating quartz and placer mining claims, the term "manner" means the method and way of locating and recording the claims, and includes the instrumentalities and means to be used in effecting their location and the recording of them; and the two provisions of that act requiring county recorders to perform the duties before performed by district mining recorders, and requiring the district recorders, within thirty days after the law took effect, to deposit the books and records pertaining to their offices with the county recorders, are sufficiently indicated by the title, within the meaning of the state Constitution, requiring that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. *Ibid*.

c. Provision for, by rules and regulations of miners.

The Federal mining laws allow miners to provide for the recording of mining claims. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

Under the Federal statutes authorizing miners of each district to make regulations not in conflict with the laws of the United States, or in conflict with the laws of the state or territory in which the district is situated, governing the location and manner of recording, etc., of a mining claim, and making no provision for a recorder in mining districts, the authority to provide for recorders and the recording of all papers relating to mining locations and holding mines is left to the states in which such locations are made; and, if the state does not exercise the power, the miners in the district may. *Re Monk*, 16 Utah, 100, 50 Pac. 810.

And record books of a mining district, containing the record of the location of quartz mines since the organization of the district, showing a custom among miners of that district requiring locations to be recorded with the mining recorder of said district, are competent for the purpose of proving the custom of miners with reference to recording claims, and may be introduced for that purpose in an action involving the validity of a mining location. *Flaherty v. Gwinn*, 1 Dak. 509. Appx.

So, the pre-emption book of a county is admissible in evidence in an action to quiet

the title of a mining claim, without producing the original notice of the claim, to establish the existence of a custom of the district to record certain claims in the county recorder's office designating the boundaries in a particular way, and to show compliance by the locator with such regulations; the entry thus shown being the original notice, and not a record or copy of an independent original. *Pralus v. Pacific Gold & S. Min. Co.* 35 Cal. 30.

Mining rules and regulations with reference to recording mining claims, however, are to be liberally construed. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361.

And a rule or regulation established by miners, providing for the recording of claims, whether by resolution or by usage and custom, to be obligatory, must be of such a character that, if complied with, it would give to the party recording some right under it, and, if neglected, would deprive him of some right which he otherwise would have. *Flaherty v. Gwinn*, supra.

And proof of a record of a mining claim is irrelevant and of no effect, in the absence of proof of some regulations making the record obligatory, or giving it some effect. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* supra.

Nor need a notice be recorded where there is no mining district recorder, and the rules and regulations of the district are no longer in force and effect. *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

And failure locally to record a notice of location is cured by a formal annulment of the local laws providing therefor, prior to entry of a claim for a patent. *Re Childs*, 10 Land Dec. 173.

So, to effect a forfeiture of a mining claim by a mining regulation for failure to record the location thereof, the regulation must expressly provide that such failure to record shall work a forfeiture. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

And, in the absence of such a provision, the fact that a mining claim was not recorded in the records of the mining district will not invalidate it as to any party having actual notice of location. *Ibid.*

d. Purpose and effect.

The purpose or object of provisions for recording mining claims is to give notice of the appropriation of the lands claimed, to others seeking to locate upon unappropriated lands. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643; *Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741, Overruled on other grounds in *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* supra.

And to show a compliance with mining laws and customs. *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659.

When required, it is one of the steps 7 L.R.A. (N.S.)

requisite to constitute a perfect mining location, and it constitutes notice to the world of the facts therein set forth, such as a description of the premises claimed, and by whom, and when located. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111.

The acts which, taken together, amount to the location of a mining claim, begin with the discovery and terminate with the filing for record of the declaratory statement; and, since the location is not complete until such declaratory statement is filed, the date of its filing is the date to which a patent relates; and, where the declaratory statement is invalid, one of the essentials of a legal location is wanting, and there is no date to which a patent can relate. *Hickey v. Anaconda Copper Min. Co.* 33 Mont. 46, 81 Pac. 806.

But, where the statute does not require, or authorize, or give any definite legal effect to the posting and recording of notices of location of a mining claim, such posting and recording do not in themselves constitute a location, but are merely acts tending to show a proper marking of the surface locations by which the boundaries of the claim may be traced. *Daggett v. Yreka Min. & Mill. Co.* (Cal.) 86 Pac. 968.

And it was the probable intention of Congress that the record should have some practical effect, such as to hold the claim for a reasonable time until the vein could be developed so as to admit of an intelligent marking of its surface boundaries. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312.

A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's right of exclusive possession and enjoyment of his mining location granted by law; the purpose of the description in the certificate being to identify the claim with reasonable certainty. *Pollard v. Shively*, 5 Colo. 309.

But the purpose of recording notices of location of mining claims is entirely distinct from the statutory system of recordation by which parties are permitted to have transfers of property and certain other written instruments recorded in the recorder's office, so as to give constructive notice thereof. *San Bernardino County v. Davidson*, supra.

And a location certificate differs from the ordinary documentary muniments of title in that it is not a title, nor proof of a title; nor does it constitute, nor of itself establish, the possessory right in issue to which it relates. *Strepey v. Stark*, supra.

But, where a recording act attaches no penalty to a failure to record a location notice, the recording of location notices is in fact but a registration act, and recorded location certificates simply impart constructive notice like any other registration. *Jordan v. Duke*, 6 Ariz. 55, 53 Pac. 197.

e. Application of rules to placer-mining claims.

It will be seen from the language of the

provision of U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, that all records of mining claims, hereafter made, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim, that it applies to all mining claims, including placer as well as lode claims; so that, if a record is required either by state or territorial statutes, or by miners' rules, it must conform to this provision. So far as the state and territorial statutes and miners' rules are concerned, they are frequently so expressed as to be applicable to both classes of claims; and generally where they are not so applicable separate provisions have been adopted with reference to placer claims, which in nearly all if not all cases correspond substantially with provisions for recording lode claims.

The act of the territorial assembly of Montana of May 8, 1873, requiring a person to make and file in the office of the county recorder a statement of the discovery of any mining claim upon any vein or lode, bearing gold or silver or other valuable deposit, however, does not include a placer-mining claim. *Moxon v. Wilkinson*, 2 Mont. 421.

f. Contents.

1. General considerations.

While the acts of Congress do not require record of a location notice, yet, where the same is required by the local legislation or regulations of miners, then the requirements of the Federal statute as to location and identification become operative and imperative as to the record. *Deeney v. Mineral Creek Mill. Co.* 11 N. M. 279, 67 Pac. 724.

And it should contain the names of the locators, the date of the location, and such description of the claim located, by reference to some natural object or permanent monument, as will, with reasonable certainty, identify the claim. *Book v. Justice Min. Co.* 58 Fed. 106; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Brown v. Levan*, 4 Idaho, 795, 46 Pac. 661; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *Hauawirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480; *Charlton v. Kelly*, 2 Alaska, 532.

And it must contain enough to enable a person of reasonable intelligence to find the claim and trace its boundaries. *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654.

And an instruction on an issue as to the validity of a mining location, undertaking to tell the jury what the locator is required to do to make a location, is improper where it is too indefinite on the question of recording to mean anything except that some kind of a record is required: it should tell them what must be recorded, and when the 7 L.R.A. (N.S.)

record must be made, and where. *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413.

A recorded notice failing to describe the claim is wholly void, and confers no rights to the premises as against another who peaceably entered and made location thereon. *Deeney v. Mineral Creek Mill. Co.* supra.

Certificates of mining locations required to be recorded by law, however, are to be liberally construed. *Talmadge v. St. John*, 129 Cal. 430, 62 Pac. 79; *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

And the record of a mining claim is sufficient when it contains directions which, taken in connection with the markings of the claim on the ground, will enable a person of ordinary intelligence to distinguish the premises located from the public mineral lands open to exploration. *Smith v. Newell*, 86 Fed. 56.

Nor is it necessary, where a miners' regulation provides that a person desiring to locate a mining claim must have his notice of location recorded so as to show the name of the locator, date of location, and a description of the claim, that the record of a mining claim should be a literal and exact copy of the notice posted upon it. *Gird v. California Oil Co.* 60 Fed. 531.

The record in such case is intended to contain a more exact and specific description of the claim than the notice posted upon it. *Ibid.*

2. Name, date, etc.

As we have seen, a record of a mining claim, whether it is a recorded notice, a certificate of location, or a declaratory statement, is usually required to state the name of the lode, the name of the locator, and the date of location or discovery.

This is a prerequisite to a valid location under the Federal statute, when a record is required. *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752.

And, under the Colorado statutory provision to this effect, making and recording a location certificate containing the name, a description of the lode, the name of the locator, and the date of location is necessary to perfect a mining location. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111.

The New Mexico statute requiring that the names of co-owners of mines must be recorded, however, does not mean those who are vested with a legal title; and, where several persons agree to prospect for and locate mines, and that all mines located in the name of either shall be owned in common by all; and they locate several mines, each in his own name,—the location is not subject to the objection that the name of each claiming an interest in each mine should have appeared on the location notice; the legal title is in the locator named for each mine, and the others have such interest with him as constitutes under the mining laws, a holding in common, to the extent, at least, of making work done for the development of all satisfy the law, if sufficient

in quantity and value. *Eberle v. Carmichael*, 8 N. M. 169, 42 Pac. 95.

And, under the Idaho mining laws, § 5, providing that no person shall record claims in the name of any other person, unless he has the written authority of such person or persons, and exhibits the same to the recorder, in the absence of proof to the contrary, it will be presumed, where a notice is filed by one for himself and others, having a common interest with him, that the recorder has seen and made a minute of such written consent before the notice was recorded. *Kramer v. Seattle*, 1 Idaho, 485.

So, U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, requiring all records of mining claims to contain the date of location, means the correct date, and not a fictitious, fraudulent, and incorrect one inserted for the purpose of defeating the just rights of some other claimant, or to defeat a location previously made. *Muldoon v. Brown*, 21 Utah, 121, 59 Pac. 720.

But the validity of the recorded notice of location of a mining claim made in compliance with the provisions of that act is not affected by the inclusion in it, preceding the date, of the words, "dated on the ground," this constituting a mere surplusage of words. *Preston v. Hunter*, 15 C. C. A. 148, 29 U. S. App. 621, 67 Fed. 996.

3. Description of claim and lay of the lode.

Statutory requirements as to the description of the claim and the lay of the lode, in records of mining claims, like other similar requirements, are mandatory, but, like them, are subject to liberal construction.

Thus, the length of a mining claim along the vein each way, measured from the center of the discovery shaft, is required to be given in a certificate of location, by Wyo. Rev. Stat. §§ 2546, 2547; and a certificate failing to give it is totally void. *Slothower v. Hunter* (Wyo.) 88 Pac. 36.

So, a recorded notice of location of a lode claim is not admissible in evidence on an issue as to the right of possession thereof, where it omits altogether a description of the discovery shaft, or of excavations made as an equivalent thereof, required by Mont. Pol. Code, § 3612. *Hahn v. James*, 29 Mont. 1, 73 Pac. 965.

And, while it may not be necessary that the notice should state definitely that the excavation cuts the vein at the depth or for the length required by the statute, yet the statement of dimensions must be such as to leave at least an inference that such is the case; and a notice which thus fails to set forth the work done does not conform to the spirit of the statute, and is invalid. *Helena Gold & Iron Co. v. Baggageley* (Mont.) 87 Pac. 455.

And a declaratory statement, containing a statement of but one dimension of excavations made as the equivalent of a discovery shaft, is insufficient and of no effect. *Ibid.*

So, the requirement of Mont. Pol. Code, 7 L.R.A. (N.S.)

§ 3612, that the declaratory statement of a mining location must contain the location, and the description of each corner, and the markings thereon, is mandatory; and a substantial compliance with its provisions is necessary to prove a valid location; and a statement describing a claim by metes and bounds, and giving no description of the corners or markings thereon, is invalid. *Purdum v. Laddin*, 23 Mont. 389, 59 Pac. 153.

In the above case, *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713, supra, XI. f; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384, supra, VIII. d, 1; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728, supra, VIII. d, 3; and *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, infra, XII. f, 4, (c),—were distinguished upon the ground that they were decided prior to the adoption of the Political Code of 1895, under statutes not requiring that trees, stakes, or monuments must be marked so as to designate the corners of the mining claim, or that the declaratory statement must contain the description of and markings on each corner.

And where a notice of location of a mining claim gives the location of each corner, but does not show that there were any markings upon any of them, or their dimensions, or give a description of them in any other particular by the markings thereon, the location is of no value, and the notice is not admissible in an action to determine an adverse claim. *Hahn v. James*, 29 Mont. 1, 73 Pac. 965.

A declaratory statement of a mining claim, which fully meets all the requirements of the law, except that it omits to state that the corner posts of the claim are at least 4 feet 6 inches in length, however, is not rendered invalid by such omission under that act where the corner posts were in fact 4 feet 6 inches in length. *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156.

In the above case, *Purdum v. Laddin*, supra, was affirmed so far as it held that the provisions of Mont. Pol. Code, § 3612, are mandatory and must be substantially complied with, but was distinguished upon the ground that the declaratory statement in that case made no attempt at any description whatever of at least two of the corners, and did not show whether they were marked by trees, rocks in place, or posts.

And Mont. Pol. Code, §§ 3611, 3612, were amended by Sess. Laws 1901, p. 140, to avoid the effect of the decision in *Purdum v. Laddin*, supra, that a notice which failed to give the location and description of the corners, with the markings thereon, was insufficient. *Helena Gold & Iron Co. v. Baggageley*, supra.

So, under the Federal statute providing that a mining location must be described with reference to some natural object or permanent monument which will identify it, and the Colorado statute requiring a certificate of location to contain such a description as shall identify the claim with reasonable certainty, that degree of certain-

ty with which the final survey for a patent for a mining claim fixes the *locus* and the subject matter of the grant is not required. *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543.

Nor is a certificate of location of a mining claim subject to the objection that it does not state the distance from the discovery shaft to the side lines, there being no such requirement in the law. *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462.

And a record of location of a quartz lode, made pursuant to a statutory provision that all claims shall be recorded in the county recorder's office within sixty days from the time of posting notices thereon, is not rendered inadmissible in evidence by the fact that it did not specify the number of feet claimed, this being unnecessary. *Conner v. McPhee*, 1 Mont. 73.

But, where the call of a location certificate of a mining claim is for a post at a named corner, parol evidence is not admissible to show that a stump was in fact established as that corner. *Pollard v. Shively*, 5 Colo. 309.

Nor is a recorded notice of location of a mining claim, which shows a discovery made upon a vein or deposit bearing precious metals, the amount of ground claimed, the length of the claim, giving the distance in opposite directions from the discovery, and stating that the claim was staked at both ends, and at the corners in a legal way; and referring to another claim as the one nearest to it; and containing the name of the claim, the signature of the locator, the date of location and of record, and the county and mining district in which located, placed upon the ground, which was actually marked in accordance with the notice, though in some respects indefinite,—subject to the objection that it does not describe any ground. *Bonanza Consol. Min. Co. v. Golden Head Min. Co.* 29 Utah, 159, 80 Pac. 736.

So, the Federal statute providing that the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced does not require that these boundaries, so marked on the ground, shall be put in the declaratory statement, or other record of the claim; and a state or territorial statute providing for such record, and requiring that it shall contain the name of the claim located, and such a description of it by reference to some natural object or permanent monument as will identify it, does not require it. *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31; *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918.

And a notice of location, recorded as provided by law, is not insufficient because of a failure to mention either the state or the county of the purported location, where it makes reference to the preliminary notice posted as required by law and recorded in the records of the county, and this preliminary notice named the county in which the claim was located. *Talmadge v. St. John*, 129 Cal. 430, 62 Pac. 79.

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Nor is a recorded notice of a location subject to the objection that it does not show the particular district within which a mining claim is located where the posted notice sufficiently shows it, and the recorded notice is a copy thereof; and the local mining regulations merely require that the notice posted shall be recorded. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361.

And a defective description in the record or declaratory statement of a mining location may be cured if the stakes or monuments on the ground identify the claim. *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713.

4. Reference to natural objects or permanent monuments.

(a) General rules as to.

Under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, as well as under similar state statutes, all records of mining claims must contain such a description of the claims located, by reference to some natural object or permanent monument, as will identify them. *Brown v. Levan*, 4 Idaho, 795, 46 Pac. 661; *Drummond v. Long*, supra; *Gilpin County Min. Co. v. Drake*, 8 Colo. 586, 9 Pac. 787; *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312; *Gleeson v. Martin White Min. Co.* 13 Nev. 442.

And a recorded notice or certificate of location of a mining claim is invalid under that act where it contains no description of the claim by reference to any natural object or permanent monument by which it may be identified. *Mutchmor v. McCarty* (Cal.) 87 Pac. 85; *Fuxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702.

And it is inadmissible in evidence for any purpose. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* supra; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384.

And recording a mere copy of a notice of location with a description of the *locus* of the claim appended thereto is not sufficient compliance with the statutory requirement. *Gleeson v. Martin White Min. Co.* supra.

So, the reference, in a location notice or certificate designed for record, to some natural object or permanent monument to identify a mining claim, must be such as to furnish a reasonable certainty that the *locus* of the claim has not been, and cannot well be, changed. *Brown v. Levan*, supra.

It must be such as to fix the location with certainty, so that subsequent locators can determine what ground is included within the location. *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480.

And, where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notices, or such that the claim may be floated almost anywhere to suit the ground, or to cover ore that may afterwards be discovered, it cannot furnish a founda-

tion for a valid location. *Brown v. Levan*, supra.

And the reference must be such as will enable a skilled engineer to identify the claim without reference to contiguous claims, the location of which is uncertain. *Ibid*.

The permanent monument which may be referred to in the notice or record of a mining claim must be of such a character as to permanence, and the reference to it in the notice must be so definitely made, that a prospector or other person looking for mineral deposits could, with the aid of the notice, find the monument, and from it and the description in the notice trace out the extent of the claim. *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789; *Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741.

And such as will enable a person endeavoring to locate a claim correctly to make a survey of it by means of reference made to such natural object or permanent monument. *Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741, Overruled on other grounds in *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789.

So, courses and distances from natural objects or permanent monuments to discovery stakes, or corner stakes, or some other objects, must be stated with reasonable certainty. *Brown v. Levan*, supra.

And a location notice of a mining claim, which fails to give the direction of the initial point or permanent monument to which it is attempted to tie the location from the point of discovery, is void under Idaho Rev. Stat. § 3101, providing that a notice of location shall specify the distance and direction from a discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim. *Clearwater Short Line R. Co. v. San Garde*, 7 Idaho, 106, 61 Pac. 137.

The construction given to references in a notice of location and records of a mining claim to natural monuments, however, should be liberal, not technical. *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; *Brown v. Levan*, supra; *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

And, where a mining claim has been located in good faith, if, by any reasonable construction, the language used in the notice or record in referring to natural objects and permanent monuments will impart notice to a subsequent locator, it is sufficient. *Morrison v. Regan* and *Seidler v. La Fave*, supra.

And this is so although it fails to designate the natural object or permanent monument as such in the precise language of the statute. *Seidler v. La Fave*, supra.

Nor are the natural objects or permanent monuments, with reference to which a mining claim must be located in a valid record thereof, required to be on the ground located, although they may be; and the natural objects may consist of any fixed natural

object. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

And permanent monuments may exist before the location of a mining claim, or may be erected for the purpose of tying the claim to them. *Brown v. Levan*, 4 Idaho, 795, 46 Pac. 661.

So, where objects are named as the boundaries of a location of a mining claim, the presumption is that they exist, and the duty of showing the contrary is cast upon the disputing party. *Shattuck v. Costello* (Ariz.) 68 Pac. 529.

And a reference, in a record of a mining claim, to a natural object or permanent monument, will be presumed, in the absence of evidence upon the point, to be sufficient for identification. *Brady v. Husby*, 21 Nev. 453, 33 Pac. 801.

And such a record, containing such a reference to a natural object or permanent monument as might under any circumstances identify the claim, is admissible in evidence; it being a question of fact whether such reference is sufficient. *Ibid*.

Nor is it for the court to say, from an inspection of a location notice, whether or not a survey corner therein specified is a permanent monument; this is a matter of proof. *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037.

And parol evidence is admissible on an issue involving the validity of a mining claim, for the purpose of proving that a thing named in the certificate of location as a natural object or permanent monument is in fact such. *Londonderry Min. Co. v. United Gold Mines Co.* (Colo.) 88 Pac. 455.

Nor is error in refusing to admit in evidence a certificate of location of a mining claim predicated upon its invalidity cured by testimony tending to show that the reference in it was not such as would serve to identify the claim. *Ibid*.

And an instruction involving the validity of a mining location, erroneous because predicated upon the supposed invalidity of a certificate of a prior location of the same claim, is not cured by a proper instruction given in the first instance, where, had the original certificate been admitted in evidence, it must have been determined to have been valid, and the jury might have determined that it was prior to the date of any discovery of minerals upon which the location in question was based. *Ibid*.

In Nevada it is held that a record of location of a mining claim, containing a reference to a natural object or permanent monument, is not required by statute; it is necessary only where district laws require it. *Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659; *Brady v. Husby*, supra.

But the rule has been asserted that the intention of a statute providing that a recorded certificate of location shall contain, among other things, such a description as shall identify the claim with reasonable certainty, is to give one seeking the *locus* of a recorded claim something in the nature

of an initial point from which to start, and, following the course or distance given, find with reasonable certainty the claim located, and that therefore the identification must be by reference to some natural object or permanent monument. *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543.

(b.) Mountains, gulches, canyons, and other natural formations.

Mountains, prominent buttes, and hills satisfy the law as natural objects or permanent monuments, with reference to which a location of a mining claim must be described in a notice or record of the location. *Ibid.*; *Meydenbauer v. Stevens*, 78 Fed. 787.

And a location certificate locating a lode by reference to two mountain peaks, by giving the course or bearing of each from the discovery shaft in degrees and minutes, is *prima facie* sufficient to render such certificate of location admissible in evidence. *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24.

So, a mountain referred to in a notice of location of a mining claim in describing the claim will be assumed to be a recognized landmark in the absence of evidence to the contrary; and the notice is not subject to the objection that it pointed out no particular portion of the mountain as a beginning point. *Vogel v. Warsing*, 146 Fed. 949.

Describing the lode as being on the south-west side of a named mountain and in a named gulch, however, does not furnish the definite location by reference to permanent monuments required by the statute. *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543.

But, while a description of a mining claim by reference to its direction from mountain peaks, naming or describing them, or stating the distance therefrom, may be insufficient, such a description naming the county and mining district in which the claim is located, and stating the metes and boundaries thereof, and that it is situated on a named river near a named city, and that the shaft or cut 100 feet from the south side line is on the left bank of a small creek, which is named, stating the bearings of the perpendicular falls in said creek from the shaft or cut, is a sufficient description of the claim located by reference to some natural object or permanent monument, within the meaning of the statutes. *Jackson v. Dines*, 13 Colo. 80, 21 Pac. 918.

And a location certificate of a mining claim, which gives the government section in which it is located, and the course which the highest point of a well-known mountain bears from the discovery shaft, the surface boundaries on the ground, describing posts at the corners and center of the side lines, and tying the surface boundaries by course and distance to the discovery shaft, contains a sufficient description of the claim. *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244.

In the above case, *Gilpin County Min. Co. v. Drake*, 8 Colo. 586, 9 Pac. 787, *infra*, XII. f, 4, (d), was distinguished upon the ground that in that case there was no point named

from which the description should start; but the decision therein was disapproved as not being in accord with the Supreme Court of the United States, so far as it decided that a tie to a patented claim was not a good tie.

So, a ridge and a hog's-back have been held to be natural objects in this connection. *Meydenbauer v. Stevens*, 78 Fed. 787.

And so have gulches, canyons, and ravines. *Meydenbauer v. Stevens*; *Drummond v. Long*; and *Duncan v. Fulton*, *supra*; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384.

And a reference to a canyon renders a notice of location containing it admissible in evidence. *Flavin v. Mattingly*, *supra*.

But a location notice naming the mouth of a big canyon as the natural object or permanent monument to which it is sought to tie the location is fatally defective where it does not give the direction of the location from such monument. *Clearwater Short Line R. Co. v. San Garde*, 7 Idaho, 106, 61 Pac. 137.

And a certificate of location of a mining claim, stating that the claim is situated on the north side of a named gulch, about timber line, on the west side of a named mountain, does not sufficiently refer to any natural object or permanent monument. *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702.

Nor does a recorded notice of location of a mining claim, describing it as situated near the head of the right-hand fork of a named canyon, and about 5 miles from a named railroad, sufficiently describe the claim by reference to natural objects or permanent monuments; the reference to the canyon and the railroad being too indefinite. *Darger v. Le Sieur*, 8 Utah, 160, 30 Pac. 363, *Affirmed on Rehearing* in 9 Utah, 192, 33 Pac. 701.

So, streams, waterfalls, cascades, lakes, inlets, and bays or arms of the sea are natural objects. *Meydenbauer v. Stevens*, *supra*.

And so are confluences of streams. *Drummond v. Long*, *supra*.

And a creek is a natural object, within these rules. *Smith v. Cascaden*, 148 Fed. 792.

(c) Monuments, posts, and other erections.

Monuments of stone, and boulders, satisfy the requirements of the law as permanent monuments, with reference to which a location of a mining claim may be described in a notice or record of a mining claim. *Meydenbauer v. Stevens*, 78 Fed. 787; *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543; *Talmadge v. St. John*, 129 Cal. 430, 62 Pac. 79; *Russell v. Chumaseero*, 4 Mont. 309, 1 Pac. 713.

And a recorded notice of location describing the claim as beginning at a large boulder at the west end of a named lode, thence 240 feet to the discovery shaft, and thence 1,260 feet west to the east line of another named lode, giving the boundaries of the two sides by named lodes, and stating the

distance in a northerly direction from a named person's house, contains such a description of the claim with reference to some natural object or permanent monument as will justify its admission in evidence. *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654.

So, stakes and posts of proper size, and properly marked and planted in the ground, may be permanent monuments. *Meydenbauer v. Stevens* and *Russell v. Chumasero*, supra; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522.

And posts by which the lines of a mining claim are marked, from 5 to 7 inches in diameter, which are firmly planted in the ground and stand not less than 5 feet above the ground, are permanent monuments, within the meaning of the Federal statutes. *Credo Min. & Smelting Co. v. Highland Min. & Mill. Co.* 95 Fed. 911.

Where mining lode claims are found where there are no permanent monuments or natural objects other than rocks or neighboring hills, stakes driven in the ground are the most certain means of identification. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

And, where a notice of a mining claim described the claim as beginning at the "northwest corner of Ed. Williams, 1-16, at a black oak post," the presumption is that "Ed. Williams, 1-16," is a well-known natural object, until the contrary appears. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572.

Where the description in a notice of a mining claim specifies a stake as the place of beginning, however, whether that stake was of such a size and so planted in the ground as to come within the meaning of the statutory term "permanent monument" is a question for the jury, under proper instructions from the court. *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.

And a declaratory statement or record of a mining location with reference to permanent stakes or monuments which do not exist as a fact on the ground is not good. *Russell v. Chumasero*, supra.

So, blazed trees may be permanent monuments within these rules. *Drummond v. Long*, supra.

A tree is a fixed natural object which may be used as a monument in locating a mining claim, as well as a post or stake; but it should be marked in some manner so as to be readily identified, unless it possesses peculiarities so different from trees in general that a description of it is sufficient to identify it. *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462.

Likewise, a point of intersection of well-known roads satisfies the requirement of the law as a permanent monument. *Drummond v. Long*, supra.

And uncertainty in a notice of location of a mining claim referring to a depot as a permanent monument, and not giving the exact distance and direction of the claim 7 L.R.A. (N.S.)

from the depot, is a matter which can be cleared up and explained by evidence outside of the notice; and, where the record contains evidence showing that at the time the location was made there was but one depot in the mining district, and that the mine could be located with reference to it, it is sufficient. *Farmington Gold Min. Co. v. Rhymney Gold & Copper Co.* 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832.

(d) Mining claims, mines, and their appurtenances.

A reference to a patented mining claim which is well known and clearly defined is a sufficient compliance with laws requiring that the notice or record of a mining claim shall contain such a description as will identify the claim by reference to some natural object or permanent monument. *Book v. Justice Min. Co.* 58 Fed. 106; *Meydenbauer v. Stevens*, 78 Fed. 787; *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Riste v. Morton*, 20 Mont. 139, 49 Pac. 656.

And a description in a location certificate of a mining claim which ties the claim by course and distance to a patented claim is sufficient. *Carlin v. Freeman*, 19 Colo. App. 334, 75 Pac. 26.

So, a mining claim may be a permanent object, with reference to which another claim may be described as well when not patented as when patented. *Londonderry Min. Co. v. United Gold Mines Co. (Colo.)* 88 Pac. 455.

And a mining claim, with reference to which another mining claim is described, will be taken to be a permanent monument, in the absence of any evidence or presumption that it is not patented. *Riste v. Morton*, supra; *Slothower v. Hunter* (Wyo.) 88 Pac. 36.

Or until the contrary appears. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153, Affirmed in 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548.

In the absence of evidence to show that the claim referred to was not a well-known and clearly defined mining claim, it will be presumed it was so, and therefore a natural object or permanent monument, within the meaning of the Federal statute. *Smith v. Cascaden*, 148 Fed. 792.

A description in a notice of location by reference to an adjoining mining claim is a sufficient reference to a permanent monument to allow the notice of location to be introduced in evidence, it then becoming a matter of proof as to whether the adjoining claim is a permanent monument. *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725; *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713; *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723; *Shattuck v. Costello (Ariz.)* 68 Pac. 529; *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789, Overruling *Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741.

And it casts upon the party attacking the notice the burden of showing that there is no such mine. *Kinney v. Fleming*, supra.

And, in order to determine whether or

not the things described are permanent monuments within the meaning of the statute, parol testimony as to their character may be given. *Seidler v. La Fave*, supra.

A description in a notice or record of location of a mining claim as located a specified number of feet in a named direction from another mine is prima facie a sufficient description of the claim by reference to some natural object or permanent monument. *Hammer v. Garfield Min. & Mill. Co.* 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548, Affirming 6 Mont. 53, 8 Pac. 153; *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

In *Morrison v. Regan*, supra, *Clearwater Short Line R. Co. v. San Garde*, 7 Idaho, 106, 61 Pac. 137, supra, XII. f. 4, (b), was distinguished upon the ground that in that case the location notice failed to give the direction of the mining claim from the natural object to which it was attempted to tie it; and *Brown v. Levan*, 4 Idaho, 794, 46 Pac. 661, infra, was distinguished upon the ground that in that case the claims referred to as a monument were not situated with reference to the claim sought to be located as stated in the location notice, and the mining claims named as adjoining claims were not located until sometime afterwards; but it was said that, if the rule laid down in this case in any manner conflicts with the rule laid down in that case, that case is overruled to the extent of such conflict.

So, a certificate of location of a mining claim, giving the mining district, county, and state of its location, and describing it as lying west of a named mining claim and south of another named mining claim, prima facie measures up to the requirements of the statute, so as to be admissible in evidence on an issue as to the validity of a location, though the distances from the mining claims are not mentioned. *Slothower v. Hunter*, supra.

And a record description of a mining claim, correctly describing the location with reference to well-established lines of another claim, so that, with the aid of the location stakes the lines of the claim can be easily ascertained, is sufficient, though it erroneously refers to the southeasterly end of another claim when that claim has no such boundary, and describes a distance of 400 feet as 4 feet, and gives the course of a boundary as northerly and southerly when it is not due north and south. *Smith v. Newell*, 86 Fed. 56.

So, a notice of location of a mining claim recorded in the district records sufficiently complies with the law, where it calls for stone monuments at each corner of the claim, and describes it as bounded by four other claims. *Southern Cross Gold & S. Min. Co. v. Europa Min. Co.* 15 Nev. 383.

And a description in a location certificate by metes and bounds, beginning at corner No. 1, describing a parallelogram by courses and distances, and concluding "corner No. 1 of Wichita lode, joining corner No. 4 of Wichita Eagle lode," furnishes such a ref-

erence to a permanent monument as to render the certificate prima facie competent as evidence of location. *Londonderry Min. Co. v. United Gold Mines Co. (Colo.)* 88 Pac. 455.

So, a location notice stating that the location is bounded on the east by a named mine, and is $\frac{1}{4}$ of a mile south of a named road, and about 3 miles east of a named town, contains sufficient reference to permanent monuments to sustain its validity. *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31.

And a reference to a known mining claim, with date of its location, or to recorded claims adjoining it, having a hoisting shaft, is sufficient. *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

Nor is a notice of location of a mining claim which shows a discovery made upon a vein or deposit bearing precious metals, the amount of ground claimed, and its dimensions, and referring to another claim as the one nearest to it, and containing the name of the claim, the signature of the locator, the date of location and of record, and the county and mining district in which located, placed upon the ground which was actually marked in accordance with the notice, though in some respects indefinite, subject to the objection that it does not tie the claim to any natural object or permanent monument. *Bonanza Consol. Min. Co. v. Golden Head Min. Co.* 29 Utah, 159, 80 Pac. 736.

And a recorded notice of location, describing a placer-mining claim as in a named district, and claiming No. 13a below the discovery on Cleary creek, 1,320 feet up and down stream, and 330 feet each side of the center stake, sufficiently complies with the Federal statute requiring such notice to describe the claim located by reference to some natural object or permanent monument that will identify the claim, where in locating placer claims the custom is that the one first discovered upon a gulch or creek is called the discovery claim, and other claims are numbered from such claim up and down the gulch or stream; and it is customary in certain localities to give to side or bench claims the same number as those upon the creek, with the addition of a letter of the alphabet, to designate the tiers back from the creek claims. *Smith v. Cascaden*, 148 Fed. 792.

Referring to named mines and giving the direction as southwesterly, however, is not a sufficient reference to a permanent monument in a notice of location of a mining claim, where half a dozen mines might be located, each one of which would be in a southwesterly direction from the mines named. *Brown v. Levan*, 4 Idaho, 795, 46 Pac. 661.

Nor does a location certificate bounding the location as beginning at the westerly end of a named mining claim on a named lode in a named district, and running thence in a westerly direction, without naming the point of commencement in the westerly end

of such claim, sufficiently describe the claim by reference to natural objects or permanent monuments. *Gilpin County Min. Co. v. Drake*, 8 Colo. 586, 9 Pac. 787.

And describing a discovery shaft as being about a specified number of feet north of a specified lode, consisting of a parallelogram 1,500 feet in length by 300 feet in width, containing about 10 acres, is not such a description, there being nothing to show from what point in the lode the measurement should start. *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543.

And the survey referred to by Wyo. Rev. Stat. 1899, §§ 2546, 2547, providing that a certificate of location of a mining claim shall contain a description of the claim, if upon ground surveyed by the United States system of land surveys, by reference to section or quarter-section corners, which shall identify the claim beyond question, making the survey void if not conforming to the other requirements, means a completed survey by proper authority; and a survey made before the location, but which was not approved, is not a sufficient monument to which to tie it. *Slothower v. Hunter* (Wyo.) 88 Pac. 36.

So, the prospect hole, prominent monuments, and stakes of another properly marked mining location are permanent monuments within the meaning of this requirement. *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480; *Drummond v. Long*, supra.

And mining shafts of a neighboring mining claim satisfy the requirements of the law as permanent monuments, with reference to which a location may be described. *Drummond v. Long*, supra; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522.

And drifts, tunnels, and open cuts are all permanent monuments. *Meydenbauer v. Stevens*, 78 Fed. 787.

(e) Determination as to existence and sufficiency.

It is for the court to define, in its instructions given to the jury upon an issue as to the validity of a mining location, what is a permanent monument within the meaning of the statute. *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.

But it is not for the court to say, by merely looking at the record or declaratory statement, what things referred to are, or what are not, natural objects or permanent monuments; this is a matter of proof. *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713.

The existence of a natural object, within the meaning of the statute, and the sufficiency of the description of the location of a mining claim with reference thereto, are questions of fact, to be determined like other questions of that class. *Slothower v. Hunter*, supra.

And the question whether an object referred to as a permanent monument, in a notice of location of a mining claim, amounts to a natural object or permanent

monument within the meaning of the statute, is one for the jury. *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789, *Overruling Baxter Mountain Gold Min. Co. v. Patterson*, 3 N. M. 269, 3 Pac. 741; *Londonderry Min. Co. v. United Gold Mines Co. (Colo.)* 88 Pac. 455; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.

Unless the reference thereto is so indefinite that it can be told from an inspection of the certificate that the claim cannot be identified thereby. *Londonderry Min. Co. v. United Gold Mines Co.* supra.

So, when there is a description, but it is merely defective, the question should be left to the jury, with the other evidence in the case. *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384.

And where the record of a mining claim describes the location with reference to a natural object, or a permanent monument, it is for the jury, on an issue as to its validity, to determine whether a miner seeking information from the record could go to the natural object or permanent monument, and, from the description, find the notice pointing out the location on the ground with reasonable certainty. *North Noonday Min. Co. v. Orient Min. Co.* supra.

g. Verification.

The statutes of some of the states require a verification of the instrument constituting the record, or the attachment thereto of an affidavit stating specified matter with relation to precedent steps taken toward location.

The object of this requirement is to prevent fraud by subjecting the locator to the penalties of perjury if he swears falsely. *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643.

In Montana the declaratory statement of the location of a mining claim must be verified by the oath of the locator, or one of the locators, and, in case of a corporation, by an officer thereof, duly authorized to act. *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Mattingly v. Lewisohn*, 13 Mont. 508, 35 Pac. 111.

This requirement is within the power of the state legislature. *McCowan v. MacLay*, 16 Mont. 234, 40 Pac. 602; *Hickey v. Anaconda Copper Min. Co.* 33 Mont. 46, 81 Pac. 806.

And not in conflict with the laws of the United States upon the subject of the location of mining claims. *Berg v. Koegel*, 16 Mont. 266, 40 Pac. 605; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.

And it is not in conflict with the organic law of the territory. *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037.

It simply imposes additional duties and burdens upon the locators of mining claims upon the public mineral lands of the United States, and does not constitute an interference with the primary disposal of the soil, within the meaning of U. S. Rev. Stat. § 1851, limiting the legislative power of the territories. *O'Donnell v. Glenn*, supra.

And, under it, a location notice or declar-

atory statement, defective because not verified, or because the verification does not conform to the statutory requirements, is incompetent to prove a location. *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461.

And it is incompetent as evidence on an issue as to the right of possession of mining ground. *Russell v. Hoyt*, 4 Mont. 412, 2 Pac. 25; *McBurney v. Berry*, 5 Mont. 300, 5 Pac. 867.

So, an affidavit attached to a location notice, stating that the locators have fully complied with the requirements of the law and local customs, simply states a conclusion of law, and is not a verification of any fact. *McCowan v. Maclay*, supra.

Nor is the requirement of the filing of a declaratory statement on oath complied with by an affidavit of the locators that the foregoing notice by them subscribed is a true copy of the original notice of location above described, as posted on the claim on the day therein stated; and such a declaratory statement is invalid. *Hickey v. Anaconda Copper Min. Co.* supra.

And the same rule applies to a declaratory statement as to which there is no verification as to any portion of the location, except that the description of the lode as given in the notice is true and correct; the word "description," as used in the affidavit, meaning the delineation or account of the mining claim by the recital of its metes and bounds, or courses and distances, and its geographical position only, and not the whole location notice. *McCowan v. Maclay*, supra.

So, the date of location is an essential element of description in a mining claim, under the statutes of the United States; and, where it is given in the body of the location notice, but it is not sworn to, the location notice is not competent as evidence of location. *O'Donnell v. Glenn*, supra.

And a common error having the force of law is not shown by the fact that 33 per cent of the mining prospectors of one county in a large territory, during about two years, used a form of verification for location notices which was fatally defective under the law of Congress, by reason of omitting to state the date of location, where it does not appear that any considerable number of persons have relied on, or sought to fix their rights by, the alleged common error, or that large property interests depend upon upholding it. *O'Donnell v. Glenn*, 9 Mont. 452, 8 L.R.A. 629, 23 Pac. 1018.

Likewise, the oath to a declaratory statement of a mining location is required to be a part of the record; and extrinsic evidence that the oath was taken after the location and before the recording is inadmissible. *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037.

And a statement on oath, which appears on its face to have been sworn to in the neighborhood of a year before the discovery and location, is not a declaratory statement of the location, within the meaning of the statute, in the absence of anything to show that the affidavit was wrongly dated by

mistake of the notary. *Berg v. Koegel*, 16 Mont. 266, 40 Pac. 605.

Nor is a location notice, the affidavit to which does not contain notarial evidence that the party making it took oath, or was ever present before the officer, a declaratory statement in writing on oath, required to be recorded with the county recorder. *Metcalf v. Prescott*, supra.

Since the act of Congress does not require that the notice of location shall be verified by oath, however; and since the requirement of verification is an additional burden imposed upon the locator of a mining claim, —the courts should so construe it that it will not be more burdensome than can be reasonably helped. *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643.

And a verification of a declaratory statement of the location of a mining claim, in form and substance in accordance with the statute, is prima facie sufficient; and the facts therein stated are prima facie true. *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963.

And an affidavit attached to a location notice is sufficient to sustain the notice, where it appears therefrom that the affiant was before the notary, and that she swore to the oath and subscribed to it, and her name appears as that of a subscriber, though it does not appear in the body of the affidavit. *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075.

In the above case, *Metcalf v. Prescott*, supra, was distinguished upon the ground that in that case the affidavit was not signed, and there was no jurat to it, and nothing about it to show that the alleged affiant ever signed or swore to it, or was ever before a notary.

Nor need the oath be made upon the personal knowledge of the affiant; it is sufficient if made upon information and belief. *Wenner v. McNulty*, supra.

And a declaratory statement verified in proper form is not rendered invalid by evidence disclosing the fact that it was made by the locator entirely upon information received by others, and not upon his personal knowledge. *Mares v. Dillon*, supra.

And where one person discovered a mining claim in the strict and literal sense by personally viewing a lode or lead of precious metal, and he informed an associate of the discovery, and was his agent in making it, and the location was made in their joint names, a notice of location, duly verified by oath of the associate, who did not personally make the discovery, which in all other respects complies with the provisions of the law of both the United States and the territory, is not invalid and inadmissible in evidence on the theory that it was not sworn to by the discoverer. *Wenner v. McNulty*, supra.

So, Idaho Rev. Stat. § 3104, requiring an affidavit to be attached to the location notice of a mining claim, stating the citizenship of the locator, that the location was properly made upon unoccupied ground, and performance of specified recovery work, is a reasonable regulation that the legislature

is fully authorized to make, and is not in conflict with the laws of the United States. *Van Buren v. McKinley*, 8 Idaho, 93, 66 Pac. 936.

And the verification may be made by an agent. *Dunlap v. Pattison*, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504.

But the affidavit must be sworn to before an officer authorized by law to administer oaths. *Van Buren v. McKinley*, supra.

And a notice of location, required by that act to have an affidavit attached, to which is attached a paper signed by the locator and purporting to have been sworn to before a deputy district recorder, is not admissible in evidence in an action to adverse a patent to a mining claim, under Idaho Rev. Stat. § 3103, providing for recording notices of mining claims; and that, "for the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where he may deem it necessary, and at all places more than 10 miles distant from an existing office;" and, upon failure of any recorder to make an appointment for ten days after a petition in writing presented to him, the resident miners in the district may appoint one of their number temporarily; there being nothing to authorize a district recorder to appoint a deputy. *Ibid*.

So, *Bellinger & C. (Or.) Anno. Codes & Statutes*, § 3976, providing that a locator of a mining claim shall, within sixty days from and after posting the location notice, file for record with the recorder of conveyances, if there is one, who shall be the custodian of miners' records and miners' liens, otherwise with the clerk of the county wherein such claim is situated, a copy of the notice of location, having attached thereto an affidavit showing the sinking of a discovery shaft, or its equivalent, is in addition to, and in aid of, and not repugnant to, the Federal statutes, providing that all records of mining claims must contain the name or names of the locators, and date of the location, and such a description of the claims by reference to some natural object or permanent monument as will identify them; and is valid and binding upon the locator. *Wright v. Lyons*, 45 Or. 167, 77 Pac. 81.

And omission within the specified time to cause to be attached to the copy of a notice of location of a mining claim delivered to the clerk for record an affidavit in proof of work required to be done by the statute, so that the same is not recorded, is fatal to the validity of the location. *Ibid*.

h. The act of recording.

1. Method and place of.

State statutes and miners' rules and regulations, requiring a record of a mining claim, usually, if not universally, make provision with reference to the method of the filing and recording, and the officer with whom, or the office in which, it is to be done.

A county recorder holding office under the statutory system of recordation, by which 7 L.R.A.(N.S.)

parties are permitted to have transfers of property and certain other written instruments recorded so as to give constructive notice thereof, cannot be required to record a miner's notice of location where this is not made his duty by law, and a recorder is provided for by local regulation. *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659.

But, in the absence of any organized mining district, the record of a mineral location should be made in the recorder's office of the county in which the land is situated. *Re Rose Lode Claims*, 22 Land Dec. 83.

The location of a mining claim recorded in strict compliance with the laws of the United States and of the state or territory in which the location is made, however, is valid though the recording was not in compliance with the local regulations of the mining district. *Johnson v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130.

And the duty of a recorder to record notices and proofs of a mining location does not depend upon their validity or their effect, but upon the statute prescribing what may be recorded. *Kern County v. Lee*, 129 Cal. 361, 61 Pac. 1124.

Nor does the fact that the recording fees for recording a certificate of location of a mining claim were not paid in advance affect the question of the effect on the validity of the location of the failure of the recorder to record the certificate thereof, where the locator had done all the law required of him in respect thereto. *Shepard v. Murphy*, 26 Colo. 350, 58 Pac. 588.

And a mining location is not affected by a mistake of the recorder in recording the location in a wrong name, where the certificate itself complied with the statute, and no one was misled by the error. *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919.

Nor does a mistake of the recorder in copying a notice of the location of a mining claim in the book of records by omitting one of the lines invalidate the location, where all the steps required by local rules and regulations were performed by the locators, and the lines were distinctly marked upon the ground. *Myers v. Spooner*, 55 Cal. 257.

And, under *Mills's Anno. Stat. (Colo.)* § 3150, providing that the discoverer of a lode shall, within three months from the date of the discovery, record his claim in the office of the recorder of the county in which the lode is situated, by a location certificate, where the locator of a lode has fully complied with all the provisions of the statute necessary to constitute a valid location, and has lodged his location certificate with the proper officer within the time required by law, and has been notified that it would be recorded, he has done all that the law requires of him in respect to recording his claim; and his location cannot be defeated by conflicting locations subsequently made, which were duly recorded, because the recorder omitted to record his location. *Shepard v. Murphy*, 26 Colo. 350, 58 Pac. 588.

But a record of the location of a placer-

mining claim, made in a memorandum book without designating any natural object or permanent monument, or any work by which the claim can be identified, which book is retained in the possession of the locator, is not in compliance with U. S. Rev. Stat. § 2324, and U. S. Comp. Stat. 1901, p. 1426, and is of no legal force as a record. *Fuller v. Harris*, 29 Fed. 814.

So, registry was expressly required by the Mexican mining ordinance; and this is not shown by proving that sheets of paper, not executed at the same time, but assumed to be sufficient, were, at some time, placed in the office of the alcalde, and that they remained there for a time in one of the pigeon holes of his desk. *United States v. Castillero*, 2 Black, 17, 17 L. ed. 360.

It will be assumed on appeal that the evidence in a case was sufficient to sustain the finding of the court below that a proper location notice had been filed and recorded, so as to preclude a contention of the party asserting the contrary, that no such notice was filed and recorded, where he omitted to preserve the evidence in this regard in the record. *Score v. Griffin* (Ariz.) 80 Pac. 331.

2. Time of.

State statutes and miners' rules and regulations requiring the recording of a mining claim usually fix a period of time after discovery, or after posting notice, within which the record must be made. These provisions are subject to the ordinary rules of construction.

Thus, the provision of Alaska Pol. Code, § 15, that notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, means not beyond ninety days from the date of discovery, and a compliance with the act at any time before the last day has expired is sufficient. *Butler v. Good Enough Min. Co.* 1 Alaska, 246; *Charlton v. Kelly*, 2 Alaska, 532.

And such a provision is reasonable and necessary in a country of great distances, bad trails, and rigorous climate like Alaska; and miners' rules or customs reducing the limit are invalid. *Butler v. Good Enough Min. Co.* supra.

So, a certificate of location of a mining claim, filed sixty-one days after the date of discovery, is not invalid because not filed within the sixty days required by law, where the last day of the sixty was Sunday, since in such case it would be excluded from the computation. *Columbia Copper Min. Co. v. Duchess Min. Mill. & Smelting Co.* 13 Wyo. 244, 79 Pac. 385.

And, where a location of a mining claim is attacked before the expiration of the time allowed by law for the filing of notices of location, the locator or owner, to support it, need show only acts of location, independent of a certificate of location. *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723.

Nor is failure to record the certificate of

location of a lode-mining claim within the period prescribed by law a defense in an action by a locator against a trespasser, where the trespass was committed before the expiration of such period, and the trespasser had acquired no rights between such expiration and the record of the locator's certificate. *Columbia Copper Min. Co. v. Duchess Min. Mill. & Smelting Co.* supra.

So, the failure of the locator of a mining claim to record his notice of location within the time prescribed by a state statute does not work a forfeiture of the claim, where no such penalty is attached by that statute. *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 299, 131 Fed. 579.

And the same rule applies to failure of a locator to comply with a district regulation that all mining claims shall be recorded within a specified period after location. *Johnson v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130.

Nor will failure to record a location certificate of a mining claim within the specified time from the date of discovery of the lode inure to the benefit of an overlapping claim based on a junior discovery, when the junior discoverers have neither made, nor attempted to make, a relocation. *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443.

So, objection that a notice of location was not filed within twenty days after the discovery thereof, as required by local law, is waived by a failure to assert it. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153.

And failure to record a certificate of location of a lode-mining claim within the period prescribed by law will not invalidate the location, where no intervening rights of third persons to the same ground have been acquired previous to the actual filing. *Columbia Copper Min. Co. v. Duchess Min. Mill. & Smelting Co.* supra. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702; *Preston v. Hunter*, 15 C. C. A. 148, 29 U. S. App. 621, 67 Fed. 996.

The objection that a certificate of location of a mining claim was not recorded within the prescribed period does not vitiate the certificate, or render it void; the only effect of failure to record is that it cannot affect intervening rights. *Slothower v. Hunter* (Wyo.) 88 Pac. 36.

And the rule is the same though the statute requiring the certificate of a mining claim to be recorded within a specified period provides that any record of a location of a lode-mining claim, which shall not contain all the requirements made in this provision, shall be void. This provision relates to the time of making the record, provided no adverse rights have intervened in the meantime, and failure so to record a certificate of location does not make a location void; it is the record thereof only which is made void by the statute. *Zerres v. Vanina*, 134 Fed. 610.

And a location of saline lands, and the recording of the survey in accordance with the provisions of the statute, though not within the time specified are valid and sufficient against one who attempts to acquire an adverse title more than twenty years after such recording. *Garrard v. Silver Peak Mines*, 82 Fed. 578, Affirmed in 36 C. C. A. 603, 94 Fed. 983.

Under U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, making the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, not in conflict with the laws of the United States; and under Colo. act February 13, 1874, requiring the discoverer of a lode, within three months from the date of his discovery, to record his claim in the office of the recorder of the county in which the lode is situated, however,—a person, locating a mining claim upon an Indian reservation, which reservation was afterwards extinguished by treaty, must, to sustain his location, within three months from the date on which the reservation was extinguished record his certificate of location; and, in case of his failure to do so, it does not lie with him to insist upon his wrongful entry upon the premises during the existence of the reservation, as against persons who went upon the premises after they had become a part of the public domain, and made a proper location thereon. *Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, Affirming 9 Colo. 349, 12 Pac. 198.

Whether a record of a mining claim was made within the prescribed time is a question for the jury in ejectment. *Charlton v. Kelly*, 2 Alaska, 532.

i. The record as evidence.

1. What may be proved by.

A location certificate when recorded, or other record of a mining claim, is competent evidence prima facie of all that the statute requires such certificate to contain, and which is therein sufficiently set forth. *Streprey v. Stark*, 7 Colo. 614, 5 Pac. 111.

And it is presumptive evidence of a proper discovery, and that the locator has complied with the law. *Cheesman v. Shreeve*, 40 Fed. 787.

And, where a resident of the United States made a mining location and recorded a location notice at or near the time reciting the facts, it will be presumed that he posted the notice of his claim, and properly marked the ground. *Jantzon v. Arizona Copper Co.* 3 Ariz. 6, 20 Pac. 93.

So, the record furnishes presumptive evidence of the execution of the instruments of which it consists, and this presumption can be overcome only by countervailing testimony of a preponderating character. *Kramer v. Settle*, 1 Idaho, 485.

And, where evidence has been given on an issue as to the validity of a mining location, tending to establish the existence of a dis-

covery notice, it is proper that the location certificates, original and amended, should be admitted for the consideration of the jury in connection therewith. *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018.

The act of Congress of May 10, 1872, § 5, providing for the contents of the record of mining claims, however, gives no greater effect to the record of such claim than is given to the registration laws of the state, and does not exclude proof of actual possession and of its extent, as prima facie evidence of title. *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435.

And, while the local record of a mining community may be and probably is the best evidence of rules and customs governing the community, and to some extent the distribution of mining rights, it is not the best or only evidence of priority or extent of actual possession. *Ibid.*

Nor is the certificate of location of a mining claim by the probate judge of a county anything more than prima facie evidence of compliance by the locator with the law requiring the sinking of a shaft to complete the location. *Zeckendorf v. Hutchison*, 1 N. M. 476.

Or that the claim which was located by several persons was held by them as a company, and not in severalty as individuals. *Ibid.*

And an instrument purporting to be a record of a mining claim in dispute, not required, to be made and filed under the laws of a state or territory of the United States, or under miners' rules or regulations, is not legal notice of the rights claimed, and is not a link in the chain of title claimed, and is incompetent as evidence of a right of possession to placer-mining ground. *Moxon v. Wilkinson*, 2 Mont. 421.

So, where a recorded notice of a mining claim contains statements not required by law to be incorporated in it, it is not evidence as to such statements. *Flick v. Gold Hill & L. M. Min. Co.* 8 Mont. 298, 20 Pac. 807.

But a false statement in a recorded location notice may be rejected as surplusage where the description is sufficient to ascertain the premises to which it is intended to apply without the aid of the false statement, leaving the instrument to take effect without it. *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037.

And a statement in a recorded notice, that the claim was situated in one county, when it was in fact situated in another, does not affect its validity or admissibility in evidence, where a statement of the county in which it was situated was not required by law. *Ibid.*

So, where the right of possession of a mining claim is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. *Streprey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Farmington Gold Min. Co. v. Rhymney*

Gold & Copper Co. 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832.

And a copy of the record of a mining location, under Cal. special act 1875-76, chap. 562, p. 853, having special application to a particular county, requiring all notices of mining locations to be recorded in the recorder's office, is proof of nothing except the bare fact that such a notice had been recorded. It is not proof that the notice was posted on the claim, or that the location was so marked on the ground that its boundaries could be readily traced, or that they include the apex of a lode or any valuable mineral deposit. *Mutchmor v. McCarty* (Cal.) 87 Pac. 85.

2. Methods of proof.

Records of mining claims are subject to general rules with reference to methods of proof by record evidence.

Thus, a statutory provision that copies of papers duly filed in the recorder's office, certified by the recorder, shall be received with like effect in courts in actions and proceedings, as the original instruments, papers, and notices, applies to records of location of mining claims. *Kramer v. Settle*, 1 Idaho, 485; *Willeford v. Bell* (Cal.) 49 Pac. 6.

And district record books containing the records of mining claims are not objectionable as evidence of mining locations on the ground that they are not shown to have come from the proper custodian, where they are produced by the county recorder of the county in which the claim in question is situated, and the pleadings in the action admit that the claim is located in a specified mining district in that county. *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31.

So, the statutory rule by which the records, laws, and proceedings of mining districts are rendered admissible as evidence authorizes the proof of a certificate of location or a declaratory statement of a mining claim by office or certified copy, without preliminary proof of the existence or loss of the instrument recorded. *Sullivan v. Hense*, 2 Colo. 424; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759.

And the official records of a county, transcribed, under the supervision of the recorder, into a book which has been recognized as part of the public records of the office, the original book having been lost or destroyed, are admissible in evidence to prove the location of a mining claim. *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, affirming 3 Mont. 65, as to this point.

So, where the original records of mining claims of a district were destroyed by fire, and the miners, by a subsequent resolution, required the claims to be rerecorded in a new book, the new book, though not competent to prove the claim, is competent to prove that a claim had been recorded according to the rules of the vicinage. *McGarrity v. Byington*, 12 Cal. 426, 2 Morrison Min. Rep. 311.

A notice of a mining location in a record-
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er's book is the original notice, however, and not a record or copy of an independent original. *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659; *Pralus v. Pacific Gold & S. Min. Co.* 35 Cal. 36.

And a person asserting title under Mont. Stat. Ex. Sess. 83, § 1, providing that any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold or silver or other valuable deposits shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which the discovery is made a declaratory statement thereof in writing, on oath before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States, must produce in evidence the original declaratory statement duly signed and sworn to, or, if the same is lost or not within his power, a record thereof, or transcript of such record duly authenticated; and, where the original was not lost, but was under the control of the opposing claimant, no copy of the record or transcript thereof can be received in evidence. *Stapleton v. Pease*, 2 Mont. 550.

XIII. Additional or amended location.

a. Authority for and purpose and nature of.

Though there is no statutory provision for amendment of a location of a mining claim, or for amending notices of location, locators, who have apprehension as to the sufficiency of their locations or as to their notices of location, may put up another notice correcting the defect. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

And where several persons posted a notice of location of a mining claim, and signed the same as locators, while a subsequent notice posted on the same claim, signed by a part only of the original locators, and by other persons whose names were not on the first notice, is an original notice so far as the new locators are concerned, it does not affect the rights of the prior locators whose names were omitted, or operate as an abandonment of the first notice by the persons whose names were signed to both; and, in an action by all the persons whose names were signed to both notices, to quiet their title as against an adverse claimant, the second notice is admissible in evidence. *Ibid*.

In most of the mining states and territories, however, this is provided for by statute. These statutes, with perhaps one exception, are substantially alike, and provide that if at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, or erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate

was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act,—such locator, or his assigns, may file an additional certificate subject to the conditions of this act, and to contain all that this act requires an original certificate to contain, provided that such amended location does not interfere with the existing rights of others at the time such amendment is made; and no such amended location or record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.

These statutes are supplemental to the Federal statutes, and not in conflict therewith. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 25 Fed. 389.

And they embrace all classes of mining claims, including placers as well as lodes. *Kirk v. Meldrum.* 28 Colo. 453, 65 Pac. 633.

And an amended location of a mining claim, made to correct a mistake in the original location, though the amended declaration was filed before the enactment of the statute providing therefor, became a valid location by the enactment thereof, where it provided that an amended or additional declaratory statement, which may have been filed by the locator, shall have the same force and effect as though it had been filed thereunder. *Wilson v. Freeman*, 29 Mont. 470, 68 L.R.A. 833, 75 Pac. 84.

The purpose of provisions of this class is to permit the locator to cure errors and defects, and supply omissions, so that a location of a mining claim which is defective may be rendered perfect. *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054.

And to take in territory embraced in abandoned overlapping claims if so desired. *Ibid.*

They are designed for the benefit of locators of mining claims, giving them opportunity to cure defects if any existed in the original notice, or the marking of the boundaries, and mistakes in marking the courses, etc. *Porter v. Tonopah North Star Tunnel & Development Co.* 133 Fed. 756.

And the intent is that the additional certificate shall operate to cure defects in the original, and thereby put the locator, when no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111.

And, where such amendment is made before other rights attach, the amendment relates back to the original location. *McGinnis v. Egbert.* 8 Colo. 41, 5 Pac. 652.

They enable a miner who, in good faith, has gone upon the public domain and expended time and money in performing substantial acts required to locate a mining claim, but through inadvertence or ignorance has failed to comply with the requirements of the statute in describing his claim, to cure such error at any time by an amendment correcting the defective description, and thus perfect his record as of the date of his original certificate. *Frisholm v. Fitzgerald*, 25 Colo. 290, 53 Pac. 1109. 7 L.R.A. (N.S.)

An amended location, when made in accordance with these provisions, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance; and parties coming upon the claim described in the amended certificate, subsequent to the perfection of the amended location in compliance with the mining laws, can acquire no rights therein. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co. supra.*

And a certificate of location, though insufficient, should be admitted in evidence on an issue as to the validity of the location, where it is followed by an additional or amended certificate, which either supplies what it lacks or conforms as a whole to the statute. *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244.

Nor does the amendment of a location of a mining claim forfeit any rights acquired by the original location, except such as are inconsistent with the amendment. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 134 Fed. 268.

And an amended location by a purchaser of a mining claim, wherein he makes use of a discovery of his own within the limits of his purchase and on a junior location, embraced for the greater part within the boundaries of the purchase, does not defeat or affect his right to the benefit of all the mineral veins and lodes in the claim purchased, as well as all the expenditures made by his grantor in the development thereof. *Tam v. Story*, 21 Land Dec. 440.

These provisions are for the benefit of locators, however. They are not obliged to act upon them. And, where the original notice is clear, definite, and certain, and the boundaries of the claim are so marked and monumented that the same can be readily traced and determined, it is not necessary that the locator should file an amended certificate of location; it is sufficient if he is satisfied with his original notice, to file the same within ninety days, and call it his certificate of location. *Porter v. Tonopah North Star Tunnel & Developing Co. supra.*

The amended location authorized by these provisions is essentially different from the relocation authorized by U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426. The former is made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while the latter is a new and independent location, which can be made only where the original location, and all rights thereunder, have been lost by failure to make the necessary annual expenditure. *Re Teller*, 26 Land Dec. 484.

b. By whom it may be made.

An amended or additional location may be made by an authorized agent, and the authority need not be in writing. *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

And an amended location made by a stranger to the record may be shown to have been made in trust for the real owner. *Re*

Silk Finish Lode, Nov. 2, 1894, Mineral Law Dig. 105.

But, where several persons acting jointly locate a mining claim, an additional location certificate cannot be filed by one of them, unless it is for the benefit and in the names of all. *Hallack v. Traber*, 23 Colo. 14, 46 Pac. 110.

And, where several persons locate a mining claim, and the claim is deeded to one of their number in trust, for the purpose of obtaining a patent thereto for the benefit of all the owners, and the trustee files an additional location certificate taking in additional territory, the trustee cannot retain in his own right, for his own individual use, the additional territory thus taken in, since to permit it would be to allow him to reap an advantage from the trust property and from his relation to it as trustee. *Ibid*.

c. Defects which may be reached and changes made.

1. General rules.

The filing of an amended certificate of location of a mining claim, if done under proper conditions, is effectual for all purposes enumerated in the statute. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 389; *Johnson v. Young*, 18 Colo. 635, 34 Pac. 173.

And this is so whether such purposes are mentioned in the amended certificate or not. *Ibid*.

The amended location provided for by these statutes, however, presupposes and is based upon the original location, and the locator is able to file an amended location certificate only by reason of the fact that the original has been filed. *Hallack v. Traber*, *supra*.

And the rights of a person making an amended location depend upon the locator's ownership of the original location; and, if his original location is entirely invalid, and at the time of the amended location the original is owned, wholly or in part, by others, their title will not be affected or divested by the amended location. *Re Teller*, *supra*.

It is the defective or erroneous certificate which may be amended, as distinguished from the one which is absolutely void. *McEvoy v. Hyman*, 25 Fed. 696; *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

If a location of a mining claim is so defective as absolutely to fail to comply with the statutory requirements and define the claim, it is void, and a second certificate cannot be considered as amendatory thereof, so as to date back to the first and validate the claim; but, if the first certificate is not void, but merely lacks in technical detail, the second will be considered as amendatory, and will relate back to the first, and both should be regarded as one, and may be put in evidence as such. *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69.

These provisions cannot avail unless it 7 L.R.A.(N.S.)

appears that there was an original location which was valid, though imperfect. *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054.

And, where a mining claim was located upon ground not subject to location, and, after such land reverted and became a part of the public domain and subject to location, a second location was filed thereon, a subsequent amendment of the first location does not operate to validate it. *Gurney v. Brown*, 32 Colo. 472, 77 Pac. 357.

So, an amended location notice, made with reference to the original location for the purpose of curing possible errors therein, confers no new rights, and is of no effect, in the absence of any question as to the validity of the original location, except as to the question whether or not the ground was, at the time, subject to location. *Jordan v. Duke*, 6 Ariz. 55, 53 Pac. 197.

Nor is a location, invalid because based upon a discovery within the limits of an existing and valid location, subject to amendment. *Sullivan v. Sharp*, *supra*.

In the above case, *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173, *infra*, XIII. c, 3, was distinguished upon the ground that in that case the original location was valid, the discovery upon which it was based being upon ground subject to appropriation.

An original certificate of location, and an additional or amended one, may both be admitted in evidence as one, however, on an issue as to the validity of the location, though neither one, as a whole, is absolutely correct and in perfect conformity with the statute, where in both, or from both, there may be found and deduced all that the law requires, the statute being otherwise complied with, so that the miner's record is complete and his title is perfect. *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Butte Consol. Min. Co. v. Barker* (Mont.) 89 Pac. 302.

And the right at any time to amend a certificate of location of a mining claim, given by Colo. Gen. Stat. § 25, p. 724, is not taken away or affected by § 16 thereof, declaring that defective certificates shall be void; since, when read in connection with § 25, and qualified by it, it is to be understood as saying that defective certificates are lacking in force and sufficiency until amended as provided in § 25, but not wholly void. *McEvoy v. Hyman*, *supra*.

Nor can a person having no valid claim to a mining location complain of an amendment to correct a mistake in a prior location. *Wilson v. Freeman*, 29 Mont. 470, 68 L.R.A. 833, 75 Pac. 84.

And an additional certificate of location is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the controverting party; and its admissibility as evidence is not affected by the fact that it was filed subsequent to the commencement of the suit. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111.

2. Mistakes in prior location.

An amended certificate of location may be used to cure a defective or erroneous certificate. *Morrison v. Regan*, supra; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652.

And, in the absence of any statutory provision declaring that, where a certificate of location fails to describe the claim with reference to some natural object or permanent monument, it is void, an original certificate defective in this respect may be amended. *Morrison v. Regan*, supra.

And, where the only defect alleged to exist in a location certificate is that it fails to describe the claim with reference to some natural object or permanent monument, and the locator files an amended location, he is in a position to invoke the rule that a subsequent locator cannot object that all the steps necessary to a valid location were not performed at the time it was made, provided they are afterwards performed before other rights attach. *McGinnis v. Egbert*, supra.

So, Colo. Gen. Stat. § 2409, providing that a defective or erroneous certificate may be amended, qualifies the declaration of § 2400 thereof, that a certificate that shall not contain such a description as shall identify the claim with reasonable certainty shall be void, so as to give it some force and validity; and an amended certificate designed to correct an attempted location defective because there were no stakes upon the ground is not subject to objection on the ground that the original location was void, and that therefore no amendment could be made. *Frisholm v. Fitzgerald*, 25 Colo. 290, 53 Pac. 1109.

And an amendment of a declaratory statement of a mining claim, with reference to defects in the original certificate and failure to comply with the requirements of the law, relates back to the date of the original location, in the absence of any intervening rights. *Butte Consol. Min. Co. v. Barker*, supra.

Likewise, where a mining claim was located, and was valid in all respects except in a failure to file for record a valid certificate thereof, an amended certificate, made before third parties have acquired intervening rights, will, as to such third parties, relate back to preserve and keep intact the claim as originally located and staked. *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24.

The proviso of the statute withdrawing existing rights of others from the effect of an amended location is applicable only to amendments changing boundaries, and relocation taking in territory not before included within the claim; it does not apply to amendments correcting defective description for the purpose of perfecting the original record. *Frisholm v. Fitzgerald*, supra.

Nor does it apply to errors or defects in the certificate. *McEvoy v. Hyman*, 25 Fed. 596.

While an additional certificate of location does not relate back absolutely to the first certificate in the sense in which the term 7 L.R.A. (N.S.)

"relation" is employed to express the well-known legal doctrine, it does relate back to the right of the locator accruing by virtue of the prerequisite acts of discovery, prior possession, excavation, posting, and marking boundaries, done in attempted compliance with the law respecting the filing of a location certificate. *Strepey v. Stark*, supra.

The omission of the name of one of the original locators of a mining claim from the certificate of amended location, however, does not affect the title acquired by the original location, unless done with the knowledge and consent of the original locator. *Re Auerbach*, 29 Land Dec. 208.

Nor is an amended declaratory statement of a mining claim rendered defective by the addition therein of another name to the name originally given to the mining claim, where it refers to the location as originally named, and declares that it is intended as an amendment of the declaratory statement of that claim. *Butte Consol. Min. Co. v. Barker*, supra.

And the fact that an amended certificate of location contains names other than those set forth in the original cannot be taken advantage of by third persons; but such certificate may be treated as an original notice as to the persons whose names do not appear in the first, and as a supplemental or amended notice as to those whose names appear in both. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* 125 Fed. 389; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

3. Taking in new territory.

A change of boundaries may be effected by means of an amended location certificate, where intervening rights of others are not thereby interfered with. *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240.

And the validity of an amended location including grounds not within its original boundaries is not affected by the fact that the locator had not discovered mineral in the added part. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* supra; *Hallack v. Traber*, 23 Colo. 14, 46 Pac. 110.

Nor is it affected by the fact that the locator had never been in actual possession thereof. *Tonopah & S. L. Min. Co. v. Tonopah Min. Co.* supra.

And a patent may be issued for the claim as amended, without additional outlay in the way of labor and improvements. *Hallack v. Traber*, supra.

So, under these provisions, if at any time the locator of any mining claim shall be desirous of taking in any part of an overlapping claim which has been abandoned, such locator, or his assigns, may do so by means of an additional certificate. *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173.

And an additional certificate of location of a mining claim, filed for the purpose of taking in overlapping, abandoned ground, is not rendered ineffectual for that purpose by the fact that it did not specify in terms that it was filed for that purpose. *Ibid.*

So, where a location notice as posted did

not definitely locate one end of the claim, the locator has the right, after initiating his claim, to locate that end. *Wiltsee v. King of Arizona Min. & Mill. Co.* 7 Ariz. 95, 60 Pac. 896.

And where an original location of a mining claim was defective or erroneous in that the locator misdescribed his claim as running easterly and westerly, he may file an amended declaratory statement that the claim ran in a northerly and southerly direction, to correspond with the marking of the claim on the ground. *Wilson v. Freeman*, 29 Mont. 470, 68 L.R.A. 833, 75 Pac. 84.

New rights cannot be added to a mining location by amendment, however, where they are inconsistent with those acquired by other locators, when locations were made between the dates of the original and the amended location. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 134 Fed. 268.

And if an amended location includes land not included in the original location, and interferes with existing rights as to such land, the amended location does not relate back to the date of the original so far as the included land is concerned. *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

And title to a mineral lode in the actual possession of persons claiming and engaged in developing it cannot be acquired by others by a survey and recording a location certificate. *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443.

Nor can an amendment to a location, describing different lands, or making certain that which was uncertain, revert back to the original defective location, so as to affect a town-site entry, or other claim, intervening after the first location. *Reilly v. Berry*, 2 Ariz. 272, 15 Pac. 26; *Blackmore v. Reilly*, 2 Ariz. 442, 17 Pac. 72.

And an amended location of a mining claim embracing additional ground, after the claim has been officially surveyed and the survey becomes a basis for patent proceedings which are carried to entry, though preceding entry, cannot be recognized as the subject of further patent proceedings to include the additional tract as a part of the original claim. *Re Gilson Asphaltum Co.* 33 Land Dec. 612.

It cannot be assumed, however, in the absence of anything tending to disclose when an amended certificate of location was filed, that the boundaries of the claim were so changed as to prejudice the rights of the owners of another claim. This fact must be established affirmatively by owners of the latter claim. *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633.

XIV. Full performance as a prerequisite to possessory title.

a. General rule.

A strict compliance with the Federal, state, and territorial statutes is necessary to acquire and preserve one's right to the 7 L.R.A.(N.S.)

possession of a mining claim. *Lockhart v. Wills*, 9 N. M. 354, 54 Pac. 336, Affirmed in part in 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665; *Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777; *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856; *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906; *Zeckendorf v. Hutchison*, 1 N. M. 476.

And so is compliance with such local regulations of the mining district as are not in conflict with statutory provisions. *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Becker v. Pugh*, supra.

A location according to law is a condition precedent to a grant from the government. *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713; *Zeckendorf v. Hutchison*, supra.

And to the right of possession of the claim. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759.

A person claiming ground not actually possessed and worked for mining purposes must show his right thereto by constructive possession; and he can show this only by physical marks or monuments, or by compliance with all the legal requirements of a valid location. *Roberts v. Wilson*, 1 Utah, 292; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Jordan v. Duke*, 4 Ariz. 278, 36 Pac. 896; *Bulette v. Dodge*, 2 Alaska, 427.

And a locator of a mining claim, who has failed to comply with the statute so as to make his constructive possession good as against any person holding adversely to him, cannot recover in an action brought to determine an adverse claim thereto with reference to the ground not in his actual possession, whether the adverse claimant has made a valid location on the ground or not. *Hahn v. James*, 29 Mont. 1, 73 Pac. 965.

And an instruction to find for the plaintiff in an action involving a right to mining ground, where the defendant has disclaimed possession of the claims claimed by the plaintiff, if it is found that the defendant claims the same ground as the plaintiff, is erroneous as ignoring the acts necessary to make a valid location. *Darger v. Le Sieur*, 8 Utah, 160, 30 Pac. 363.

A location cannot be considered valid unless upon proper development thereof a patent may be obtained for such portions of the surface ground included therein as embrace the evidences of the essential acts of location. *Armstrong v. Lower*, 6 Colo. 393.

While discovery is a prerequisite to a valid location, the discovery alone does not constitute a location. The discovery of ore vests in the discoverer no right or title to the property; it is but one step in acquiring title to a mining claim; and it must be followed by a location consisting of the marking of the claim by monuments so that its boundaries can be readily traced, the posting of notice thereon, and, where the state or district law requires it, the recording of such notice. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Copper Globe Min. Co. v. Allman*, supra; *Redden v. Harlan*, 2

Alaska, 402; Bulette v. Dodge, 2 Alaska, 427; Charlton v. Kelly, 2 Alaska, 532.

And, where locators go upon a mining claim and remain there until after 12 o'clock midnight of the day of location, posting notices thereof and setting stakes at two of the corners of the claim, and then leave the ground and never return, they do not proceed far enough to acquire rights which can be lost by abandonment or otherwise, so as to bring the claim within the provisions of the law with reference to the relocation of abandoned claims. *Paragon Min. & Development Co. v. Stevens County Exploration Co.* (Wash.) 87 Pac. 1068.

Nor will performance of statutory requirements which are conditions precedent to the acquiring of a title to mineral claims be presumed. *Zeckendorf v. Hutchison, supra.*

And, under N. M. Rev. Stat. § 5, p. 728, providing that mining locations may be sold and transferred in the same manner as real estate, it will not be presumed, in case of such a sale, that all the requirements of the statute with reference to perfecting the location were complied with upon the part of the seller at the time of the sale. *Ibid.*

It devolves upon one whose claim of ownership and right to the possession of a mining claim are put in issue to show affirmatively that he has complied fully with all the requirements of the statutes, Federal and state, and of the local rules and regulations relative to the location of mining claims; that is, that he has made a valid location. *Garfield M. & M. Co. v. Hammer, supra*; *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413.

And an averment that a grant was of vacant public land, and that a notice of location was posted thereon, is insufficient as an allegation of title to a mining claim. *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200.

Discovery of mineral, marking the boundaries, filing a declaratory statement with a proper description of the claim by reference to some natural object or permanent monument, possession and title to the time of discovery, performance of annual assessment work required by law, and that the locator is a citizen of the United States, or has declared his intention to become such, are all essential averments in a complaint, in an action brought to settle the question of the right to the possession of a mine. *Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414.

And it is proper for the court to submit to the jury, to find as a question of fact from the evidence, whether an applicant had complied with such requirements. *Bryan v. McCaig, supra.*

Proof of a clearly defined surface claim, surveyed and marked by a United States surveyor in accordance with the law, including a quartz lode running with the claim, and work on the vein inside the surface claim and within the lines of the disputed ground, however, is sufficient to put an adverse claimant on proof of his right. *Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co.* 12 Nev. 312. 7 L.R.A. (N.S.)

And evidence that, at the time of the location of a mining claim a notice was posted and subsequently recorded, and that the claim was marked on the ground by monuments so that the boundaries thereof could be readily traced, warrants a finding that the claim was located and the boundaries marked on the ground in accordance with the law. *Risch v. Wiseman*, 36 Or. 484, 78 Am. St. Rep. 783, 50 Pac. 1111.

So, one who discovers mineral signs or indications may assign or transfer his prospective discovery to another, who may follow it up and complete a valid location. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.* 13 Okla. 425, 73 Pac. 936.

But where a man discovered a vein, and posted a notice, and erected a discovery monument thereon, claiming in his notice twenty days to complete and record his claim, and, after some delay, other persons arranged with him by which they were to complete his location for their mutual benefit; and notice was accordingly posted in their behalf, and monuments were erected, —the location by the co-owners does not relate back to the original notice, but is an original transaction, and does not take precedence over a location made by third persons in the meantime. *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409. But see *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, disapproving of this case so far as it holds that there was a new location, as distinguished from a completion of the old one.

As to the effect of a defect in a location of a mining claim by reason solely of non-compliance with a state law, the laws of the United States having been complied with, where the state law is afterwards repealed, see *DWINNELL v. DYER*.

Questions with reference to performance of particular steps going to constitute a location, as a prerequisite to possessory title, are considered in the previous subdivisions of this note relating to such steps.

b. The question of time of performance.

In the absence of any provision as to time of completion of a location of a mining claim, as is the case under the Federal statutes, the discoverer of a mineral vein is generally held to be entitled to a reasonable time after the discovery in which to complete his location embracing the same. *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, Affirming 55 Fed. 11; *Murley v. Ennis*, 2 Colo. 300.

And his right of possession while he proceeds with the work is as absolute as after the development is completed. *Murley v. Ennis, supra.*

What would be a reasonable time after discovery for the completion of the location, within this rule, depends upon the circumstances affecting the ability of the locator properly to define his claim. *Doe v. Waterloo Min. Co. supra.*

And these circumstances should be such as pertain to the ground to be located, its character, the means of properly marking

the ground sought to be located, and the ability properly to ascertain the dimensions and course or strike of the vein, on account of which the location is made. *Ibid.*

And, where a vein is exposed about 400 feet in one place and about 40 feet in another, and it does not appear that the dip of the vein is exposed at any point, and 1,000 feet of the vein are covered, and there is a large amount of quartz on the side of the mountain where the vein is situated, twenty days is a reasonable time to allow for the completion of a location after discovery. *Ibid.*

The rule has been asserted, however, that one who discovers ore in lands, and subsequently locates such lands as a mining claim, acquires no right by such location, as against another who locates such lands after the discovery, but previous to his location. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488.

And that, where two persons locate mining claims upon the same land, and there is no pretense of any actual possession of the whole claim, other than by compliance with the act of Congress with reference to the location of mining claims, the question for decision is, Which party has complied with the requirements of the law and is prior in time? not, Which, on the whole, has the better right? *Funk v. Sterrett*, 59 Cal. 613.

And under this rule, where a miner discovered a vein, and went upon the ground, and posted a notice, and erected a discovery monument, the notice stating that he claimed twenty days within which to mark the boundaries and record the claim, after which he was away for some time, a part of the time detained by illness and a part of the time engaged in posting notices elsewhere, a location made and completed by others upon the same land, though within the twenty days, was the prior one, and must prevail. *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409.

So, upon the other hand, where the time of performance is prescribed by law, if a locator neglects to perform any necessary requirement within the time prescribed, his attempted location is of no avail as against an intervening location, peaceably and regularly made, covering the same ground, though he performs the neglected requirements after the inception of the second location. *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Jordan v. Duke*, 4 Ariz. 278, 36 Pac. 896.

But a person who first discovers a vein, and posts his discovery notices, is entitled to hold it as against a subsequent discoverer, who succeeds in first completing all the requisite acts of location, where he follows his discovery with the remaining acts necessary to a location within the prescribed period. *Pelican & D. Min. Co. v. Snodgrass*, 9 Colo. 339, 12 Pac. 206.

And the order in which the acts requisite to a location of a mining claim are done is immaterial, provided they are completed before the rights of others intervene. *Perigo v. 7 L.R.A. (N.S.)*

Erwin, 85 Fed. 904; *Bulette v. Dodge*, 2 Alaska, 427; *Charlton v. Kelly*, 2 Alaska, 532; *DWINNELL v. DYER*.

Nor can a subsequent locator of a mining claim object that all the steps necessary to a previous valid location of the claim were not performed at the time provided, where they were afterwards performed before other rights accrued. *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *SHARKEY v. CANDIANI*.

And failure of a locator to complete his location within the time required by law does not prejudice his rights, where he was prevented from completing it by the act of a trespasser who forcibly ejected him. *Erhardt v. Boaro*, 2 McCrary, 141, 8 Fed. 692; *Miller v. Taylor*, 6 Colo. 41.

But the locator of a mining claim, asserting adverse possession and ouster as an excuse for not perfecting his location, must show that he was in some way prevented thereby from perfecting his location. *Lockhart v. Wills*, 9 N. M. 354, 54 Pac. 336, Reversing on rehearing 9 N. M. 263, 50 Pac. 318.

And a locator of a mining claim who fails to perfect the same as required by law cannot set up as an excuse for such failure that, prior to the expiration of the time allowed by law to perfect his location, others took adverse possession of his claim, where he was not aware of it until after the forfeiture. *Ibid.*

So, where a mining location has been forfeited by failure to perform the statutory requirement for a valid location, the fact that such failure was the result of a conspiracy to defraud the locator, on the part of a colocator with other persons, who located after the forfeiture, is immaterial. *Lockhart v. Wills*, 9 N. M. 354, 54 Pac. 336, Affirmed in part in 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665.

Questions as to time of performance of particular steps going to constitute a location are considered in the previous subdivisions of this note relating to such steps.

c. Exceptions based on possession.

The acts of Congress with relation to the location of mining claims and the determination of the right thereto do not prevent the application to the subject of statutes of limitation, by which an actual, exclusive, and uninterrupted possession bars all claim, and vests a perfect title in the adverse holder. 420 Min. Co. v. *Bullion Min. Co.* 9 Nev. 240, 3 Sawy. 634, Fed. Cas. No. 4,989.

And adverse possession of a mining claim, the claimant holding and developing it by work and labor performed for a longer time than the period of limitation prescribed by statute, renders the claim valid as against everyone except the United States. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572.

And U. S. Rev. Stat. § 2332, U. S. Comp. Stat. 1901, p. 1433, authorizing miners to acquire a right to mining lands by holding and working the same for five years, in the absence of an adverse claim, makes posses-

sion continued for five years without adverse claim equivalent to a location under the laws of Congress; and it does not require both a valid location and five years possession, in the absence of such claim. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047.

That act is to be construed in connection with the remaining Federal statutes, and the effect is simply to declare that possession for the statutory period is equivalent to a valid location. *Upton v. Santa Rita Min. Co.* (N. M.) 89 Pac. 275.

But evidence of possession of a mining claim for the period prescribed by the local statute of limitations is immaterial where the person offering such testimony claims under a location duly made pursuant to law, and there is no issue as to the original validity of such location, but simply one as to whether he had forfeited it by failure to do the annual assessment work for a given year. *Ibid.*

So, the rule has been asserted that two kinds of possession of mining ground are recognized: First, where the miner, by virtue of work and improvement upon a tract of mineral land and occupancy thereof, holds the same, independent of the location statutes, against one having no better right; and second, where, after discovering a vein, the miner undertakes to avail himself of the benefits of the location statutes. *Armstrong v. Lower*, 6 Colo. 581.

Under this rule, if a person claiming a mining right is unable to prove a valid location in accordance with the mining laws in force, he may still recover in ejectment if he shows actual possession under color of title at the time the defendant entered. *Lebanon Min. Co. v. Consolidated Republica-* *can Min. Co.* 6 Colo. 371.

And, as against a third person who has not complied with the statutes and local laws, a person doing work on a mining claim, or who has done work not abandoned, has an actual possession to the extent of the work done. *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401.

And evidence that the plaintiff in an action of ejectment to recover possession of a mining claim knew that work had been done by another claimant on the claim, and that the plaintiff had examined the records and knew the defendant's title to the premises in question, is competent as tending to show title and possession in the defendant. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

A loose, uncertain, scrambling, and mixed possession of a mining claim, however, is not sufficient to vest a title to it under the statute of limitations, where the possession of the opposing party is equally good. *Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 562.

And evidence of the erection of a discovery stake at a shaft, and the posting of notices stating where the location work is being done, is insufficient to show such actual possession of a whole mining claim as will
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warrant its recovery against an adverse claimant. *Armstrong v. Lower*, supra.

And U. S. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429, with reference to patenting mining claims, is a statute of repose only so far as to bar the assertion of adverse mining claims not filed within the period of publication, and does not relieve the Land Department from the duty of ascertaining whether the land sought to be patented is mineral in character, and therefore subject to disposition under the land laws. *Ferrell v. Hoge*, 29 Land Dec. 12.

On this subject, see also *Richmond Min. Co. v. Rose*, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055, supra, X. d, 1.

XV. Conclusion.

Up to a recent date mining comprised a large part of the business of the precious metal-bearing states and territories and it is still extensively carried on. It suddenly sprang into activity upon the discovery of gold in the West, and necessarily clashed to a large extent with other interests which had been acquired in the public lands of the mining regions. In the location of a mining claim, which is the initial step to the business of mining, the brunt of this clash was largely borne; and, owing to the varied nature and great extent of these clashing interests, and the vast financial interests involved, and the ability with which the questions at issue have been contested, and the care with which they have been decided, the subject of location of mining claims covers a broad field of jurisprudence. So broad is the subject, and so minutely and extensively have the cases covered it, that an attempt to conclude this note with anything like a complete résumé of the principles of law involved would be impracticable owing to the proportions which it would necessarily assume. Indeed, the breadth and extent of the subject, and the numerous principles which have been invoked to meet its requirements, together with the extended and accurately minute consideration which it has received, have made it necessary to divide and subdivide this note to such an extent that perhaps the best method of summarizing its contents is to call the attention of the reader to the table of contents.

It may be well to add, however, that location can be made only upon unappropriated, unoccupied public lands of the United States; and lands patented, or subjected to entry for patent, to individuals or associations are private property, and not unappropriated. Nor are lands legally located, or held in the proper process of location, for mining purposes, unappropriated within these rules; though an attempt to locate lands which is totally invalid does not segregate them from the public domain. Nor are lands subject to location unless they are mineral lands, and the question whether or not they are mineral lands, when arising in a contest with a nonmineral claimant, turns upon whether or not they are more valuable

for mining purposes than for the other purposes for which they are claimed; and, when arising between two mineral claimants, it turns upon whether or not sufficient mineral had been found to warrant an ordinarily prudent man in spending his time and money in the hope of realizing profit therefrom.

So, the right to locate mining claims is conferred upon citizens and those who have declared their intention to become such; and it is to citizens only that mining claims may be patented. But the modern rule is that a location by an alien is voidable only, and not void; and that it is subject to attack by the government only; and that by location he acquires a title which he can convey to a citizen, and which becomes good by relation, upon his subsequently declaring his intention to become a citizen. There are no restrictions upon location, based upon nonresidence, minority, or sex of the locator; and a location may be made through an agent.

As to the process of location, the would-be locator prospects upon the public domain for mineral, and a discovery of sufficient mineral to warrant an ordinarily prudent man in following it up and spending his time and money thereon gives him the right to post a notice at the point of discovery, claiming a mining claim. This is the initial step to the location; but it is not the whole location. He must now take steps to ascertain the strike of the vein or the position of the mineral discovered, with a view to the proper location of his surface claim. For this purpose he is entitled to a period of time, fixed upon the basis of reasonableness in some jurisdictions, and by statutes or miners' rules in others; and during this period he is protected against intrusion. When he has ascertained the strike of his vein, or the position of his mineral, he adjusts his surface claim accordingly; if it is a lode claim, he usually fixes it in the form of a parallelogram along the strike of the vein, and if it is a placer claim he usually fixes it to conform to a legal subdivision of the public survey. But a departure of a lode claim from a parallelogram in form does not invalidate the claim so long as parallelism of the end lines is maintained; if the vein deviates from a straight line it is proper for the location to deviate with it; and the only penalty attached to locating across the vein, instead of along its strike, is that the side lines become the end lines. Nor is a placer-mining claim confined absolutely to the form of a legal subdivision; practicability is the test, and the location may follow the deposit. So, in following a vein or deposit, and in maintaining the proper form, a locator is not precluded, in the absence of objection by the owner, from laying his claim so as to overlap or cross other claims, provided his discovery is not upon the conflicting area; though he cannot follow his vein when it passes out of his lines into a senior location.

Having ascertained the position of the

mineral sought to be appropriated, and adjusted his surface claim thereto, the locator must now mark it upon the ground. This must be done in such a manner that the boundaries can be readily traced. But any marking which will accomplish this is sufficient under the requirements of the Federal mining laws. And it may be by physical objects or marks placed upon the ground, or by utilizing natural objects already there. Substantial compliance with additional requirements by state statutes and miners' rules and regulations, however, is necessary. These rules apply to placer as well as to lode claims; and the object of the requirements is to enable other prospectors to ascertain exactly what ground has been appropriated. And the marks establish the boundaries, and are controlling when they vary from courses and distances set out in notices and certificates; and the validity of the location is not affected by their subsequent removal or obliteration.

With the marking on the ground the location is completed, where no record is required. In most of the mining states and territories, however, a record is required, either by state statutes, or by regulations of miners; and, where it is so required, the Federal statute, which is substantially copied by most of the local enactments and regulations, provides that it shall contain the name or names of the locators, the date of location, and such a description of the claim located by reference to some natural object or permanent monument as will identify the claim. This necessitates a record of such a nature that from it a prospector can locate the natural object or permanent monument referred to, and from it and them can locate the claim in question. The purpose of a record is to give public notice of the appropriation of the lands located, and to show compliance with the mining laws and customs, and both statutory provisions and mining rules as to preparation and contents must be substantially complied with; and, when properly prepared, it is evidence of all things which the statute requires it to contain, and which are therein sufficiently set forth.

This completes the location. It may be amended, however,—at least in a number of the states and territories in which amendment is provided for by statute,—either before or after completion, either for the purpose of correcting mistakes in the original location, or to take in new unappropriated or abandoned territory; though an amendment cannot give validity to a void original location. And, while full performance of all the various steps above enumerated is a prerequisite to a possessory title, the order of performance is not material where all are performed before the rights of others intervene. Nor does the failure to perform any particular act within the prescribed time furnish a ground for objection to a location when it was afterwards performed before rights of others accrued; and, though the necessary acts of location are never performed, the mining laws do not prevent

statutes of limitation from vesting title in an adverse holder of a mining claim upon an session, exclusive, and uninterrupted possession for the statutory period, as against everyone except the United States.

F H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

McDEARMOTT COMMISSION COMPANY
et al., Appts.,
v.

CHICAGO BOARD OF TRADE.

(77 C. C. A. 479, 140 Fed. 961.)

Board of trade—market quotations—publication.

A board of trade, which has a right of property in market quotations collected in its exchange, does not surrender or dedicate them to the public by permitting sub-

Headnote by VAN DEVANTER, Circuit Judge.

Case Note—Property rights in market quotations:—The latest leading case involving the right of a board of trade or stock exchange to control the distribution of its market quotations—that is, the prices offered and accepted in the course of transactions between its members on the floor of its exchange—is *Board of Trade v. Christie Grain & Stock Co.* 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, Reversing 61 C. C. A. 11, 125 Fed. 161, and Affirming 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507. Upon the preliminary hearing of the *Christie Case*, 116 Fed. 944, where an injunction was granted to restrain the defendant grain and stock company from receiving or surreptitiously acquiring the complainant board's market quotations, and to prevent certain telegraph companies from giving such quotations to such company, it was held that the board of trade had at least a qualified property right in the market quotations, resulting from transactions between its members, and in the distribution thereof; but the exact limitations of this property right were not decided nor was the full extent of the board's control over its quotations made clear. The court was of the opinion that the board possessed such a measure of ownership and control as to justify it in requiring telegraph companies with whom it had contracted for the transmission and distribution of its quotations to secure everyone desiring them a written consent that the same would not be used in the conduct of a bucket shop, but that they were for the private and individual use of the applicant therefor in business in which he was engaged. The court said: "The quotations are the result of transactions between the members of the board of trade upon the floor of an exchange hall owned by it and maintained . . . (N.S.)

scribers, to whom they are communicated upon condition that they shall not be made public, to post them upon blackboards in their places of business, where the posting is done for the advantage of the subscribers, and not of the public, and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value.

(July 9, 1906.)

A PPEAL by defendants from an order of the Circuit Court of the United States for the Western District of Missouri enjoining the use by defendants of certain market quotations. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Philips, District Judge.

Messrs. Charles S. Cryaler and Clifford Histed, with Mr. James H. Harkless, for appellants.

Mr. Henry S. Robbins, with Mr. Martin H. Foss, for appellee.

at its own expense. They are gathered by its own employees. They possess a positive commercial value when instantaneously and continuously transmitted and distributed, . . . and are a source of substantial revenue to the complainant."

Upon the final hearing in 121 Fed. 608, a permanent injunction to the same effect was granted in accordance with the conclusion announced in the preliminary hearing, that the board had a property right in its quotations.

This judgment was reversed in *Christie Grain & Stock Co. v. Board of Trade*, 61 C. C. A. 11, 125 Fed. 161, where it was held that the Chicago Board of Trade was not entitled to invoke the aid of a court of equity in securing the pecuniary benefit derived from the communication and sale of quotations collected from the transactions of its members on the floor of its exchange, where it appeared that at least 85 per cent of such transactions were bucket-shop operations in violation of the statutes of the state as construed by its supreme court.

Upon the first hearing of *Board of Trade v. L. A. Kinsey Co.* 125 Fed. 72, the trial court arrived at the same conclusion as did the circuit court of appeals in the *Christie Case*, and refused to grant an injunction to restrain the defendants from receiving, using, selling, or distributing the quotations of prices of commodities dealt in on the floor of the complainant's exchange, upon the ground that 95 per cent of the board's transactions on the floor of the exchange were bucket-shop operations which were knowingly permitted by the board itself. The court was of the opinion that the proportion of these transactions which were illegal was so large as to taint them as a whole, and that whatever prop-

Van Devanter, Circuit Judge, delivered the opinion of the court:

This is an appeal from an interlocutory order granting an injunction restraining the appellants from acquiring and using certain continuous market quotations without the appellee's consent.

Recognizing that these quotations, as collected by the appellee in its exchange, are its property; that, while they remain such, it has the right to control their acquisition and use by others; and that wrongful invasions of this right may be restrained in equity (Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Board of Trade v. Cella Commission Co. 145 Fed. 28),—the appellants rest their opposition to the in-

junction upon the sole claim that they do not obtain the quotations until they have been given to the public with the appellee's knowledge and approval, and have ceased to be private property. In brief, the facts are these: Under an arrangement between the appellee and certain telegraph companies, which act as distributing agents, the quotations—that is, those wherein the price of any commodity is quoted oftener than at intervals of ten minutes—are communicated by telegraph to commercial exchanges, brokers, and others throughout the country upon the express condition that they shall be used only in the private and individual business of the receiver; that they shall not be sold, communicated, or otherwise given to news distributors or others; that no one shall be

erty right the board might have in its quotations was so infected with illegality as to forbid the interference of a court of equity for its protection.

But this judgment was reversed in 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507, and it was held that the property right of the board of trade in the quotations gathered by it from the transactions of its members upon its floor was not destroyed by the mere fact that a large percentage of the business done under its auspices consisted of gambling transactions, or by the further fact that such quotations were susceptible of bad as well as good uses. The court was also of the opinion that, even if the board permitted gambling transactions within its exchange, it was not thereby deprived of the right to enjoin the wrongful dissemination of its market quotations, inasmuch as a court of equity cannot deny relief upon the sole ground of the immoral or illegal acts of a complainant, if the particular right asserted in the suit is not thereby affected.

Upon appeal to the Supreme Court of the United States, the judgment of the circuit court of appeals in the Christie Case was reversed and in the Kinsey Case affirmed, and the injunctions prayed for by the board of trade were granted in both cases. This court held that the plaintiff board of trade's collection of quotations was entitled to the protection of the law. "It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's." The contention that prevailed in the circuit court of appeals in the Christie Case was also made here,—that the board of trade was not entitled to the protection of a court of equity when the greater part of the transactions of its members on its exchange were in fact bucket-shop operations forbidden by law. In reply to this, the court said that, if the board's collection of information was otherwise entitled to protection, it did not cease to be so, even if it were information concerning illegal acts. "The statistics of

crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data." It was therefore held that the use and distribution of the board's continuous quotations by those who had obtained them by breach of the confidential terms on which the board communicated them to its customers would be enjoined, though such quotations related to "pretended buying and selling" carried on in the board's exchange hall, within the meaning of the Illinois act prohibiting the keeping of places where such transactions were carried on.

So, in *Cleveland Teleg. Co. v. Stone*, 105 Fed. 794, it was held that the Chicago Board of Trade had a right of property in its market quotations until the same were made over to the public, and that such board had the further right to convey to the telegraph company its property right in said quotations, and that such grantee was entitled to protection in the enjoyment of the same before publication, and that their unauthorized publication or distribution by others would be enjoined. The court said that, if it was admitted that the board had a property right in these quotations, it could not be denied that it would be greatly damaged by the broadcast scattering thereof "by purloiners who, by reason of having to pay nothing for these quotations so stealthily obtained by them," could obviously render valueless the board's right of property.

To the same effect is *National Teleg. News Co. v. Western U. Teleg. Co.* 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294, in which it was held that, while the market quotations and sporting news gathered by a telegraph company and delivered to its patrons by means of tickers were not, as so delivered, within the protection of the United States copyright laws, yet they were a species of property which would be protected by equity against appropriation by rival companies intending to furnish them to their patrons in competition with the first company to the injury or destruction of the service. The court deemed the print-

owed to directly or indirectly take them in the office of the receiver, or to make wire connection with the instrument or wires over which they are received; and that failure to strictly comply with any of these requirements shall terminate the receiver's right to a continuance of the service.

By reason of a charge which is made in communicating the quotations in this case, their collection and distribution are a source of substantial profit or gain to the appellee. Many of those to whom they are communicated immediately post them on blackboards in their places of business as a convenient means of stimulating and facilitating trade. These places of business, including the commercial exchanges, are maintained by private owners for the

transaction of private business, and members of the public enter, not as a matter of common right, but only by the license of the owners, and usually for purposes in connection with their business. The posting seems to be with the knowledge and approval of the appellee, but not with any assent that the quotations may be copied and taken away, or reproduced and used elsewhere. The appellants are brokers and commission merchants at Kansas City, Missouri. In some systematic way, not satisfactorily disclosed, but confessedly without the consent of the appellee, they obtain the quotations immediately upon their being posted by those who rightfully receive them. They then display them upon blackboards in their own offices, and use them in their

enterprise proceeding from the ticker and conveying these quotations, to have acquired commercial value. "It is, when thus used, at least, a distinct commercial product,—such so as any other output relating to business and brought about by the joint exertion of capital and business ability." See *Illinois Commission Co. v. Cleveland*, 166 U. S. 56, 5 C. C. A. 205, 119 Fed. 301, where the court was "content, on the reasoning of" the foregoing case, to restrain the telephone company from obtaining, receiving, and selling the Chicago Board of Trade's market quotations.

In *Board of Trade v. Consolidated Exchange*, 121 Fed. 433, the court held that it was undoubtedly the law to dispute that the board of trade had a property right in original quotations of market prices for a limited period of time, but that it might also control the publication thereof, and that the unauthorized use of the board's continuous quotations was an infringement of such right; but a preliminary injunction was refused to restrain the defendant from the market quotations in question, because of the failure of proof that the defendants were using the quotations sought to be protected.

In *Bradley v. Western U. Teleg. Co.*, 100 Fed. Dec. Reprint, 707, the court said that market quotations collected by a telegraph company were its own property, and an injunction was refused to restrain such company from discontinuing furnishing market quotations to the complainant.

In *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 104, it was held that the foreign financial news of a news-association was property, and that, as that property was not aban- doned by publication, the unauthorized publication thereof would be enjoined.

In *Exchange Teleg. Co. v. Gregory*, 101 U. S. 147, it was held that, where a telegraph company and the committee of the London Stock Exchange entered into an agreement whereby information as to the prices of stocks and shares from time to time during the day was collected on the exchange and supplied to the tele- graph company, the latter had a right of property at common law in the information, and was entitled to an injunction to restrain one who had obtained the same surreptitiously from infringing upon that right by continuing to publish the information. Lord Esher said: "This information—this collecting together of materials so as to give knowledge of all that has been done on the stock exchange—is something which can be sold. It is property, and, being sold to the plaintiffs, it was their property."

There are some cases where this property right is definitely recognized, though there is no specific holding to that effect, of which the most recent seems to be *New York Cotton Exchange v. Hunt*, 144 Fed. 511, in which a preliminary injunction was granted to restrain the defendant from receiving, using, or selling, directly or indirectly, the exchange's quotations, or permitting or maintaining any wire to his office over which the quotations should pass, or from distributing the quotations until he should have acquired the right to receive them, either by contract of purchase from the exchange, or, with its approval, from one of the telegraph companies authorized to distribute them. It appeared that the defendant had a contract with the telegraph company to furnish him the complainant's market quotations, to which contract the complainant was not a party; and that at the time this contract was made the telegraph company was exercising the privilege of distributing these quotations to whomsoever it pleased by permission of the cotton exchange. It further appeared that the telegraph company was about to cease furnishing the defendant with the quotations because of a contract entered into between the exchange and the telegraph company by the terms of which an application by the person desiring the quotations and an approval thereof by the exchange were prerequisites to the furnishing of these quotations to anyone, and that the defendant refused to make such application. Upon the authority of the *Christie Case*, supra, the property right therein of the party collecting such market quotations was recog-

graph company, the latter had a right of property at common law in the information, and was entitled to an injunction to restrain one who had obtained the same surreptitiously from infringing upon that right by continuing to publish the information. Lord Esher said: "This information—this collecting together of materials so as to give knowledge of all that has been done on the stock exchange—is something which can be sold. It is property, and, being sold to the plaintiffs, it was their property."

own business in like manner as do their competitors, who pay for them. The time intervening after the quotations are posted by others and before they are displayed in the appellants' offices is sometimes five minutes, but generally is much less.

It is the contention of the appellants that in the circumstances described the posting of the quotations by those who rightfully receive them is a general publication, and instantly operates as a surrender or dedication to the public of the proprietary rights of the appellee. The circuit court held otherwise (143 Fed. 188), resting its decision largely upon the reasoning and conclusion of the Supreme Court in *Board of Trade v. Christie Grain & Stock Co.* supra, where it is said: "The plaintiff does not

lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using knowledge obtained by such a breach [citing cases]. The publications insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough."

nized; also his right to control them. To that end, the owner was held to be able by contract to say who should distribute them, and to limit the distribution to such parties as it might choose and on such reasonable terms as it might impose. It followed, therefore, that the defendant would be enjoined from destroying partially or wholly the complainant's property right, by wrongfully obtaining the use and benefit of such property without the consent of the exchange, and in violation of the contract between the exchange and the telegraph company. It was also held that the exchange was in no way affected by the contract between the defendant and the telegraph company, and was not bound thereby, and that its existence in no way affected the right of the exchange to limit the distribution of its quotations.

A permanent injunction was afterwards granted by the same court, without opinion, and the order made on that occasion was affirmed by the United States Supreme Court in *Hunt v. New York Cotton Exchange*. 205 U. S. 322, 51 L. ed. —, 27 Sup. Ct. Rep. 529. The court here, following the *Christie Case*, proceeded upon the assumption that the quotations were property, and were entitled to the protection of the law, and that the exchange had the right to keep to itself the work which it had done, or paid for doing, and that such right would be violated by one who got the quotations from a person forbidden to communicate them, as well as by one who surreptitiously obtained them. This right must, of course, mean a property right, and that that is the assumption of the court clearly appears from its answer to the contention that there was not enough involved in the case to give the Federal courts jurisdiction. Upon this point, it was held that its value to the exchange, and not the rate paid to the telegraph company for furnishing the quotations, determined the jurisdiction; and that the evidence clearly showed that the value of the right to these quotations was much greater than the jurisdictional amount of \$2,000.

So, in *Sullivan v. Postal Telegr. Co.* 61 7 L.R.A.(N.S.)

C. C. A. 1, 123 Fed. 411, it was held that the Chicago Board of Trade and the telegraph companies with which it had contracted for the transmission of its market quotations had the right to make reasonable regulations for the conduct of the business, and that a rule requiring all customers, as a prerequisite to being furnished with the quotations, to sign an agreement that they would not use the same, in conducting a bucket shop, was reasonable and capable of being enforced.

And in *Sullivan v. Chicago Bd. of Trade*, 111 Ill. App. 492, it was held that, where one who had a contract with a telegraph company which entitled him to receive from it the continuous quotations of the board of trade, which contract he was not permitted to assign without consent of the company, the party to whom he sold out his business without such consent had no rights under such contract, and was not entitled to an injunction to restrain the telegraph company to remove the tickers by means of which he received such quotations.

And in *Griffin v. Western U. Teleg. Co.* 8 Ohio Dec. Reprint, 572, injunction was refused to prevent the telegraph company from removing its ticker from the complainant's office, and in this way depriving him of the market quotations of the Chicago Board of Trade, where such action was contemplated by the telegraph company because of an order from such board of trade forbidding it to furnish the quotations to bucket shops.

But this property right in market quotations cannot, in the absence of a copyright, extend beyond the moment that the quotations are given to the public. Therefore it sometimes becomes a very important question whether or not there has been such a dedication to the public as would make the quotations public property. And it seems clear that the rule to be gathered from *McDEARMOTT COMMISSION CO. v. CHICAGO BD. OF TRADE* and other authorities is that, if there has been such dedication

While that case in principle goes far toward sustaining the ruling of the circuit court, we think it must be conceded to the appellants that it does not determine the precise question now presented; that is, whether the posting of the quotations in the circumstances described is such a general publication as to make them public property. The question is not, however, altogether new. It was presented and determined adversely to the appellants' contention in *Board of Trade v. Hadden-Krull Co.* 109 Fed. 705, where it was said by Judge Seaman: "These market quotations are peculiar in their property use and value, and, without immediate transmission to the customer, so that he receives them simultaneously with other customers, and before their pub-

lication generally, they possess no purchase value. To make them available, it is essential to have the quotations written or printed in some form for the information of all entitled to their use; and it appears here that they were in some instances so furnished in the 'ticker,' and in others were placed on a blackboard in the office of the customer. No reason appears for finding a publication in the one method if not in the other, and I am of opinion that neither constitutes a dedication to the public while limited to the use and office of the customer."

Older and more frequent application of the principle underlying that decision is found in the cases defining the common-law rights of an author in his literary or dramatic composition. Thus a professor of a

the public, the person collecting such quotations is, of course, not entitled to give their unauthorized use enjoined; but, on the other hand, unless there is sufficient evidence to establish such dedication to the public, the property right of the board of trade or stock exchange in its market quotations will be protected by equity, even though there was a limited publication of the quotations by their owner's customers.

Accordingly, it was held in *Board of Trade v. C. B. Thomson Commission Co.*

Fed. 902, that, while the board had an doubted common-law right of property in its quotations as prepared by its officers and agents until the same were published, and was thereby entitled either to withhold them entirely from publication, or make the first publication thereof, the common law afforded no protection against subsequent publications, and such protection could be obtained only through statutory copyright; and that, therefore, a preliminary injunction would be refused to restrain the use of the complainant's market quotations, where it was disputed whether there had been such prior publication as to make the quotations public property; though the court held that the giving out of the quotations to a limited number of persons for individual use would not be a publication as would defeat the complainant's property right.

In the final hearing of this case, in *Board of Trade v. Hadden-Krull Co.* 109 Fed. 705, complainant was held to be entitled to decree enjoining the defendants from taking and using its market quotations without authority, where the evidence failed to show any act or conduct in respect to quotations prior to their receipt by the defendants which would confer upon the general public a right to use them. Here, as said to be well established that the board of trade had a property right at common law in its market quotations, and this common-law right of property preserved until voluntary publication; that, unless such publication intervened before the use of the reports by the

defendants, either through the transactions of the telegraph companies or of their subscribers, the arrangement with the telegraph companies whereby they distributed the quotations to their customers did not deprive the complainant of its right to maintain its bill. The court went on to say that the difficulty in such cases was to ascertain the time when the fact of publication occurred. But, regardless of the question whether the placing of the quotations upon the blackboard of a customer of the board of trade would constitute such publication as would open their use to the general public; and disregarding, too, the further question whether the fact that a limitation was placed upon the nature of the use of the quotations delivered, would prevent their delivery from constituting a publication, if access by the public was open, and there was no restriction upon the extent or number of persons having such access or use,—it was held that, inasmuch as the testimony was undisputed that the quotations received by the defendants were wired to them by persons who obtained them by stealth and unfair means without the consent or knowledge of the owner, the quotations so derived would not be open to the defendants' use or benefit, unless they were equally open to the general public at the same moment.

And in *Board of Trade v. Cella Commission Co.* 76 C. C. A. 28, 145 Fed. 28, Reversing 121 Fed. 1012, it was held that the board's right of property in its continuous market quotations endured for a sufficient length of time to enable it to avail itself of the benefits thereof; and an injunction was accordingly granted to restrain the defendant commission company from using such quotations without the board's consent. The court did not think the contention well taken that, when the quotations were taken off the wires and posted on the commission company's blackboard and used in its business, they had been superseded by later ones, and had therefore become in a sense surrendered and dedicated to the public so that anyone might use them without let or hindrance;

university, who delivers orally in his classroom lectures which are his own composition, does not communicate them to the public, so as to entitle one who hears them, or another, to print and circulate them without his permission. 2 Story, Eq. Jur. §§ 943, 949; Abernethy v. Hutchinson, 1 Hall & T. 28; Caird v. Sime, L. R. 12 App. Cas. 326; Bartlette v. Crittenden, 4 McLean. 300, Fed. Cas. No. 1,082; New Jersey State Dental Soc. v. Dentacura Co. 57 N. J. Eq. 593. 41 Atl. 672, 58 N. J. Eq. 582, 43 Atl. 1098. And an author of a drama or play, who permits another to represent it upon the stage, does not surrender or dedicate it to the public, so as to entitle one who attends its representation, or another, to print and publish it, or to represent it upon the stage,

without the author's permission. 2 Story, Eq. Jur. § 950; Macklin v. Richardson. 2 Ambl. 694, 7 English Ruling Cases, 66; Turner v. Robinson, 10 Ir. Ch. Rep. 121, 510; Roberts v. Myers, Brunner, Col. Cas. 698, Fed. Cas. No. 11,906; Boucicault v. Fox, 5 Blatchf. 87, Fed. Cas. No. 1,691; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480. In the last case it is said: "So far as is disclosed by the case, the drama remained in manuscript until printed by the defendant, and there is no claim that it has been published by the author or the plaintiff, or with their assent, except by its public performance on the stage; and if it has not, by that act, become *publici juris*, it

for the reason that the commission company would hardly do business upon the basis of quotations which were known to have been superseded by later ones. "To do so would be betting upon the happening of an event that either had already transpired, or was to some extent at least foreshadowed by the later evidence of the trend of the market."

Some of the cases, while admitting that a board of trade or stock exchange has a property right in market quotations gathered by it, deny that, for that reason, such organization may do as it pleases with its own, and arbitrarily furnish the same to some persons and refuse them to others. These decisions apply the controlling principle of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, that private property being devoted by its owner to a public use ceases to be *juris privati* only, and is therefore subject to public regulation.

Thus, in *New York & C. Grain & S. Exchange v. Board of Trade*, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855, Reversing 27 Ill. App. 93, it was held that, while the market quotations of the board of trade were its private property, they had in course of time become clothed with a public interest; and such board, as long as it continued in the business of collecting and furnishing such quotations, must do so without unjust discrimination as to persons, and must furnish them upon the same terms to all who might desire to obtain them for lawful purposes. The reasoning of the court in arriving at this conclusion deserves to be quoted at length: "The contention of the board of trade is that it is strictly a private corporation, and that both the individual and aggregate business of its members is essentially private business, and that the market news and statistics collected and compiled at the expense of the association are the private property of the association, and that it has a legal right to control such market news and statistics, and determine what telegraphic despatches touching the same it will send directly from the floor of its exchange during business hours, and to whom

they shall be sent, or whether it will send any such despatches whatever. The board of trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principals with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers, and merchants whom they represent. For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world. The great power and influence which the board possesses in dictating market values are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business—though in form, and as between the members, the mere private and individual dealings of such members—is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal. A potential factor in attracting this accumulation of business to the halls of the exchange, and in vesting the board with this power to regulate and determine the market prices of grain and provisions, is the fact that many years ago the board admitted and invited the telegraph companies, which are quasi public corporations, to the floors of the exchange, and permitted and encouraged them to gather market quotations, showing the changes and fluctuations in the prices of the various products as they occurred, and send instantaneous information from the floors of the board, by means of telegraph lines and instruments, to all the principal towns and cities, and by means of ticker circuits to the places of

till remains the private property of the author or his assignee, who alone have the exclusive right to it, and may prevent its publication. When a literary work is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others. An author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an intent to dedicate it to the public. An unqualified publication by printing and offering for sale such a dedication. The rights of an author of a drama in his composition are twofold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and pub-

lishing it. Lectures and plays are not, by their public delivery or performance, in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. It does not give to the hearer any title to the manuscript or a copy of it, or a right to the use of a copy. The manuscript and the right of the author therein are still within the protection of the law, the same as if they had never been communicated to the public in any form. The permission to act a play at a public theater does not amount to an abandonment by the author of his title to it, or to a dedication of it to the public."

Without extending the reference to adjudged cases, we hold that the effect of the

business of all persons desirous of such information, which information was furnished to all persons and corporations, without discrimination, who were willing to receive and pay for the same. In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the board of trade, and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports, inaugurated, and for years persisted in, by the board of trade and the telegraph companies. This market news is a species of property, and, if the statistics with reference to the individual business of the members of the association, and the aggregate business of its members, had from the start been gathered and compiled at the expense of its members, and for their sole use, it would be it would have been strictly private property held in trust by the board for the benefit of such members, and wholly free from any public interest therein. But the board did not so exercise its franchises as to conduct its business, but admitted telegraph companies to the floor of its exchange, and permitted and encouraged them, from day to day and year after year, to publish these statistics of the dealings on the board, and telegraph them, immediately as they were made, throughout the land, to whomsoever would pay for such information. Until the business of the country adapted itself to these means and applications, and the point was reached when the action upon the board were puissant enough to determine the market values of the products of the country; and all persons dealing in such products could not, without the knowledge and benefit of these immediate quotations, intelligently and safely so deal. The facts that the board of trade is a private corporation, and that the dealings between its members are private business, as is transacted between dry goods, grocery, and commission merchants, and that the statistics of these dealings, collected as we have stated, are private property. (N.S.)

erty, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public in respect thereto." The court then quoted from *Munn v. Illinois*, supra, to the effect that when one devoted his property to a use in which the public had an interest, he thereby granted to the public an interest in that use, and therefore must submit to be controlled by the public for the common good to the extent of the interest he has thus created; and went on to say: "Assuming these market quotations are reports are property, and the private property of the board of trade, yet, if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily to all alike, common to all, and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them. . . . The question is, Can the board so conduct its affairs for a long term of years as to create a standard market for agricultural products, and, acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until, by the usage and custom of mer-

publication relied upon by the appellants is to be determined by inquiring whether it is so restricted in point of place, purpose, and persons as to be consistent with the retention by the appellee of its proprietary rights, or is so general or unqualified as to indicate an intent to surrender or dedicate them to the public at large. Tested in this way, the facts before recited admit of but one conclusion. The publication relied upon consists altogether in the posting of the quotations by those who subscribe for them. This is done in places which, by reason of their ownership and use, are private. Its controlling purpose is that of stimulating and facilitating trade with the subscriber, and not of conferring a benefit upon the pub-

lic. It implies, of course, a permission that in dealing with the subscriber his patrons may use the information which the quotations contain, but not that they may be copied and taken away or reproduced and used elsewhere. It does not make knowledge of them general, or make them accessible to the public as of right, or render them of no further value. In short, it is so restricted as to be consistent with the retention by the appellee of its proprietary rights, and does not indicate an intent to surrender or dedicate them to the public.

We conclude, therefore, that the order granting the injunction was rightly made, and it is affirmed.

chants, thus advanced by the methods adopted by the board and telegraph companies, such instantaneous market quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements, and pay for the information desired, say that one shall and another shall not have such information. If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies, and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers, and producers." The court added that it did not wish to be understood as holding that the board was legally bound to continue in the business of furnishing the quotations to the public, or that it might not voluntarily abandon such business; but it did hold that, as long as it carried on the same, it must do so without discriminations as to persons.

The fundamental principle of the foregoing case, that the property of a board of trade in its market quotations, being clothed with a public interest, is to that extent a right shared with the public, seems to be the basis of the conclusion reached in *Christie Street Commission Co. v. Board of Trade*, 92 Ill. App. 604, where injunction was denied to restrain a telegraph company from giving to one alleged to be conducting the business of a bucket shop, and the latter from receiving, the board's market quotations, because the evidence failed to disclose any such interference with the private rights or property interests of the board as would warrant the intervention of a court of equity.

And in *Western U. Teleg. Co. v. State*, 165 Ind. 492, 3 L.R.A.(N.S.) 153, 76 N. E. 100, the doctrine of *Munn v. Illinois* was again applied; and it was held that a quasi public corporation, as long as it continued in a business impressed with a public interest, must be subject to such regulations as might be found necessary to prevent in-

jury to such public interest; and that therefore a telegraph company which had purchased the continuous market quotations of a board of trade, and had been supplying them at a fixed price to persons desiring them, for such a length of time that they became necessary to the successful conduct of the business carried on in the products covered by the quotations, could not, while continuing in the business of furnishing the quotations, refuse to supply them to anyone able and willing to pay for them, and to be governed by reasonable rules and regulations made by the company in reference thereto. The court, however, so far recognized the control of their owner over such quotations as to hold that a provision in the contract under which they were sold to the telegraph company, that they should not be supplied to a person conducting a bucket shop, was "a proper and reasonable regulation to which this court unhesitatingly gives its approval."

This proposition of attaching a public interest to the market quotations of a board of trade or stock exchange was repudiated by Judge Hook, of the Federal circuit court, in rendering his decision in favor of the complainant in *Board of Trade v. Christie-Grain & Stock Co.* 116 Fed. 944 (reviewed above), in the following language: "Courts cannot, by their decrees, assume the initiative in declaring private property to be impressed with a public use. There should first exist that condition of growth or expansion of a private business, or of its relation to the public service or public necessity, which justifies the assertion of a public interest therein, and the accompaniment of public control, followed by legislative recognition or declaration of such condition. The power to bring under governmental control the lawful business of individuals and private corporations not vested with the power of eminent domain, and who are not engaged in what, by common acceptance, is termed a public service, for the reason that such business, through the enterprise and prudent management of its conductors, has grown to be of great public interest and concern, is of the gravest and most momentous character. It is doubt-

doctrine that, in the absence of legislative action, a suitor in a court of equity may be denied relief merely because theancellor is of the opinion that his business, originally private in its character, has grown to such magnitude that the public is entitled to an interest therein, and to a control thereof commensurate with that interest. When such a condition arises, the assurance of the public control is limited by the extent of the public interest, and the king of regulations pertaining thereto is legislative, not judicial, cognizance."

After the decision in the *Munn Case*, but before its principles had been applied by the Illinois supreme court to the market quotations of a board of trade, several decisions were rendered, principally by the Federal circuit courts, that are entirely opposed to the application of the doctrine of the *Munn Case*, though that decision is not it specifically mentioned by the courts in rendering their opinions; but their language is to rebut any other presumption than the doctrine in question was at least present in the minds of the judges.

Thus, in *Metropolitan Grain & S. Exchange v. Board of Trade*, 15 Fed. 847, an injunction was refused to restrain a telegraph company from breaking its connection with the complainant's office and thereby discontinuing the market quotations of board of trade, and to restrain the board from interfering with the sending of the telegraph company to complainant's reports of the prices of commodities and the transactions on the board's exchange. It appeared that the board of trade had notified the telegraph company that it gathered and distributed its quotations that it would not permit the latter's reporters and reporters to attend the daily meetings of the board and to send reports from to persons transacting business in certain way, among whom was the complainant; and the telegraph company notified the complainant of the action of the board, whereupon it filed its bill for relief. It was contended that the public had a right to the information afforded by these reports, and that, because the two complainants were corporations, the board was obliged to allow the reporters on its exchange and the telegraph company was obliged to transmit such reports to whoever desired them and was willing to pay for them.

But the court held that the board had the right to exclude all persons but their members from their meetings, or to admit only such as they chose. To quote the opinion: "As the proof shows, the complainant, at great expense, secures for the use of its own members reports of the market in other parts of the world. The complainant, if allowed, would make these reports public property, and give them to persons not members of the board, and perhaps, never could attain the position of membership of this body, all the advantage of membership. . . . It is absurd to say that information thus obtained by a private use becomes public property, . . . (N.S.)

merely because it is collected and paid for through the agency of a private corporation. Transactions on the board are not public only so far as the board or its members see fit to make them so. Undoubtedly, the members of the board who act as agents, brokers, or factors for others, can be compelled by their principals to disclose prices to them, but not to the public. . . .

Members of this board can go 'on change' and deal with each other privately, and are not compelled to let the public know the prices at which they deal. The mere fact that they have been in the habit of informing the public of prices is no evidence that they are obliged to do so if they do not see fit to do it. In fact, we often see, as a matter of common knowledge and information, quotations made of large transactions between different dealers on the board in commodities at prices not made public, thereby showing clearly that they exercise their own option of withholding from the public information as to their prices."

So, in *Bryant v. Western U. Tele. Co.* 17 Fed. 825, in which injunction was refused to compel a telegraph company to furnish a bucket shop with the quotations of prices ruling upon the Chicago Board of Trade, contrary to a rule of the board, though the owners of the bucket shop were members of that board, it was held that the Chicago Board of Trade, being a private corporation, could make public its transactions, or refuse to do so, and could distribute the same through such agents or upon such conditions as seemed advisable to it; and that, since the reporting by the telegraph company of the daily markets upon this board was done by the permission of the board, it was not a right that the telegraph company possessed without such permission. The court deemed it "quite clear that a merchant, or a number of merchants and dealers organized into a corporation, can give to a reporter the terms of their private transactions to be transmitted to others upon any conditions they may choose to impose, even to the extent that these transactions shall not be transmitted to others dealing in the same goods or commodities. These transactions on the board of trade are private transactions in the sense that the general public are not entitled to them except by the permission of the board."

And in *Marine Grain & S. Exchange v. Western U. Tele. Co.* 22 Fed. 23, it was held that the Chicago Board of Trade had the right to decide to whom other than its own members the reports of its own dealings collected by its own employees should be distributed. The court also held that the board had control of its own floor, and could admit such persons there as it saw fit, and that it could make its transactions wholly secret and keep them within the knowledge of its own members, or make them public so far and only so far as it saw fit to do so. "Information as to the condition of the demand and prices for commodities dealt in on the board in other markets

is collected and announced among the members of the board during the daily sessions of its members; and this information, together with reports of prices and dealings between the members at these sessions, if given as a matter of right to anyone demanding the same, would give to persons not members nearly if not quite all the advantages of membership, without the attendant expense and responsibility."

And these same principles were held to be controlling in *Commercial Telegram Co. v. Smith*, 47 Hun, 494, also decided before the supreme court of Illinois had ruled that the business of a board of trade or stock exchange in furnishing market quotations was one clothed with a public interest. In this case injunction was refused to restrain the New York Stock Exchange from excluding the plaintiff company from its premises, and from making an exclusive arrangement with another telegraph company to collect the market quotations of the exchange and to distribute the same among its customers. The court said: "The claim that the stock exchange has no right to exclude the Commercial Telegram Company from its floor upon the ground of public policy evidently proceeds upon an entirely erroneous theory. The exchange is a private association; it has the right to admit to its floor whom it pleases; it obtained nothing from the state except that protection which the law affords to every citizen; it has sought no special privilege and obtained no special powers. It is therefore just as much the master of its own business and of the method of conducting the same as any private individual within the state. It may make public the transactions which occur within its walls, or it may refuse all information in respect thereto. No matter which course is pursued, so long as it violates no law, it has a right to conduct its business as it pleases. . . . The New York Stock Exchange has asked nothing from the people of the state except that which is granted to every citizen; it has no special privileges under the law; it has no special rights; and the people, therefore, have no right to interfere in the transaction of its business to any greater extent than they have in that of any individual. It will hardly be claimed, we imagine, that because a man has carried on business in a certain way for a number of years that he has no right to change his methods."

And in *Re Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549, the foregoing case was followed, and mandamus refused to compel a telegraph company to furnish the petitioner with the market quotations of the New York Stock Exchange, in the same manner and at the same price as they were furnished to others. In this case the New York supreme court attempts to answer the reasoning of the Illinois supreme court in arriving at the conclusion that the business of furnishing market quotations was one in which the public was interested, and, therefore, subject to public control. The court said that the stock exchange had the

absolute right to give information as to the dealings of its members with each other to whom it pleased and upon such conditions as it saw fit to impose; and, therefore, it could give its market quotations to the telegraph companies to be delivered to certain specified persons upon condition that such information be given to no other persons. The court considered the information delivered to the telegraph company for transmission to be a communication which the stock exchange wished to transmit to certain persons and to no one else, and held that the stock exchange could not be required to furnish the petitioner with information relating solely to its own business upon its own property. As to the doctrine enunciated in *New York & C. Grain & S. Exchange v. Board of Trade*, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855, the court said: "The Chicago Board of Trade was a corporation, and the powers of a court of equity over a corporation are much more extensive than over private individuals; but we cannot agree with that decision so far as it appears to justify an interference by the public or the courts with a voluntary association in the transaction of its business because the public desire information as to its transactions. There is no doubt much information as to the method by which large corporations, associations, or firms transact their business, which would be quite valuable to their competitors and interesting to the public; but this would hardly be considered as justifying an interference by the courts. The basis of that decision is that, as the board had so conducted its affairs for a long term of years as to create a standard market in agricultural products, and, acting in concert or combination with the telegraph companies, had built up a great system for the instantaneous communication of intelligence concerning the market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, that it could not be allowed to create a monopoly in the matter of the market quotations by furnishing them to some and refusing them to others. It is difficult to see why a voluntary association, because of the importance and character of its business and members, and of their transactions could be compelled to transmit to a particular individual information of its transactions. It was said in the case last cited: 'We do not wish to be understood as holding that the board of trade is bound by law to continue the business of collecting and furnishing to the public market quotations, or that it may not voluntarily abandon such business; but we hold that, so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons.' (p. 166.) Or, in other words, that, because it gives information to one person, it must give the same information to all, and the court will compel it to give such information to anyone asking therefor. But the question may well be asked, Where does the

ourt get this power? No statute gives it. Nothing that these individuals have done, no obligations that they have assumed to the public, no privileges which they have received from the public, gives to the public the right to interfere with their private business or requires them to give information about it to those who desire such information. No franchise has been conferred upon this voluntary association by the public which justifies an interference by the public with its method of conducting its business, and to grant such an application would, it seems to me, be an interference with the liberty of the individual which is protected by the Constitution and the law. The doctrine established in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and kindred cases, does not apply. No property of a stock exchange has been devoted to public use. The stock exchange excludes the public from its property; restricts the transactions therein to its own members; adds information of such transactions to those whom it designates as the persons at whom it is to be received. Information as to transactions upon the stock exchange is not such property as could be 'clothed with a public interest,' so that a 'grant to the public of an interest in that use' would be implied. Such information is not property in any sense, and the public or particular individual has no right to go to this voluntary association and insist that information of its transactions should be furnished."

To the same effect is *Wilson v. Commercial Telegram Co.* 18 N. Y. S. R. 78, 3 N. Supp. 633, in which it was held that the New York Stock Exchange performed public service and was charged with no public duty, and that the business transactions on its floor, being exclusively those of its individual members, had the same immunity from public inspection as other mercantile transactions, and that the exchange might refuse to furnish information as to its transactions—that is to say, its market quotations—to such persons as it saw fit, though for many years it had permitted persons not members to have access to its floor and to gather reports of its transactions to be distributed as news.

And the doctrine of the Illinois court is not to have met with approval in *Reitt v. Philadelphia Local Teleg. Co.* 18 Pa. 316, in which it was held that, where a telegraph company, incorporated as a transmitter of telegraphic despatches for the public, established in connection with its business a system of collecting and distributing information respecting the prices of stock, under a special contract with each customer, it did not thereby become bound to perform such favors for anybody, but might arbitrarily refuse any applications for the same, and might discontinue the service at pleasure when its contracts expired.

Each one of the foregoing lines of cases is correct in principle, the court, in *Cain v. Eastern U. Teleg. Co.* 10 Ohio Dec. Rept. (N.S.)

print, 72, refused to decide, though it held that, admitting the binding force of the principle, that the business of distributing market quotations was one affected with a public interest and therefore amenable to public control, the case at bar called for no application thereof.

Attention may be called to some Federal cases that, while admitting a property right on the part of a board of trade in market quotations gathered by it, have yet refused, at the suit of the board, to restrain the unauthorized use of such quotations by others; upon the ground that the greater part of the transactions on the board's exchange from which such quotations were collected, were bucket-shop deals in violation of law, and that the board knowingly permitted the use of its exchange by its members for such purpose, which deprived it of any standing in a court of equity. *Board of Trade v. O'Dell Commission Co.* 115 Fed. 574; *Board of Trade v. Donovan Commission Co.* 121 Fed. 1012; *Board of Trade v. Ellis*, 122 Fed. 319. But these cases must be deemed to be overruled by the *Christie Case*, supra.

Many of the authorities which hold that a board of trade has a property right in its market quotations were cited by the Massachusetts court in *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204, to support its conclusion that facts with reference to contemplated buildings or improvements, which have been ascertained promptly, by effort and expense, and compiled and put in form for the use of contractors, and which have a commercial value so long as they are not generally known, were also property entitled to protection as such. It was further held in this case that the furnishing to subscribers of such information under contract not to disclose it was not a publication which would deprive its owner of the right to protection against its unlawful use by another.

For a discussion of the right of a bucket shop to compel the furnishing to it of market quotations, see *Western U. Teleg. Co. v. State*, 3 L.R.A. (N.S.) 153, and the note thereto.

ARKANSAS SUPREME COURT.

STATE OF ARKANSAS et al., Appts.,
v.

AL VAUGHAN et al.

(— Ark. —, 98 S. W. 685.)

Gaming—betting on horse race.

1. Betting on horse racing is not within a statute making criminal "betting any money on any game of hazard or skill."

Case Note.—Horse racing as a game within gambling statutes:—This question seems to have arisen most frequently in prosecutions under criminal statutes.

In *Cheesum v. State*, 8 Blackf. 332, 44 Am. Dec. 771, it was held that a horse race

Nuisance—gambling house.

2. Rooms where bets are made on horse racing are common nuisances at common law, although betting on horse races is not prohibited by statute.

Injunction—criminal nuisance.

3. Injunction will not lie against the maintenance of a criminal nuisance merely to subserve the public welfare.

(December 10, 1906.)

APPEAL by plaintiffs from a judgment of the Chancery Court for Pulaski County overruling a demurrer to the answer in a suit to enjoin the maintenance of a criminal nuisance. Affirmed.

The substance of the answer referred to in the opinion is sufficiently set out therein. The complaint was as follows:

"The plaintiffs, the state of Arkansas, by Robert L. Rogers, attorney general for said state, and Lewis Rhoton, prosecuting attor-

ney for the sixth judicial circuit, and the city of Little Rock, by W. E. Lenon, mayor, and Ashley Cockrill, the city attorney of said city say: That the defendant Al Vaughan is the owner of lot 1 in block 10 in the city of Argenta, and has a two-story brick building thereon. That the east half of the ground floor of said building is rented and leased to the defendant Bob Furth, and perhaps to others associated with him, by the said Al Vaughan, for the purpose of conducting and operating therein what is commonly known as a 'gambling house or pool room;' and that defendant Bob Furth and others associated with him, in renting said premises from said Al Vaughan, do therein and thereat operate and conduct a gambling house or pool room where money or other things of value are paid, received, won, and lost on horse races, and where tickets for pool or chance on horse races run, or to be run, at the various race courses in the state of Arkansas and throughout

is a game, within a statute enacting that "any person legally called to give evidence against another for gaming shall be deemed a competent witness to prove such gaming, although such person may have been concerned as a party;" and, therefore, it was not error, as against the defendant, for the trial court to compel the person with whom the defendant made the bet for which he was prosecuted to give evidence in the cause.

In Opinion of Justices, 73 N. H. 625, 63 Atl. 505, it was held that, within the statute which provides a punishment for any person who "shall gamble or bet on the sides or hands of such as are gambling or playing at any game;" and defines a gambler as "every person who plays at a game of chance or skill in a place which is resorted to for the purpose of gambling;" and also provides that, "if any person keeps any house, shop, or place resorted to for the purpose of gambling, . . . or suffers any person to gamble in any way in any such place, . . . he shall be fined,"—horse races are games, and the betting or wagering money thereon is gambling, and a place kept where betting, book making, or pool selling upon horse races is promoted or permitted would be a common gambling place.

In Miller v. United States, 6 App. D. C. 6, it was held that a horse race is a game of chance where a wager has been made upon the result, within the meaning of a statute prohibiting the setting up or keeping any kind of "gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property."

In State v. Shaw, 39 Minn. 153, 39 N. W. 305, it was held that a horse race is not a gambling device, within the statute prohibiting gambling with "gambling devices," and "keeping gambling devices designed to be used in gambling."

In McElroy v. Carmichael, 6 Tex. 454, it 7 L.R.A. (N.S.)

was held that horse racing is not a gambling device, within a statute which punishes "betting at any gaming table, . . . or at any other gambling device whatever."

In Cheek v. Com. 100 Ky. 1, 37 S. W. 152, it was held that, while a horse race is not a game, betting on such a race is a hazard within a statute which reads: "If any person or persons shall engage in any hazard or game on which money or property is bet, won, or lost, such person or persons shall be subject to a fine."

In Com. v. Shelton, 8 Gratt. 592, it was held that betting on a horse race is not gaming, within the meaning of the statute which provides that "any free person who, at any ordinary race field, or public place, shall play at any game whatever, . . . or bet on the hands or sides of others who do play, shall be punished," etc.

In Cheek v. Com. 79 Ky. 359, it was held that betting on a horse race is not gaming, and is not, therefore, within the statute against inducing another to visit a place where "gaming" is carried on.

In Harless v. United States, Morris (Iowa) 169, the statute provided for the punishment of "every person who shall bet any money or property, or play at or upon any gaming table, bank, or device," etc. The court said that the whole scope and object of the statute seemed to be to prevent and punish the betting and staking of money upon games of chance,—games in which the result depended in a very considerable degree upon sheer hazard; and that horse racing was not included in that class.

In Thrower v. State, 117 Ga. 753, 45 S. E. 126, it was held that betting on a horse race is gaming, within a statute prohibiting the keeping of a gaming house.

In Swigart v. People, 154 Ill. 284, 40 N. E. 432, Affirming 50 Ill. App. 181, it was held that a room kept and used for the purpose

the United States, are bought, sold, and cashed.

"Plaintiffs say that the defendant Al Vaughan has for several months past rented and leased said premises for the said purpose, and has for several months past suffered and permitted, and will, unless enjoined, continue to suffer and permit, the use of said premises for said unlawful purposes, and that, in consequence thereof, here is maintained in said house by the defendant a public gaming house and a public nuisance. Plaintiff says that said premises are located near the entrance to the public free bridge, between Little Rock and Argenta, across the Arkansas river, and upon the main thoroughfare leading there, and that the business portion of each of said cities is located immediately upon said river and at the respective entrances of said bridge, and that said Arkansas river is the only thing that separates the business parts of the two cities, and that said river

also divides Pulaski county into two equal parts, and that Little Rock is the capital of the state of Arkansas and the county seat of Pulaski county, and that Little Rock is the market place for the people of said county, and that for these reasons thousands of people daily are crossing said bridge, and are forced to pass the said premises, and thus the citizens of the two cities and of the rural district in going and coming to market, and in visiting the said capital and the county seat of their state, are brought into contact with those that assemble and congregate around said gambling house and pool room.

"Plaintiffs state that the unlawful criminal business conducted by the defendants is so strategically located that it daily attracts to said place and to the vicinity thereof from Little Rock, from Argenta, and from the adjacent country and towns, a large number of criminals, gamblers, low and dissolute characters, sporting men, dissolute

book making and selling of pools contingent upon the result of horse races was a common gaming house, within the meaning of a statute which prohibited the keeping "a common gaming house."

In *People v. Weithoff*, 51 Mich. 203, 47 N. Rep. 557, 16 N. W. 442, it was held that the use of a room for the purpose of selling pools on horse races makes it a gaming room, within the meaning of a statute prohibiting the keeping or maintaining of a gaming room.

In *State v. Ayers* (Or.) 88 Pac. 653, it was held that the selling of pools on horse races is not an offense within the statute prohibiting the playing of games, etc., by gaming devices, for money, property, or any consideration thereof; since the chance upon which the wager is made is the competitive speed of a particular horse, and not manipulation of any device.

In *Louisville v. Wehmhoff*, 116 Ky. 845, 3 S. W. 876, 79 S. W. 201, it was held that betting by the buyers of pools on horse races is not a game, within the statute which fixes a penalty against "whoever shall engage in any game whatever at which money or property is bet, won, or lost, in any place, or on premises in his occupation."

Edwards v. State, 8 Lea. 411, it was held that, a pool being a bet, the sale of a pool on a horse race run in the state of New York was a violation of the statutes against gaming. The statutes are not set out.

When a question has arisen a number of times under statutes providing for the recovery of money or property bet and lost in games.

Thus, it has been held that betting on a horse race is gaming within the meaning of a statute which provides for the recovery of any money or property lost by betting at cards, dice, or any other games. *Tatman v. Strader*, 23 Ill. 493; *A. (N.S.)*

Garrison v. McGregor, 51 Ill. 473; *Richardson v. Kelly*, 85 Ill. 491.

In *Ellis v. Beale*, 18 Me. 337, 36 Am. Dec. 726, it was held that horse racing is a game, within a statute which permits the recovery of money lost by betting on certain enumerated games, and "any other game."

In *Dyer v. Benson*, 69 Ga. 609, it was held that betting on a horse race is gaming, within the statute which reads: "Gaming contracts are void. . . . Money paid, or property delivered up, upon such consideration, may be recovered back from the winner by the loser," etc.

In *Wade v. Deming*, 9 Ind. 35, it was held that betting on a horse race was betting on a game, within the meaning of a statute which enacted that money lost by betting on any game, etc., may, within six months next following, be recovered by suit, etc.

The question has also arisen under statutes making obligations void when given for money lost at gaming.

Thus, horse racing is held to be a game, within the meaning of a statute which provides "that all promises, notes, . . . made or entered into by any person, where the whole or any part of the consideration thereof shall be for money, etc., won by gaming or playing at cards, dice, or any game or games, shall be void and of no effect." *Shropshire v. Glascock*, 4 Mo. 538, 31 Am. Rep. 189; *Boynton v. Curle*, 4 Mo. 599.

In *Joseph v. Miller*, 1 N. M. 621, it was held that a horse race, when adopted for the purpose of determining by chance which of the parties has won, and which has lost, a valuable stake, is a gambling device within the statute which provides that "all judgments, securities, bonds, bills, notes, or conveyances, when the consideration is money or property won at gambling, or at any game or gambling device, shall be void."

women, disorderly and idle persons without lawful means of support; and that said Bob Furth has publicly advertised extensively, and still continues to do so, in the city of Little Rock, said unlawful business, and now operates a bus by which free transportation is given or offered from the city of Little Rock across the bridge to said gambling house and return, and upon which bus is conspicuously displayed a sign to that effect; and the said Furth seeks and gets a large part of his patronage from the city of Little Rock; and while said city has desired to protect its people from the corrupting influence of such an establishment, and has done everything in its power, the defendants, by their collusion and artful connivance, have enabled the defendant Furth to run a gambling house at the very gate of the city, and to attract to this school of crime and debauchery its citizens, to which not only its criminal elements flow, but many of the unwary and inexperienced and morally weak are attracted, beguiled, corrupted, and impoverished, and many of the dependent, innocent, and helpless are left in want and driven to immorality and crime for a livelihood. In this way the moral well-being and public peace of Little Rock are demoralized, and its laws evaded, annulled, and defeated in its own territory; and that the presence of said persons in the city of Argenta and at the gate of the city of Little Rock and in the state of Arkansas has a demoralizing effect on the good order and moral well-being of each of said cities, of Pulaski county and of the state of Arkansas, constituting a public nuisance, and their presence a menace to the morality, progress, and advancement of the community.

"The plaintiffs state that a further fact which aggravates the character of the evil complained of herein is that a large number of gambling houses were recently running open, and attended by a large crowd of the criminal classes in each of the cities above mentioned; but that lately a crusade has been made against said gambling houses of said cities, and several of those recently closed were in the immediate vicinity of the pool room complained of herein; but there are now no known public gambling houses in either of said cities, and a large number of the vicious, idle, and criminals who frequented said places now flock to the pool room complained of herein.

"The plaintiffs state that the defendant Bob Furth is a saloon keeper, and has been for many years, and that, in connection with his saloon, he has operated for years a gambling house containing faro bank, roulette, crap tables, and many other gambling devices, and continued to operate it until forced to desist by repeated burning

orders and raids by the officers; that thereafter he sought to get permission from the city of Little Rock to run a pool room in said city, at which bets could be made and money won and lost on horse races, such as he has now over in Argenta; but that the same was denied him and to all others, and the same prohibited as a criminal offense, because it would degrade and corrupt and debauch the citizens and visitors of the city, and attract to the community large numbers of criminals and evil characters, and generally injure the morals of the state; but, having failed in this, the said Bob Furth entered into a collusion and conspiracy with the defendant W. C. Faucette, who is mayor of the city of Argenta, and the defendant Gabe Pratt, who is chief of the police of said city, whereby, in consideration of certain sums of money paid to them regularly, he is granted the privilege of operating a gambling house commonly called a 'pool room,' and assured of the protection of said Faucette and Pratt, and for that purpose regular and periodic fines are collected of said Bob Furth.

"Plaintiffs further say that the maintenance of said nuisance, and the continuance thereof, will result in great and irreparable injury to them and to the people of the said cities and of the state of Arkansas; that an injunction against the injury complained of in this petition has never been asked for, nor refused, by this or any other court; and that it will be necessary, in order to obtain full and adequate relief, that an injunction issue restraining defendants from a continuance of the acts herein complained of.

"Wherefore plaintiffs pray that a temporary injunction issue, and that, upon final hearing, said temporary injunction be made permanent, and that defendant Bob Furth, his agents and employees, be perpetually enjoined and restrained from operating or continuing a pool room or gambling house at the place named herein; and that the defendant Al Vaughan be perpetually enjoined from renting said property to defendant Bob Furth or any other person for the purpose of operating a pool room therein; and that the defendants W. C. Faucette and Gabe Pratt be perpetually enjoined from aiding, encouraging, or abetting the said Bob Furth, or any other person, to operate or conduct a pool room or gambling house in said city of Argenta; and that Bob Furth and the other defendants be required to answer under oath what other parties are connected with or interested in the maintenance of said pool room, gaming house, and public nuisance, or in the proceeds thereof, and that, upon their discovery, an injunction be issued against them, and for all other proper relief."

Messrs. Robert L. Rogers, Attorney General, Lewis Rhoton, Bert Brooks, and W. E. Kinson for appellants.

Messrs. J. W. House and M. House, for appellees:

Betting on horse races is not a violation law.

State v. Rorie, 23 Ark. 726; Mace v. State, Ark. 79, 22 S. W. 1108; Norton v. State, Ark. 71; State v. Hawkins, 15 Ark. 259; Nes v. State, 63 Md. 242; Dunman v. other, 1 Tex. 89, 46 Am. Dec. 97; Kirkland v. Randon, 8 Tex. 10. 58 Am. Dec. 94; Bek v. Com. 79 Ky. 359.

Running a pool room is not running a gambling house.

State v. Hawkins and Norton v. State, Ark. 71; 1 Chitty, Crim. Law, 677; Harless v. United States, Morris (Iowa) 169; State v. Don, 46 Mo. 375; State v. Hayden, 31 Mo. Com. v. Shelton, 8 Gratt. 592; Hawkins v. State, 33 Ala. 433; James v. State, supra; s v. Green, 4 Harr. (Del.) 308.

An injunction will not lie where there is an adequate remedy at law or by criminal prosecution.

Beach, Inj. 1078, 1079; High, Inj. 23; E v. Patterson, 14 Tex. Civ. App. 465, 1 W. 478; Wood, Nuisances, §§ 788, 791; n v. Livingston Club, 177 Pa. 224, 34 A. 95, 55 Am. St. Rep. 717, 35 Atl. 606; Eton v. Rugg, 149 Mass. 550, 5 L.R.A. 14 Am. St. Rep. 446, 22 N. E. 55.

Chancery jurisdiction will not be exercised to restrain crime.

Ein v. Livingston Club, supra; Atty. v. Utica Ins. Co. 2 Johns. Ch.

State v. Patterson, supra; People v. L'Abbe v. District Court, 26 Colo. 46 L.R.A. 850, 58 Pac. 604; State ex Vance v. Crawford, 28 Kan. 726, 42 Am. 182; Neaf v. Palmer, 103 Ky. 496, 41 A. 219, 45 S. W. 506; State v. O'Leary, Ind. 526, 52 L.R.A. 299, 58 N. E. 703; , Inj. § 23; Hamilton-Brown Shoe Co. v. Key, 131 Mo. 212, 52 Am. St. Rep. 622, W. 1106; Menifee v. Ball, 7 Ark. 520; v. Dallas County, 13 Ark. 630; M. & Co. v. Woodruff, 26 Ark. 649; Byers v. y, 27 Ark. 97; Moore v. Duncan, 27 Ark. 157; Shaul v. Duprey, 48 Ark. 331, 3 Ark. 366; Lovette v. Longmire, 14 Ark. People v. Equity Gaslight Co. 141 N. 7, 36 N. E. 194; Remington v. Foster, 15 Ark. 609; Powell v. Foster, 59 Ga. 790; e v. Condon, 102 Ill. App. 449; Tiede v. Meidt, 99 Wis. 201, 74 N. W. 798; Atty. v. New Jersey R. & Transp. Co. 3 Eq. 137.

, Ch. J., delivered the opinion of the court. The attorney general of Arkansas, the prosecuting attorney of the sixth judicial A.(N.S.)

circuit, and the mayor and city attorney of Little Rock brought a bill in chancery against Vaughan, Furth, Faucette, and others, in the name of the state of Arkansas and the city of Little Rock, seeking to enjoin Furth from operating a pool room at a place in the city of Argenta near the free bridge, which connects Argenta and Little Rock, and that the other defendants be enjoined from permitting or assisting, in the several ways alleged, said Furth in conducting said pool room. The defendants answered, denying many allegations of the bill, and to this answer the state and city demurred, and the case was determined on the demurrer, the court overruled it, and the state and city rested upon it and appealed. The review here is limited to the admissions and allegations in the answer and the undenied allegations of the complaint, as all other allegations were eliminated by trying the case on the sufficiency of the answer. The pleadings will be set out in the statement of facts. The material parts of the answer, aside from its denial of the allegations of the complaint, are as follows: "It is true that the defendant Bob Furth operated what is known as a 'turf exchange' or 'pool room,' where money is received, won, and lost on horse races, and where tickets for pools on horse races run, or to be run, at various and divers race courses in the state of Arkansas, and throughout the United States, are bought, sold, and cashed. That in point of fact there are not more than 15 or 30 people who visit said turf exchange daily, and that neither women nor children are permitted in said pool room, or turf exchange. And they state that said pool room, or turf exchange, is conducted as a quiet, orderly business, and that no persons visit the same, except those who desire to do so, and that disorderly or dissolute characters are not allowed or permitted to visit there, and are not in the habit of doing so. It is true that he has caused the said turf exchange to be advertised by a short notice in one of the Little Rock papers, and that he has at times operated a carriage from said city of Little Rock to said pool room. . . . That the business only attracts such as desire to purchase tickets or pools on horse races, and that disorderly or lewd women of the law-breaking class are not in the habit of attending said pool room, or turf exchange. And that no one is disturbed by the gathering of the people in or about said premises. They further state that the city of Little Rock has no corporate property whatever that is in any way affected by the alleged public nuisance as described in said complaint. They further state that the state of Arkansas has no property interest

in the matters complained of, and that, if the said defendants are violating any law, the criminal courts of the state have ample power and authority to prosecute the defendants for such offenses, and that the charter of the city of Argenta authorizes said city to punish or abate a nuisance carried on as alleged in the complaint."

The first question under inquiry is whether betting on horse racing is gambling, within the meaning of the statutes against gaming. The general statute, the only one of them under which it could fall, defines the act therein made criminal to be "betting any money, or any valuable thing, on any game of hazard or skill." Kirby's Dig. § 1740. It contemplates that the game be "played," for the next section provides that it shall not be necessary for the indictment to allege with whom the game was played. § 1741. In construing these statutes in 1861, Chief Justice English, for this court, said: "But we do not think that the legislature intended to embrace horse racing by the words 'any game of hazard or skill' 'played,' etc., however vicious betting at such sports may be." State v. Rorie, 23 Ark. 726. In 1893 this court had before it betting on a game of baseball, and it was held to be criminal because on a game of skill, and the distinction that horse racing was not a game, but a sport, was approved. Mace v. State, 58 Ark. 79, 22 S. W. 1108. Some states sustain this distinction, and hold horse racing to be a sport, and not a game within the gaming statutes; but the weight of authority is to the contrary. 20 Cyc. Law & Proc. p. 884; 14 Am. & Eng. Enc. Law, p. 682. It will not do to overrule State v. Rorie merely because against the weight of authority; there is good reason to sustain the distinction therein made, and it has been acquiesced in by the state for forty-five years, when at any time it could have been changed by legislation. Therefore, it must be taken in this case that betting on horse racing is not a crime of itself. The quoted parts of the answer admit the maintenance by Furth of a turf exchange, or pool room, wherein money is received, won, and lost on horse races; where tickets for pools on horse races run or to be run in Arkansas and elsewhere are bought, sold, and cashed; that 15 to 30 persons daily visit the pool room, for the purpose of betting on the races, or buying, selling, or cashing pools on the races; that said business is advertised, and, at times, a vehicle to bring patrons to it has been furnished. What is the status of such a house, notwithstanding it is conducted in a quiet and orderly manner without unusual noise or disorderly conduct? At common law there were no statutes against gam-

ing, yet the maintenance of a gaming house was a criminal nuisance, indictable and punishable as such. Mr. Justice Scott, for this court, said: "Independent of any statute, the keeping of a common gaming house is indictable at common law on account of its tendency to bring together disorderly persons, promote immorality, and lead to breaches of the peace. Such an establishment is thus a common nuisance." Vanderworker v. State, 13 Ark. 700. Chief Justice Watkins, for this court, said: "At the common law, gaming houses were indictable as a public nuisance (Vanderworker v. State, supra); but, unless restrained by some express statute, ordinary wagers or betting were tolerated as being for amusement or recreation." Norton v. State, 15 Ark. 71. In Thatcher v. State, 48 Ark. 60, 2 S. W. 343, the court went into the subject of gaming, hawdy and disorderly houses being common-law nuisances, and held that they were such not from the noise or disorder, but on account of the evil tendency of the business there conducted. Mr. Wharton says: "It is, at common law, not indictable for persons to engage in gaming in private, or to conduct a single game of chance in a public place. But when gaming is there publicly known to be carried on, however secluded the place may be, and when unwary and inexperienced persons are there enticed and fleeced, then the parties concerned are indictable for nuisance, irrespective of any particular statutes." 2 Wharton, Crim. Law, § 1465. Mr. Bishop says a common gaming house is a nuisance, because those attracted to it, especially youths, are there lured to vice, and youths may be as effectually lured by a noiseless process as by any other. 1 Bishop, Crim. Law, §§ 1135, 1136. Therefore it follows that the fact that betting on horse racing is not within the gaming statutes does not prevent a house maintained for such betting being a criminal nuisance. As seen, the evil character of the business, and not the violation of the express statute, is what stamps it as a nuisance.

Turning more directly to the case in hand, Do pool rooms fall within the definition of common-law nuisances whether the games or sports bet upon are contrary to statute or not? Judge Cooley, speaking for the Michigan court, drew a vivid picture of the evils of betting, and showed that, even where individual wagers were tolerated by law, a house maintained to carry on a betting business was unlawful. People v. Weithoff, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442. The case of State v. Nease, 46 Or. 433, 80 Pac. 897, is much in point, as these excerpts will show: "The evidence shows that he [the defendant] was the

eeper and proprietor of what is called a 'surf exchange' or pool room on one of the principal thoroughfares in the city, at which persons daily congregated for the purpose of betting upon horse races run in other states, and reported to him by telegraph.

. . . That such a house is a gaming or gambling house, and punishable as a nuisance at common law, whether betting on horse race is a crime or not, has so often and uniformly been held by the courts that it is no longer open to discussion. There is no dissent in the adjudged cases, and it is unnecessary to do more than cite the authorities;" citing many cases. See also Cyc. Law & Proc. pp. 893, 894, notes. The foregoing question must be answered affirmatively. The common law is put in force in this state, and the punishment for common-law offenses not covered by statute is fixed as fine not exceeding \$100 and imprisonment not to exceed three months. Rhy's Dig. §§ 623, 624. These statutes have been held applicable to a gaming house as a common-law misdemeanor. *Vanderwerker v. State*; *Norton v. State*; and *Catcher v. State*,—*supra*; 1 Bishop, *Crim. Law*, § 1137. Each period in which a nuisance continues is a separate offense. *Wharton, Crim. Law*, § 1419. In addition to providing by fine and imprisonment, the state may have a judgment abating the nuisance and execution therefor. *Wharton, Crim. Law*, § 1426; *Bishop, Crim. Law*, § 1179; *Rhy's Dig.* § 2464.

The court has gone fully into the question of the criminality of maintaining a pool room and the remedies therefor, in order to ascertain whether a chancery court, by injunction, can restrain a person or persons from carrying on such business. There are some courts of learning and ability holding that common-law nuisances, such as illegal tippling houses, disorderly houses, bad houses, and gaming houses, may be restrained by injunction. These cases go back to *State ex rel. Vance v. Crawford*, 28 Mo. 726, 42 Am. Rep. 182, in which it was held that an illegal drinking saloon (one in violation of a prohibition law of the state) could be closed by injunction, although in that particular case it was not done on account of the sufficiency of a statutory remedy reaching the evil. Mr. Justice Valentine thus stated and commented on the case: "This action was originally instituted in the district court of Shawnee county, by the county attorney of such county, in the name of the state, for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon, which intoxicating liquors were illegally, continuously, and persistently sold to be drunk on the premises as a beverage.

. . . It must be admitted that this is a novel proceeding,—so novel as to startle old and experienced practitioners, and yet, if it were ascertained, after a careful examination of all its elements, to be founded in reason and justice, and to come within the acknowledged principles of long-established equity jurisprudence, it should not be dismissed unceremoniously, or denied a respectful hearing, simply because of its unquestioned and admitted novelty." Then the learned justice plausibly contends that such a use of the injunction accords with the principle of equity jurisprudence. See *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588, and *Weakley v. Page*, 102 Tenn. 178, 46 L.R.A. 553, 53 S. W. 551, where cases supporting this view are reviewed, and other cases along the same line may be found in appellant's brief. The same question came before the St. Louis court of appeals when Seymour D. Thompson was a member of that court, and that able jurist delivered an opinion completely answering the contention of the Kansas court in the *Crawford Case*. He showed by authority and reason that the jurisdiction in courts of equity to restrain public nuisances was limited to these three classes: (1) To restrain purpresture of public highways or navigations; (2) to restrain threatened nuisances dangerous to the health of a community; (3) to restrain *ultra vires* acts of corporations injurious to public right. The court proceeds: "Unquestionably, the exercise of equity jurisdiction in these three classes of cases is an exception to a very general, well-understood, and important rule. That rule is that a court of equity has no jurisdiction in matters of crime. In these three classes of cases, jurisdiction is, however, exercised for special reasons, although unquestionably the nuisance complained of is a misdemeanor and subject to prosecution by indictment." *State ex rel. Circuit Attorney v. Uhrig*, 14 Mo. App. 413. Chancellor Kent said: "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court [a chancery court], which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate.

. . . I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily by injunction, to put down a public nuisance which did not violate the

rights of property, but only contravened the general policy." *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371.

The Illinois court said: "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. . . . The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property." *Sheridan v. Colvin*, 78 Ill. 237. Again, it is well said: "It is no part of the mission of equity to administer the criminal law of the state, or to enforce the principles of religion and morality, except so far as the same may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance." *Cope v. District Fair Asso.* 99 Ill. 489, 39 Am. Rep. 30.

In *People v. Condon*, 102 Ill. App. 449, the subject of equity jurisdiction to enjoin a pooling and betting business was gone into fully, and the authorities reviewed and the result thus summed up: "(1) That a court of equity has no jurisdiction over matters merely criminal or merely immoral; (2) that a court of equity will sometimes enjoin a public nuisance; (3) that this will be done in no case where the state is the complainant, unless it be clearly shown that such nuisance affects public property, or public civil rights." A learned text writer, whose works are standard authorities, says: "Nuisances that arise from the acts of men, that for the time being make the property devoted to their purposes a nuisance, but which ceases to be so when the use is stopped, such as disorderly houses, gaming houses and cock pits that are *malum in se* and common nuisances purely, and only punishable by indictment." 1 Wood, Nuisances, § 14.

The Supreme Court of the United States considered the use of the injunction to restrain public nuisances and to preserve rights of the public in highways when the government secured an injunction against strikers interfering with interstate mail and traffic at Chicago in the railroad strike of 1894, and Mr. Justice Brewer, speaking for an undivided court, said: "The difference between a public nuisance and a private nuisance is that one affects the people at large, and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles, and goes to the same extent. . . . Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense

against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but, when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law." *Re Debs*, 158 U. S. 564, 592, 593, 39 L. ed. 1092, 1105, 1106, 15 Sup. Ct. Rep. 900, 909.

It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance, where the nuisance is one arising from the illegal, immoral, or pernicious acts of men, which, for the time being, make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery. Applying these principles here, and it is seen that the admissions of the answer prove Furth to have been daily violating the criminal laws; but there is an absence of any showing that the acts constituting the crime reached to any of the grounds of equity jurisdiction. In some cases where the jurisdiction of equity is sought to restrain a criminal nuisance, there are allegations that the criminal processes are inadequate to afford relief from connivance of the officers, or other reasons. Happily, that unfortunate situation is not presented here. The prosecuting attorney joins in this complaint, and allegations involving the officers of Argenta in the maintenance of this pool room were denied in the answer, and the state elected to treat the answer as true. It is not only the right, but the sworn duty, of every prosecuting attorney to proceed by information in justice or circuit court to close these illegal places when they have information of them. It is not only the right, but the duty, of every grand jury to find the existence of such places if they exist, and to indict the keepers thereof. It is also the privilege of any citizen to proceed against them at any time by affidavit before a justice of the peace. There is no possible excuse under the law for a pool room—a place maintained for carrying on or facilitating betting on horse races, or any other sport, or game, or contest, or other event

on which wagers are laid—to exist in Kansas for one minute. Its maintenance a crime, nothing more, nothing less. Persons charged with crime are entitled to a fair trial, and this right must not be taken from them under guise of an injunction against a nuisance.

The chancellor was right in refusing to entertain jurisdiction, and the judgment is affirmed.

IOWA SUPREME COURT.

MICHAEL CAVANAUGH, Appt.,
v.

CENTERVILLE BLOCK COAL COMPANY.

(— Iowa, —, 109 N. W. 303.)

servant—injury—proximate cause.

1. The defective condition of the track on which cars are run in a mine, by rea-

son of which a car, loaded by a miner who is to be paid by the amount delivered at the pit mouth, gets off the track, is not the proximate cause of an injury due to his pinching his fingers between the car and an implement which has been employed in attempting to get the car back on the track, where he was at liberty to suit his own convenience and employ his own methods in replacing the car.

Master—pit boss—liability.

2. A mine owner is not liable for the negligent act of the pit boss in assisting a miner who was to be paid for the amount of coal delivered, in replacing a loaded car on the track, where the mine owner owed the injured person no duty with respect to such service.

Same—fellow servant.

3. The act of a pit boss in assisting a miner to run cars out of his room to be taken to the pit mouth is that of a fellow servant, and not of a vice principal.

(October 23, 1906.)

Case Note.—Negligence responsible for accident as proximate cause of personal injury received in performance of act or work rendered necessary by the accident:—Cases involving this question are not numerous, and there seems to be none which may be distinguished from the foregoing case on one or more important and essential features.

A case similar in some respects is *Secombe v. Detroit Electric R. Co.* 133 Mich. 3, 94 N. W. 747, where a worn rail caused street car to be derailed, and the car following, while backing to the barns to secure assistance, ran into the second following car, injuring the motorman upon the track. The court held that the worn rail was not the proximate cause of the injury, in that it was the remote cause. But it is to be observed that in this case the injuries were incurred by a third person, who was no wise responsible for restoring the car to the track; and the case is of comparatively little value in any event upon the question of proximate cause, as the opinion is mainly devoted to the question as to the negligence of the company in not promulgating an efficient set of rules for backing cars, and also in keeping in its employ a careless and inefficient servant.

In *Page v. Bucksport*, 64 Me. 51, 18 Am. 239, it was held that a defect in a bridge, for which a town was responsible, the consequence of which the plaintiff's horse fell through the bridge, was the proximate cause of injuries sustained by the plaintiff in being struck by the horse in its struggle to free itself as he was attempting to recede from it. The court, in support of its decision holding the town liable, said that it was the plaintiff's duty to the town to save the horse if possible, under the general rule that a person having sustained an injury through the fault of another should use all common care to render the injury as

light as possible. In reply to the defendant's contention that, while such rule would have been applicable if the injury had happened to the horse, it did not apply where the accident happened to the driver, and not to the horse, the court said: "We do not perceive that there would be any difference upon principle whether the injury was to the plaintiff's person or to his property. The accident to the horse was an injury sustained by the owner of the horse. The plaintiff was attempting to relieve himself of an injury to his horse, and thereby of an injury to himself, when the horse in his struggles struck him with his head. . . . We think that all which took place at the time of the accident was, as between these parties, but a single happening or event. It was but one accident."

It will be noticed that in this case the decision was based upon the ground that the owner's obligation to the defendant town to rescue the horse connected his injury with the original accident so closely as to make it, in law, one event. In *CAVANAUGH v. CENTERVILLE BLOCK COAL Co.* it was held that, although the responsibility of rerailing the car rested upon the plaintiff, he was under no duty to the company to operate the car save the possibility of being discharged if he was not diligent in the pursuit of his work.

The case of *Stickney v. Maidstone*, 30 Vt. 738, which was cited and relied upon in *Page v. Bucksport*, is strikingly similar in both facts and decision. There it was contended that the injury did not result immediately from the defective condition of the bridge, but remotely; and that the plaintiff was under no legal obligation to attempt to save the horse, and, having volunteered, he must take the risk of any injury that might result therefrom. But the court said: "It was clearly the duty of the plaintiff, both mor-

APPEAL by plaintiff from a judgment of the District Court for Appanoose County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by **McClain, Ch. J.:**

Action to recover damages for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of defendant's employees. At the conclusion of the plaintiff's evidence the court sustained a motion to direct a verdict for the defendant and from the judgment on such directed verdict the plaintiff appeals.

Messrs. **Baker & Baker**, for appellant:

An employer is liable for the negligent acts of a vice principal, done within the scope of his employment, resulting in an injury to an employee.

Connor v. Saunders, 9 Tex. Civ. App. 56,

ally and legally, to use all reasonable and proper means to save the horse. It was his duty to the town so to do, and, if he had neglected to make the effort, the town would have had reason to complain. But, whatever may have been his duty under the circumstance, he clearly had the right to make all such proper and judicious efforts as were required to immediately relieve himself and his property from the position into which he had been thrown by reason of the defect in the bridge, and while doing so he must be regarded as acting under the direct and immediate force of the first cause which made such efforts necessary; and, until that end is accomplished, the town must be responsible for such injuries as ensue."

And, in connection with these cases, it may be well to notice **Duffy v. Cincinnati Street R. Co.** 2 Ohio N. P. 294, although it is not strictly in point. Here a car of the defendant railroad company was being run at a rate of speed greater than allowed by law, and, in consequence thereof, the plaintiff, who was driving a dray, was unable to get out of the way of the car, and the dray was struck and a shaft broken. As a consequence of this, the horse ran away, and the plaintiff, in endeavoring to stop the horse, was struck by the broken shaft and injured. A demurrer was interposed to a complaint setting forth the above state of facts. The court held that the injury would be referred to the wrongful act of the defendant in running its car at the unlawful rate of speed. In the course of the opinion the court said: "A car running at a high rate of speed strikes a dray and breaks a shaft. Would not the natural results be that the horse would run away, that the driver would try to catch him, and that he would be injured by the broken shaft? Could not such results be anticipated?"

The negligence of a city in filling a trench in which a gas main is laid, in consequence

29 S. W. 1140; **Newbury v. Getchel & M. Lumber & Mfg. Co.** 100 Iowa, 447, 62 Am. St. Rep. 582, 69 N. W. 743; **Beresford v. American Coal Co.** 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; **Stahl v. Duluth**, 71 Minn. 341, 74 N. W. 143.

In order to relieve the master from liability under the fellow-servant rule, it must appear that the negligence of the fellow servant was the sole cause of the injury, and not commingled or combined in any degree with negligence on the part of the master or his representative.

4 Thomp. Neg. 2d ed. §§ 4856, 4857; **Ellis v. New York, L. E. & W. R. Co.** 95 N. Y. 546; **Stringham v. Stewart**, 100 N. Y. 516, 3 N. E. 578; **Ransier v. Minneapolis & St. L. R. Co.** 32 Minn. 331, 20 N. W. 332; **Cone v. Delaware, L. & W. R. Co.** 81 N. Y. 208, 37 Am. Rep. 491; **Young v. New Jersey & N. Y. R. Co.** 46 Fed. 160; **Grand Trunk R. Co. v. Cummings**, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; **New Jersey & N. Y.**

of which the gas escapes and enters an electric-light conduit, is not the proximate cause of an injury to a workman two or more months thereafter, who was overcome by gas in descending a manhole at least two blocks from the point in question in an attempt to rescue a fellow laborer. **Murphy v. New York**, 89 App. Div. 93, 85 N. Y. Supp. 445. The decision is upon the ground that, under the circumstances, the accident was one which could not have been anticipated by any reasonable foresight. Although in this case the decedent voluntarily risked his life to save his companion, the court apparently passed over any question which might have been raised as to contributory negligence, and based its decision solely upon the question of proximate cause.

This note is intended to be confined to cases where the effects of the original accident had been definitely interrupted, and had ceased at the time of the injury in question, such injury having been sustained in the performance of work necessary to remedy the effects of the accident. It has not been the intention to include in this note cases where the effects of the accident are continuing and efforts are made to prevent further damage, as, for instance, such a case as **Leavenworth Coal Co. v. Ratchford**, 5 Kan. App. 150, 48 Pac. 927, where the plaintiff, having discovered that a broken wire of the defendant company emitted a blaze of electric fire upon his roof, apparently endangering his property, thereupon attempted to remove the wires from his building to save it from burning, and was injured by an unexpected movement of the wire caused by its being thrown from his building.

And cases involving the voluntary incur-rence of danger to save life or property have also been excluded. For an exhaustive note upon this latter subject see 49 L.R.A. 715.

Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 49 Fed. 723; Norfolk & W. R. Co. v. Skols, 91 Va. 193, 21 S. E. 342; Northern R. Co. v. Poirier, 15 C. C. A. 52, 29 U. S. 583, 67 Fed. 881; Ford v. Fitchburg R. 110 Mass. 255, 14 Am. Rep. 598; Hough Texas & P. R. Co. 100 U. S. 213, L. ed. 612; Gilman v. Eastern R. 13 Allen, 441, 90 Am. Dec. 210; *ier v. Locke*, 135 Mass. 575; Coppins New York C. & H. R. R. Co. 122 N. Y. 19 Am. St. Rep. 523, 25 N. E. 915; *ley*, Personal Injuries Relative to Master servant, § 439; Klaffke v. Bettendorf Axle 125 Iowa, 225, 100 N. W. 1116; Franklin Winona & St. P. R. Co. 37 Minn. 409, m. St. Rep. 856, 34 N. W. 898; Delude St. Paul City R. Co. 55 Minn. 63, 56 N. 461; Booth v. Boston & A. R. Co. 73 Y. 38, 29 Am. Rep. 97; Pullman Palace Co. v. Laack, 143 Ill. 242, 18 L.R.A. 32 N. E. 285; Gordon v. Chicago, R. I. R. Co. 129 Iowa, 747, 106 N. W. 177; *abatt*, Mast. & S. §§ 2249-2251; Alaska adwell Gold Min. Co. v. Whelan, 12 C. A. 225, 29 U. S. App. 1, 64 Fed. 462; *upin v. Texas & P. R. Co.* 40 C. C. A. 99 Fed. 49.

A mine boss being the representative of master in a mine in the matter of super-
endence as to all of the employees and
ations of the mine, an employee does not
ume the risks of his negligence.

eresford v. American Coal Co. 124 Iowa,
70 L.R.A. 256, 98 N. W. 902; *Island*
l Co. v. Swaggerty, 159 Ind. 664, 62 N.
1103, 65 N. E. 1026; *Wellston Coal Co.*
smith, 65 Ohio St. 70, 55 L.R.A. 99, 87
St. Rep. 547, 61 N. E. 143; *Northern*
l Co. v. Herbert, 116 U. S. 642, 29 L. ed.
6 Sup. Ct. Rep. 590; *Stahl v. Duluth*,
ra.

In determining what constitutes prox-
e cause of an injury, the inquiry is not
ined solely to whether the negligence
ged is proximate in the sense of an effi-
t cause, "*causa causans*;" but, Is it
causa sine qua non?"—that is, a cause
ch, if it had not existed, the injury would
have occurred.

ayes v. Michigan C. R. Co. 111 U. S.
28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Me-*
ic Compression Casting Co. v. Fitchburg
Co. 109 Mass. 277, 12 Am. Rep. 689;
don v. Chicago, R. I. & P. R. Co. supra;
cell v. St. Paul City R. Co. 48 Minn. 134,
L.R.A. 203, 50 N. W. 1034; *Union P. R.*
v. Callaghan, 6 C. C. A. 205, 12 U. S.
541, 56 Fed. 988; *Walrod v. Webster*
nty, 110 Iowa, 349, 47 L.R.A. 480, 81
W. 598; *Doyle v. Chicago, St. P. & K.*
l. Co. 77 Iowa, 607, 4 L.R.A. 420, 42 N.
555; *Milwaukee & St. P. R. Co. v. Kel-*
; 94 U. S. 469, 24 L. ed. 256; *Elmer v.*
R.A.(N.S.)

Locke, supra; *Knapp v. Sioux City & P. R.*
Co. 65 Iowa, 91, 54 Am. Rep. 1, 21 N. W.
198, 71 Iowa, 41, 32 N. W. 18; *Aldrich v.*
Concord & M. R. Co. 67 N. H. 380, 36 Atl.
252; *Shearm. & Redf. Neg.* 3d ed. § 10;
Gould v. Schermer, 101 Iowa, 582, 70 N. W.
697; *Hodges v. Waterloo*, 109 Iowa, 444, 80
N. W. 523; *Langhammer v. Manchester*, 99
Iowa, 295, 68 N. W. 688; *Salzer v. Milwau-*
kee, 97 Wis. 471, 73 N. W. 20; *Buehner v.*
Creamery Package Co. 124 Iowa, 445, 104 Am.
St. Rep. 354, 100 N. W. 345; *Harvey v.*
Clarinda, 111 Iowa, 528, 82 N. W. 994; *Pratt*
v. Chicago, R. I. & P. R. Co. 107 Iowa, 287,
77 N. W. 1064; *Watters v. Waterloo*, 126
Iowa, 199, 101 N. W. 871; *Brownfield v.*
Chicago, R. I. & P. R. Co. 107 Iowa, 254,
77 N. W. 1038.

If the primary cause of the injury is the
result of culpable negligence on the part of
the master, acting through another cause,
or succession of intermediate causes, so that
it is apparent that but for the primary neg-
ligence the injury would not have occurred,
the primary cause is the proximate cause.

Shearm. & Redf. Neg. 5th ed. § 26, notes
5, 6, § 31; *Northern P. R. Co. v. Poirier*,
supra; *Wible v. Burlington, C. R. & N. R.*
Co. 109 Iowa, 559, 80 N. W. 679; *Ransier v.*
Minneapolis & St. L. R. Co. and *Ford v.*
Fitchburg R. Co. supra; *Watters v. Water-*
loo, 126 Iowa, 202, 107 N. W. 871; *Aldrich*
v. *Concord & M. R. Co.* supra.

Where the injury is the result of several
culpable acts or omissions of the master,
combining or concurring to produce the in-
jury, the defendant will be liable, if he is
responsible for any one or more of such
causes.

Gordon v. Chicago, R. I. & P. R. Co. su-
pra; 4 *Thomp. Neg.* 2d ed. § 3857; *Schu-*
maker v. *St. Paul & D. R. Co.* 46 Minn. 39,
12 L.R.A. 257, 48 N. W. 559; *Milwaukee &*
St. P. R. Co. v. Kellogg, supra; *Shearm. &*
Redf. Neg. 3d ed. § 10; *Pratt v. Chicago, R. I.*
& P. R. Co.; *Hayes v. Michigan C. R. Co.* and
Pullman Palace Car Co. v. Laack,—supra;
The Joseph B. Thomas, 81 Fed. 578; *Malott*
v. *Hood*, 99 Ill. App. 360.

The intervening cause in no way affects
the liability of defendant, or exonerates him
from such liability, if his negligence in any
degree contributes to the injury.

Purcell v. St. Paul City R. Co. supra;
Walrod v. Webster County, 110 Iowa, 352,
47 L.R.A. 480, 81 N. W. 598; *Gould v.*
Schermer and *Milwaukee & St. P. R. Co.* v.
Kellogg, supra; *Palmer v. Andover*, 2 Cush.
600; *Pullman Palace Car Co. v. Laack*, su-
pra; *Shearm. & Redf. Neg.* 5th ed. § 32.

Messrs. Howell & Elgin, for appellee:

If the original negligence becomes inju-
rious only in consequence of the interven-
tion of some distinct and wrongful act or

omission by another, a human being, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.

Knapp v. Sioux City & P. R. Co. 65 Iowa, 94, 54 Am. Rep. 1, 21 N. W. 198; *Parmenter v. Marion*, 113 Iowa, 302, 85 N. W. 90; *Watters v. Waterloo*, 126 Iowa, 201, 101 N. W. 871; *McClain v. Garden Grove*, 83 Iowa, 235, 12 L.R.A. 482, 48 N. W. 1031; *Ward v. Chicago, B. & Q. R. Co.* 97 Iowa, 50, 65 N. W. 999; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *De Camp v. Sioux City*, 74 Iowa, 392, 37 N. W. 971; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 32, 10 Am. Rep. 205; *Selleck v. Lake Shore & M. S. R. Co.* 58 Mich. 195, 24 N. W. 774; *Neilson v. Gilbert*, 69 Iowa, 691, 23 N. W. 666; *Handelun v. Burlington, C. R. & N. R. Co.* 72 Iowa, 709, 32 N. W. 4; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 267; *Georgia v. Kepford*, 45 Iowa, 48; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Aldrich v. Concord & M. R. Co.* 67 N. H. 380, 36 Atl. 252.

McClain, Ch. J., delivered the opinion of the court:

The ultimate facts which the evidence for plaintiff tended to establish, so far as they are material to the determination of the questions involved, are as follows: The plaintiff was, at the time of receiving the injury complained of, engaged as a miner in the coal mine of defendant, under the usual arrangement, by which he was allowed to work under the general direction of defendant's pit boss, and receive pay at a specified price per ton for coal mined by him and delivered at the mouth of the shaft. Miners such as plaintiff work in rooms which are extended back by them, in carrying on the operation of getting out the coal, from the main entry to the depth of 125 feet; and it is the business of the miner to pick or blast down the coal on the face of the vein as the room is extended back from the main entry, load the coal upon cars furnished by the company at the mouth of his room, and deliver these cars in the entry, where they are taken by the drivers, and hauled by mules to the shaft, to be elevated by machinery to the surface. As the thickness of the vein of coal which was being mined in this mine was only sufficient to allow the use of the small cars employed for transporting the coal from the place where it was mined to the entry, and would not permit the passage of the mules without some additional height being furnished in the

entry, it was necessary to dig out the dirt below the coal vein and also above, so that the entries might be sufficient in height to allow the mules to pass through; and in such entries iron tracks were constructed on which the cars might turn. This work of preparing the entries, for the operation of the cars propelled by mules and laying the track for the cars to run upon was done by the company, employing for that purpose men paid by the day, and the company constructed for each room a slope from the entry up to the level of the floor of the room, and laid upon this slope iron switch rails, connected with the main track in the entry, and wooden rails connected with the iron switch rails, thus extending the track up into the opening of the room. The additional wooden rails necessary to carry the car back into the room to the face of the coal where the miner would load his cars were laid by the miner himself, as he had occasion to need them. It thus appears that the company was responsible for the condition of the track up the slope into the room in which the miner should work, and the miner was responsible for the condition of the track extending into the room itself. Plaintiff, having been assigned to the room in which he was working, loaded a car furnished him by the pit boss, and with the assistance of the boss was pushing it out of his room upon the switch furnished by the company, ready to be taken by the driver in the entry, when he should have occasion to attach it to a "trip" of cars being hauled to the shaft, when the car got off the track at the point where the first pair of wooden rails connected with the iron rails of the switch, and in putting the car back upon this track, with the assistance of, or in conjunction with, the efforts of the pit boss, plaintiff's fingers on one hand were injured by being pinched between the bottom of the car and a wooden prop which the pit boss had been using in "slewing" the front end of the car over onto the track, and which had been dropped by him; and as a result of this injury, which was not so severe as to prevent plaintiff from going to work the next day, but which was subsequently aggravated by blood poisoning, producing erysipelas, the plaintiff's arm had to be amputated; and his action is for the impairment of his earning capacity consequent on the loss of his arm.

There were various grounds urged in the motion for a directed verdict, but they are reducible to three propositions contended for in behalf of defendant, as follows: First, that the negligence, if any, of defendant in failing to keep the portion of the track leading to plaintiff's room in proper condition for use was not the proximate cause of plain-

ff's injury; second, that plaintiff's own negligence contributed to his injury; and, third, that plaintiff assumed the risks incident to the defect in the track. In the view which we take of the case, it is only necessary to consider the question of proximate cause.

Conceding that the track at the place where the car which the plaintiff and the pit boss were pushing down to the entry was derailed was furnished by the company and was in its charge, and that it was negligent in allowing such track to be defective, the question is whether the injury to plaintiff was the proximate result of the derailing of the car. The situation was this: Plaintiff as a miner was engaged on his own responsibility in propelling this car to the entry. This was a part of the duty which he must perform to secure compensation for the mining of the coal, for he was paid only for the coal was delivered at the mouth of the mine. Plaintiff was not under any duty to the company to operate this car, save that he did not, with reasonable diligence, prosecute his business of getting out coal, he was subject to be discharged by the pit boss; that is, denied the further privilege of working in the mine. There was no emergency involved in the derailling of the car save the delay occasioned to the plaintiff in prosecuting his business. Plaintiff was not entitled to the assistance of the pit boss or anyone else connected with the operation of the mine in pushing his car to the entry, save as such assistance was, as it appears, considered necessary and promised to him in consequence of the switch track not being in good order, and the further fact that the pit boss, desirous of having coal taken from the room to which plaintiff had been assigned, had promised assistance in getting plaintiff's cars until the track should be put in better condition. The general custom, as it appears, was for miners who had trouble in getting out their cars to call for assistance on their fellow miners, or anyone employed in the mine. On a previous day, while working in this same room, plaintiff had the assistance of the driver in getting one of his cars; but it was not the duty of the pit boss or any other employees of the mine to give assistance to the plaintiff save as such assistance had been promised in this particular case on account of the defective condition of the track. Therefore, when plaintiff's car was derailed, the responsibility of getting it back on the track, in order that he might push it onto the track, rested upon him. Assuming that the duty to the plaintiff was received while he was engaged with the assistance of the pit boss in replacing the car upon the track, we think that it was not the proximate re-

sult of the defect in the track which had caused the derailling of the car. It appears that cars become derailed from various causes. If the derailment had occurred on a portion of the track for the condition of which the plaintiff was responsible, the same kind of an accident in replacing the car on the track might, as well, have happened. The proximate result of the defect in the track had been completely reached when the car became derailed. What was subsequently done had no immediate causal relation with the defect which produced the derailment. If it had appeared that the derailment was due to the negligence of plaintiff, he would not have thereby been precluded from recovery if the company were chargeable with negligence in what subsequently took place. The defective track was not even the condition which led to the injury of the plaintiff. The condition immediately attending or preceding the injury was the derailed car, and the defect of the track was therefore nothing more than the cause of a condition.

In support of our conclusion, it would be idle to attempt any exhaustive citation of authorities, nor would it be practicable to state any rule which may be applied to all cases involving the question of proximate cause. A rule general enough to cover all cases would be too general for any practical purpose. Two illustrations will sufficiently serve to indicate the conclusion reached by this court in cases very similar to the one before us. In *Watters v. Waterloo*, 126 Iowa, 199, 101 N. W. 871, it is said that causal relation does not exist where the result proceeds from a source wholly independent of the cause insisted upon, and comes into proximate relation with such cause only by reason of being aided in some way by one or more of the results flowing from such original cause. That was a case where recovery was sought for injury by an accident consisting of a fall on an icy street, which it was claimed was the proximate result of a prior fall due to a defective sidewalk, causing the injured party to have occasional spells of dizziness, during one of which his fall on the icy street had subsequently occurred. That case is quite analogous, for the condition of dizziness accompanied or produced the fall on the icy street, while the previous fall on the defective sidewalk was merely a cause of such condition. In *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90, it was said that the act of the city in negligently allowing a platform to project over the sidewalk was not the proximate cause of an injury to a passer-by who was struck by a bale of hay falling from such platform; the platform being, as it was held, a mere condition, and

not the proximate cause of the accident. The case of *Andrews v. Chicago G. W. R. Co.* 129 Iowa, 162, 105 N. W. 404, is also very much in point.

The cases relied on by counsel for appellant are not in point. In *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369, the question was whether the wrongful failure of the defendant company to fence its track was the proximate cause of an accident to a boy who attempted, in response to a signal from another boy, to get upon a moving freight train. The court, in reversing a judgment on a directed verdict for the company, said (page 241 of 111 U. S., page 415 of 28 L. ed., and page 374 of 4 Sup. Ct. Rep.): "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is, no doubt, strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine qua non*,—a cause which, if it had not existed, the injury would not have taken place; an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate." Whether the question is made any easier by speaking of the *causa sine qua non* rather than the *causa causans*, we need not consider, for the court found that the duty imposed on the company by ordinance to maintain a fence was imposed by way of precaution to lessen the danger of such accidents as that which actually happened, and there was, therefore, an immediate proximate connection between the neglect of duty and the resulting accident, which the performance of the duty might reasonably have tended to prevent.

In *Aldrich v. Concord & M. R. Co.* 67 N. H. 380, 36 Atl. 252, the defendant company was held liable for injury to an employee from the falling of logs from a freight car on which they were loaded, the supports intended to hold the logs in place having been weakened by the shock due to the previous derailment of the car. But evidently there was here no intervening responsible cause. In *Knapp v. Sioux City & P. R. Co.* 65 Iowa, 91, 54 Am. Rep. 1, 21 N. W. 198, 71 Iowa, 41, 32 N. W. 18, it was held that, where the defendant's negligence in failing to keep its track in repair caused a locomotive engine in charge of the plaintiff to leave the track, and brought about the occasion for plaintiff to reverse the lever in order to arrest the movement of the engine and avert the dangers incident to such an accident, the negligence of the company was the proximate cause of an injury to the engineer, due to his effort in thus reversing the engine. Here 7 L.R.A.(N.S.)

it is apparent the defective condition of the track brought about the very necessity to act under an emergency which was the cause of the injury. But in the case before us there was no emergency, no occasion to act in one way rather than in another. The derailling of the train in the Knapp Case necessitated one specific act on the part of the engineer,—that is, the throwing back of the lever to reverse the engine,—while in this case the derailling of the car necessitated no act whatever as an immediate consequence, and left the plaintiff free to do whatever he might see fit toward obviating the inconvenience resulting from the derailment. He could have unloaded his car and pulled it back upon the track, or he might have secured more assistance, so that it could be put on the track without using the prop as a pry, or he might have secured some other implement than the prop by means of which he and those helping him could have replaced the car upon the track. He might act promptly, or he might act with the greatest deliberation and foresight. There was no emergency and no necessary connection between the result of the defective track and the means to be employed for remedying the condition which had arisen by reason of such defect. In speaking of an adequate and independent intervening cause, as cutting off the connection between a negligent act and a subsequent injury, it is not proper to require that the intervening cause to be searched for be one involving negligence or wrong. When an adequate intervening cause is found, it is immaterial whether that cause is one involving liability or not. It is enough that it is an independent, responsible cause. 1 Thomp. Neg. § 54. Or, if we adopt the view which Judge Thompson prefers, that the proximate cause is the probable cause and the remote cause is the improbable cause (1 Thomp. Neg. § 50), we are still wholly without support for the position of counsel for appellant, for no result of a defective track could be more improbable or further beyond the anticipation of a reasonable man than that in attempting to replace a car derailed by reason of such defect the miner would have his fingers pinched between the end of the car and a prop which somebody should bring to assist in "slewing" the car onto the track, and which should thereafter be dropped where the car would drive the miner's hand against it. Of course it is not necessary, as said in many cases, that the proximate result be one which could be anticipated in detail, but how much further could anyone have foreseen or anticipated the course of events following a defective track than that a car should, by reason of the defect, run off the track, and perhaps cause injury to someone before the force

its momentum could be fully checked? reach the conclusion, therefore, that there was no causal relation between the injury to plaintiff and the negligence of the defendant in allowing that portion of the track extending toward and into the room where plaintiff was at work, and for the maintenance of which it was responsible, to be out of repair.

But counsel further insist that there was negligence on the part of defendant represented by the pit boss as vice principal in connection with the replacing of the car upon the track, and that plaintiff was enabled to recover on account of such negligence. Without discussing in this connection the questions of contributory negligence or assumption of risk which are referred to in arguments of counsel, it is sufficient to say that the defendant company is chargeable with no duty in regard to placing this car upon the track. It did place plaintiff the duty of furnishing him a place to work at the place of the accident, and, if he had been injured by his running off the track, then, no doubt, the company would have been liable, barring, of course, contributory negligence or assumption of risk; but he was not injured by one of his cars running off the track, therefore the duty of furnishing him a place to work was not involved. There is no duty to furnish him tools and appliances which was broken, for the car was in any way defective, and, as to the effort of the prop to pry it back on the track, the use was entirely within the plaintiff's discretion. There seems to have been no duty on the company to furnish miners with all appliances for getting the cars upon the track after they should, for any reason, run off. Witnesses testified that under such circumstances, if the car is lightly loaded, the miner lifts it back himself; heavily loaded, he unloads it, or gets one to assist him, or in whatever way is available, and at his own discretion and risk, he accomplishes the replacement of the car.

It is further urged that the pit boss negligently directed the plaintiff to place himself in front of the car, and to lift, in order to place the car upon the track; but in respect the pit boss was certainly not negligent as vice principal. From the evidence, it would appear to be that the pit boss was anxious to have as much coal put out as possible, and urged plaintiff to move some cars in this room where he had previously been at work, and run them out, so induce him to do this over a track which required greater exertions than usual offered to furnish him assistance; but the assistance thus furnished him was the A. (N.S.)

assistance of a coemployee, and not of a vice principal. Such assistance was furnished on a previous day under somewhat similar circumstances by a driver, and on the day in question by the pit boss himself; but the fact that the pit boss was for some purposes a vice principal did not necessarily make him a vice principal in everything which he did. If he acted as an operative only, the liability of his master for his acts was not other or different from that which would result with reference to the acts of any other operative. *Collingwood v. Illinois & I. Fuel Co.* 125 Iowa, 537, 101 N. W. 283; *McQueeney v. Chicago, M. & St. P. R. Co.* 120 Iowa, 522, 94 N. W. 1124; *Fosburg v. Phillips Fuel Co.* 93 Iowa, 54, 61 N. W. 400; *Beresford v. American Coal Co.* 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; *Barnicle v. Connor*, 110 Iowa, 238, 81 N. W. 452; *Scott v. Chicago, G. W. R. Co.* 113 Iowa, 381, 85 N. W. 631.

There was entire failure of plaintiff to make out any negligence on the part of defendant, proximately contributing to plaintiff's injury, and the judgment is affirmed.

CALIFORNIA SUPREME COURT.

HUNT BROTHERS COMPANY et al.,
Appts.,
v.

SAN LORENZO WATER COMPANY.

(— Cal. —, 87 Pac. 1003.)

Water company—failure to furnish water—damages.

Breach of a contract to connect property with a water main and erect a hydrant for its protection from fire does not, where no time is fixed when delivery of the water shall commence, render the company liable for the value of the property in case it is destroyed by fire for want of water to extinguish it, since such injury cannot be reasonably supposed to have been in contemplation of the parties as the result of the breach.

(October 11, 1906.)

APPEAL by plaintiffs from a judgment of the Superior Court for Alameda County

Note.—The above case, and the following one of *FREEMAN v. MACON GASLIGHT & WATER Co.*, illustrate the rule suggested in the note to *Mugge v. Tampa Waterworks Co.* 6 L.R.A. (N.S.) 1171, that the liability in tort of a water company for injuries to a consumer on account of its breach of its public duty to furnish a water supply depends upon the right of the consumer to maintain the action because of his contract relation with the water company.

in defendant's favor in an action brought to recover the value of property alleged to have been destroyed by fire through defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Van Ness & Redman for appellants.

Messrs. E. S. Pillsbury, Alfred Sutro, and Pillsbury, Madison, & Sutro for respondent.

Angellotti, J., delivered the opinion of the court:

This is an appeal from a judgment given in favor of defendant; a demurrer to plaintiffs' amended complaint having been sustained, and plaintiffs having failed to amend.

The action was brought to recover \$124,496.98, damages, resulting from the destruction of certain property, the injury to other property, and a loss of profits from an established business, all occasioned by a fire, which occurred on April 12, 1901, which fire occurred without any fault on the part of plaintiffs. The corporation, Hunt Brothers Company, which will hereafter be called the plaintiff, was the owner of all said property. The numerous other plaintiffs were insurance companies which had, at the time of the fire, policies in force covering, respectively, various portions of said property, insuring plaintiff against loss by fire, and which had paid plaintiff upon said policies, on account of said loss, amounts aggregating \$91,221.42, and, having received assignments from plaintiff of its claim against defendant to the extent of the amount so paid by them, are here endeavoring to collect the amount paid by them, from defendant. The plaintiff was engaged in the business of fruit canning, packing, manufacturing cans, storage of fruits, canned goods, etc. The property injured and destroyed consisted of certain buildings used and occupied in the conduct of said business, machinery, and other implements used in such business, and the stock on hand, and 74 cottages occupied by employees of plaintiff. All this property was situated on certain premises occupied by plaintiff in Hayward, Alameda county, California. The allegations of the complaint upon which it is sought to hold defendant liable for the amount of this loss are substantially as follows: Defendant was a water company, engaged in the business of supplying water to the inhabitants of Hayward by means of mains laid in the streets of the town, and pipes running therefrom to the premises of its customers. Some time between September, 1900, and March, 1901, plaintiff and defendant entered into an agreement, whereby defendant agreed to lay a 6-inch main from one of its mains charged

and supplied with water, to a point near one corner of plaintiff's premises, to connect said premises with this new main by a service pipe, and to thereupon supply plaintiff, by means thereof, with 100,000 cubic feet of water annually, at the rate of 25 cents per 100 cubic feet, and as much more as might be required at 20 cents per 100 cubic feet; plaintiff agreeing to consume annually 100,000 cubic feet, and pay for it at the 25-cent rate. Defendant further agreed that it would erect and install a fire hydrant near said premises, to be used by plaintiff in case the premises should take fire, and connect the same with said main, and supply plaintiff, by means thereof, with water for the purpose of extinguishing any fire which might occur on said premises, in consideration of the payment by plaintiff to defendant of \$2.75 a month, which plaintiff agreed to pay. No time was specified for the commencement or completion of this work. Defendant laid the new main to a point near one corner of plaintiff's premises, as agreed, but failed to install the service pipe or the fire hydrant. On March 14, 1901, plaintiff remonstrated with defendant because of its failure to do these things, and defendant, on March 15, 1901, promised in writing that it would "immediately commence the work" of putting in the service pipe to connect the premises with the main, and also that it would "immediately commence the work" of erecting and installing said fire hydrant and connecting the same with the main. It failed to commence to do either of these things prior to the fire.

It is alleged that, if defendant had commenced the work of connecting said premises with the main, and the work of erecting, installing, and connecting the fire hydrant, as it had agreed to do, and had prosecuted said work to an end with ordinary diligence, said premises would have been so connected and said fire hydrant installed and connected and ready for use in March, 1901; and that, if said hydrant had been so installed and connected at the time of the fire, said fire could and would have been extinguished, by means of the water which would have thereby become available, before it had damaged the property to the extent of \$5,000; and that therefore the additional loss and damage were wholly due to defendant's neglect and failure to comply with the terms of its agreement. We are satisfied that the damages alleged cannot be recovered as a consequence of the breach of contract alleged. In so saying we do not dispute the proposition, made by learned counsel for appellant, to the effect that a failure to furnish water, under

contract requiring one to do so, may, under some circumstances, entitle the other to the contract to recover, as damages for such breach of contract, the value of such of his property destroyed by fire could have been saved by the water, had been furnished in accordance with the contract. We have examined the cases cited

in other states by counsel upon this position, and find that with practical similarity they appear to support the conclusion that the circumstances may be such to make the person who agreed to furnish water for the extinguishment of fires for the failure to furnish it as damages, in the value of such property destroyed by fire as would have been saved by water, if it had been furnished. *New York & N. E. R. Co. v. Meridian Water Co.* 18 C. C. A. 519, 30 U. S. App. 2 Fed. 227; *Middlesex Water Co. v. Mann Whiting Co.* 64 N. J. L. 240, 49 572, 81 Am. St. Rep. 467, 45 Atl. *Paducah Lumber Co. v. Paducah Supply Co.* 89 Ky. 340, 7 L.R.A. 77, 12 St. Rep. 536, 12 S. W. 554, 13 S. : *Gorrell v. Greensboro Water Supply* 124 N. C. 328, 46 L.R.A. 513, 70 Rep. 598, 32 S. E. 720; *Planters' L. v. Monroe Waterworks & Light Co.* 12 Ann. 1243, 27 So. 684; *Lenzen Braunfels*, 13 Tex. Civ. App. 335, 35 441; *Atkinson v. Newcastle & Glasgow Co.* L. R. 6 Exch. 404. See *San Francisco City v. Ukiah Water & Improv. Co.* 173, 179, 64 L.R.A. 231, 100 Rep. 107, 75 Pac. 773.

Cases cited are, however, all cases where the contract had been executed to the installing and commencing the contracted service, and the respective parties to the contract were acting thereon. One purporting to supply water for a purpose designated by the contract, the extinguishment of fires, and receiving agreed consideration therefor, without ever paying for such service, and without the continued observance of the contract by the water company as a promise to protect such fires as might occur on other premises. As to such a situation, it has been said, as was, in fact, said in the cases cited, that, in view of the fact that water may be supplied in such a manner as to usually extinguish fire before serious damage is done, it may be promptly and efficiently used, it may be supposed to have been in the contemplation of the parties that the damage would be the probable result of failure to comply with the contract at the time a fire occurred. It could only be maintained on a theory that one party would

pay for the continuance of the service for fire purposes, and the other receive the sums so paid. And it is solely by reason of the fact that, in such cases, damage by fire may reasonably be supposed to have been within the contemplation of the parties as a consequence of a breach of the contract to furnish water, that the liability for such damage may be held to attach; for it certainly cannot be held that any such liability would exist for the breach of a contract to simply furnish water for no particular designated purpose, or for designated purposes not including the extinguishment of fires, even although it might be that, if there had been no breach, the fire would have been extinguished in its incipiency by the water furnished, and such breach therefore would have been indirectly and remotely the cause of the loss. The law of damages does not concern itself with such remote causes. As said in *Martin v. Deetz*, 102 Cal. 55, 68, 41 Am. St. Rep. 151, 36 Pac. 368, 372: "Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages." Field, in his work on *Damages* (§ 10), says: "To trace remote effects of causes would often be a difficult, if not an impossible, task. It would require an infinite mind. Each cause produces results that in turn, alone or by combination with other causes, produces other effects, and so *ad infinitum*. It is a subject too abstruse and complicated for the human mind. In the quaint language of Lord Bacon: 'It were infinite for the law to consider the cause of causes, and their impulsion one on another.'" No case cited goes to the extent of holding that one may be liable for a breach of contract to furnish water, in the value of property destroyed by a fire, unless the case was such that damage of this kind might reasonably be supposed to have been within the contemplation of the parties to the contract as a consequence of a breach thereof; and, in the case of *Beck v. Kittanning Water Co.* 8 Sadler (Pa.) 237, 11 Atl. 300, it was expressly declared that, as the plaintiff, who had a contract for water for general use, had no contract with the defendant for a supply of water for the extinguishment of fire, he had no cause of action on his contract for damages resulting from destruction of his property by fire.

It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a

breach. Other damages are too remote. In this lies the distinction between damages for breach of contract and damages for tort; the rule as to tort being that the injured person may recover for all detriment proximately caused thereby, "whether it could have been anticipated or not." Section 3333, Civ. Code. Such, as we understand it, is the rule declared by § 3300 of the Civil Code, as that section has always been construed by this court; and it is the rule enunciated in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, which has been universally accepted and followed. See *Mitchell v. Clarke*, 71 Cal. 165, 60 Am. Rep. 529, 11 Pac. 882. As has often been suggested by writers upon this subject, the remote effects of slight causes are so beyond all possible conception of the parties to a contract, both in character and extent, that any other rule would practically preclude the making of contracts altogether, for no sane person could be expected to assume such uncertain and limitless liability. This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow in the ordinary course of things, from a breach, and therefore to have, in effect, stipulated against. The understanding and intention of the parties in this regard must, of course, be ascertained from the language of the contract, in the light of such facts. See *Sutherland, Damages*, § 45.

Where a contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, loss by fire as the consequence of a breach, may, as already suggested, be reasonably supposed to have been within the contemplation of the parties. This may also be true in the event of such a service contracted to be commenced at a certain definite time in the future, especially if the special circumstances are such as to make it essential that the particular protection from fire to be thereby afforded should commence at that time, and those circumstances were made known to the person or company contracting to furnish the service. As to this, however, it is not necessary here to decide. The contract here alleged was, in effect, first, to lay and install certain pipes through which water for general use might be supplied, and to install one fire hydrant, through which water for use in the event of fire

might be supplied; and, second, such pipes and fire hydrant having been installed, thereupon to commence supplying water for those purposes, and to continue supplying it at certain prescribed rates. No time whatever was prescribed for the completion of the work essential to the furnishing of such water, or for the commencement of the water service, except that it was to commence upon the installation of the necessary pipes and hydrant. We attach no importance to the subsequent "promise" of March 15, 1901, on the part of defendant, that it would "immediately commence the work" essential to the installing of the service for the various purposes designated. Giving this additional promise full force as a part of the contract between the parties, there was therein no undertaking on the part of the defendant that the work so to be commenced would be completed and the water service instituted at any certain, definite time. There was no allegation whatever as to any special circumstances known to defendant, or, for that matter, to plaintiff, making it essential to the protection of the property from fire that the contemplated service should be commenced within any particular time. The case presented, then, is one where the parties simply agreed upon the installation and commencement of a water service for various purposes, including one hydrant to be used for the extinguishment of possible fires, upon the installation and commencement of which the plaintiff was to commence paying, at certain prescribed rates, for the water furnished; no definite time for the commencement of such service being fixed, and no special circumstance appearing, by reason of which it might be anticipated that it was essential to the protection of plaintiff's property from fire that the service should be commenced within any particular time, or, as plaintiff claims, within a reasonable time.

Under such circumstances, it appears very clear to us that damage by fire to plaintiff's property cannot reasonably be supposed to have been within the contemplation of the parties, as possible to be caused by a failure on the part of defendant to commence the water service agreed upon. The plaintiff not having stipulated for the limited protection against fire, to be furnished thereby, to commence at or within any particular time, and, under the terms of the contract, paying for such protection only from the time of the actual commencement thereof, could not, until the actual commencement of the service, be considered as relying on such protection, or on the commencement

thereof at any particular time, in the slightest degree, and there was nothing to warrant even a supposition on the part of defendant that plaintiff did so rely. The utmost that can be reasonably contended to have been within the contemplation of the parties in this regard was that, when at some future indefinite time the hydrant had been installed, and the service actually commenced, water would thenceforth be available, by means of the hydrant, for the extinguishment of possible fires, and that failure to then have it so available, in event of a fire, might cause damage to plaintiff's property. This was the full effect of the contract of the parties, and the parties could not be understood as stipulating for such protection prior to the actual commencement of the service. This, so, whatever might be the proper measure of damage for a breach of contract failing to install the service within a reasonable time, loss of property by fire would not be an element thereof. Until the actual assumption of the duty of such protection, damage by fire could not be held to be within the contemplation of the parties as a possible consequence of a breach, and in no legal sense of the words such damage be held to have been caused by the breach alleged, although, if it had not been for such breach, water would have been available for the extinguishment of the fire. The case is not in principle from one where water was furnished by contract for other than fire purposes, and a fire occurs which could have been extinguished by such water if it had been available, but, owing to some failure of the person furnishing the water, no water was available, and the property is damaged.

As already stated, although in the case the breach is, in one sense of the word, a cause of the loss, there could be no recovery, for the water company has assumed the duty of protecting the property from fire, and loss by fire is, therefore, damage possible, within the contemplation of the parties to the contract. Although water was ultimately furnished for fire purposes, the defendant is not, under the terms of its contract, assumed the duty of so protecting plaintiff's property at the time of the

of the opinion that the amended complaint did not show any damage for which recovery might be had, and that the case was therefore properly sustained. The judgment is affirmed.

For: Shaw, J.; McFarland, J.;
Lorigan, J.
3.)

GEORGIA SUPREME COURT.

M. R. FREEMAN, Plff. in Err.,

v.

MACON GAS LIGHT & WATER COMPANY.

(126 Ga. 843, 56 S. E. 61.)

Water company cutting off supply—damages.

When a private corporation, in the exercise of a franchise granted by a municipal corporation pursuant to a statute, which conferred upon it the right to use the streets of the city on condition that it will therein lay its main and furnish the municipality and its inhabitants with a supply of water at fixed tolls, engages in the business of supplying the general public with water, it becomes liable as a public-service corporation for its wrongful act in cutting off the supply of water which it is under a duty to furnish to one of its patrons as a member of the public at large. Unless the agents of the company knew of the illness of a member of the consumer's family, this fact cannot be relied on by him as an aggravating circumstance; nor can he recover damages on the mere allegation "that another member of his family was suffering from a painful illness."

(November 16, 1906.)

E'ROR to the City Court of Macon to review a judgment in favor of defendant in an action brought to recover damages for defendant's alleged wrongful act in cutting off a supply of water to plaintiff's property. Reversed.

Statement by Evans, J.:

A petition was filed by M. R. Freeman against the Macon Gas Light & Water Company, a corporation alleged to be engaged in the business of furnishing gas and water to the residents of the city of Macon, and having "a monopoly of such business in said city." The complaint of the plaintiff was that on May 26, 1905, the defendant company, without giving him any notice, and "without legal cause," cut off the supply of water from his premises, at a time when he was sick in bed, and another member of the family was suffering from a painful illness, subjecting him to great indignity, annoyance, and inconvenience, and imperiling the health and lives of the members of his household. By way of inducement the plaintiff alleged that on November 26, 1891, the company entered into a twenty-year contract with the city, whereby the company bound itself not to cut off the water supply

Headnote by EVANS, J.

Note.—See note to preceding case.

from any customer or consumer except after five days' notice in writing, duly served on such consumer or customer, and this was one of the rules established by the company; that, prior to May 26, 1905, he had the water fixtures in his residence connected with the public water mains of the company, which are laid in the streets of the city, and used the water furnished by the company for all domestic purposes, this being the only water supply which the city authorities permitted householders to use; and that the defendant, by cutting off this supply, wilfully deprived petitioner's entire household of an absolute necessity which could be obtained nowhere else. The plaintiff characterized the action of the company as "illegal and oppressive," and alleged that he had been thereby damaged in the sum of \$2,500. The defendant demurred to the petition, on the ground that no cause of action was set forth, and also upon the following special grounds: (1) The allegation that the company has a monopoly of the business is irrelevant and impertinent. (2) Plaintiff fails to show under what contract with the company he had the fixtures in his residence connected with its mains, or by what right, or what relation he bore to the company, or what duty it owed him. (3) The terms of the contract between the city and the company are not plainly and fully set forth, nor the rules referred to in the petition. (4) The plaintiff has no right to sue upon that contract there being no privity between him and the company, and he having no right to complain of any violation of the contract. (5) The allegation that the company cut off the plaintiff's water supply "without legal cause" is a mere conclusion, and he should allege "what cause there was and why the same was not legal," so that the court might determine whether the same was a legal cause. (6) That another member of the plaintiff's family was ill is irrelevant, he not having any right to recover any damages because of this fact; nor can he recover anything under the allegation that the company imperiled the health and lives of his entire household. (7) No facts are alleged showing special damage, and the plaintiff does not show in what manner he has suffered damage in the sum of \$2,500. By way of amendment, the plaintiff attached to his petition a copy of the contract between the city and the defendant, which recited that it was entered into by virtue of the act approved September 29, 1891 (Acts 1891, § 14, p. 573), amending the charter of the city of Macon, and also a copy of the rules which he asserted had been promulgated by the company, and published as those under which it dealt with the city and its other patrons. He further alleged that this con-

tract was designed in part for the protection of the private consumers in the city who were not permitted to have wells; that the company enjoyed a valuable franchise granted by the city on condition that it would furnish water to the city and its citizens in accordance with the terms of the contract, so that the company owed a public duty to every consumer to conduct its business according to the terms of its contract and the rules published by it; that the company utterly disregarded the public duty, which it owed to plaintiff as a citizen, head of a family, householder, and housekeeper, and as "a customer who had, with defendant's full consent, connected his water pipes with the pipes of defendant;" and that, at the time the company committed the grievous wrongs complained of, he did not owe the company any amount whatever as a consumer of water, and the cutting off of his water supply was "wantonly and wilfully done with full knowledge of the fact. By another amendment the plaintiff set up that the "defendant owed to petitioner a distinct duty not to do and commit the wrongs complained of," whereby he had been damaged in the sum originally named, as well as in the further sum of \$1, which he had been forced to pay for labor in having supply turned on after it had been wrongfully cut off by the defendant. After the plaintiff had amended his pleadings, as above stated, the company pressed its demurrer, and the court passed an order, reciting that the general and special grounds of demurrer were sustained. To this order, exception is taken.

Messrs. H. F. Strohecker and J. E. Hall for plaintiff in error.

Messrs. N. E. Harris and W. A. Harris for defendant in error.

Evans, J., delivered the opinion of the court:

When a private corporation undertakes to supply water to a municipality and its inhabitants for toll, it enters upon a public service. 1 Farnham, Waters, § 162. The business and purpose for which a watersupply company is incorporated are of such a public character as to make it a quasi-public corporation. *City Water Co. v. State* (Tex. Civ. App.) 33 S. W. 259; *Foster v. Fowler*, 60 Pa. 27. In order to effectually carry out its purposes, valuable franchises in the use and occupation of the city's streets and alleys are granted, and the corporation assumes the obligation of giving adequate service to the public at large. These features of its business stamp its character as a public-service corporation, and it will be liable as such in the conduct of its undertaking, under a contract authorized by a stat-

of the state, to supply the city and its inhabitants with water. In its general characteristics a water company which accepts a franchise conferring upon it the right to use the city's streets on condition that it shall serve the public by furnishing the necessary water supply may be likened to a street-way corporation to which has been granted a franchise to occupy the streets of the city, and engage in transporting passengers for hire. Each would owe certain duties to the public, and would become liable to an action for its failure to perform, to his injury, service which it was under a duty to render to him as a member of the general public. For a breach of its public duty the city could recover nominal damages, or, if circumstances so warranted, punitive damages, and also such special damages as it proximately flow from the breach and sustained by him. What we have just said in no way conflicts with the principle established in *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 313, 5 S. 673. There the water company was held to be held liable to a private citizen for a failure to perform a duty owing to the municipality, under a contract which required it an adequate supply of water for fire protection. The city, in the exercise of its governmental functions, undertook to give its citizens adequate fire protection,—

—itself laying mains and maintaining a water-supply plant, but by hiring one Robinson to do so. No franchise of any kind was granted to Robinson, nor did he in any way obligate himself to serve the public at large, and it was not contended that the water company had any power under its charter by way of contract or otherwise, to impose upon him any public duty towards its citizens. Accordingly, the decision in this case was put upon the ground that there was no privity of contract between the city and the assignee of Robinson (the water company), and that, in the absence of any statutory provision, the contract between the city raised no public duty towards any of its inhabitants to furnish them an adequate supply of water for fire protection.

In the present case, it affirmatively appears that the contract relied on by the plaintiff was made in pursuance of express authority conferred by the legislature upon the municipality to grant a franchise upon certain terms, one of which was that consumers should be furnished water at a price to be fixed by the city in the contract. See amendment to charter, Acts 1888, p. 573. The water company, by entering into the contract which the city lawfully authorized the city to make with the company, accepted the privilege

of supplying the citizens of that city, as such, with water upon certain terms, and became a public-service corporation with an express statutory duty to perform. This duty the company owed to every private consumer of water, independently of any contract duty it owed to the municipality itself, considered as a municipal corporation engaged in the discharge of governmental functions. For a breach of this statutory duty, the company could be held liable in tort by the aggrieved member of the public, though he was no party to the contract between the city and the water company. A private person may not only sue a public-service corporation for a breach of duty owing to him, but he may by mandamus even enforce the performance by the corporation of its public duty as to matters in which he has a special interest. *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937. The petition, as amended, set forth a cause of action sounding in tort, and the particular tort alleged was a wilful breach by the defendant company of a public duty which it owed to the plaintiff as a consumer of the water it undertook to supply to the inhabitants of the city. The suit is not based on the contract between the water company and the city; this contract is simply alleged by way of inducement, for the purpose of establishing the nature and scope of the duties and liabilities of the company relatively to the general public. It is clear, therefore, that the action should not have been dismissed on general demurrer.

The objection raised by special demurrer to the allegation that the water company had a monopoly in its business of supplying the public with water was without merit. The term "monopoly" was not used in an offensive sense, or with the purpose of insinuating that the company was not conducting a legitimate business, but with a view to setting forth the pertinent fact that the company had the exclusive privilege of supplying the city and its inhabitants with water, and for this reason the plaintiff was wholly dependent upon the company for his supply of water. The assertion that the company cut off his supply "without legal cause" was an allegation to the effect that the company, without any justification, wrongfully discontinued to serve him; it was not a mere conclusion of law, nor was the plaintiff under any obligation to elaborate his pleading as to this matter. In the absence of an averment that the defendant knew that another member of the plaintiff's family was ill at the time the water was cut off, this fact could not be relied on by the plaintiff as an aggravating circumstance connected with the wrong complained of; nor was it pertinent that the action of the

See amendment to charter, Acts 1888, p. 573. The water company, by entering into the contract which the city lawfully authorized the city to make with the company, accepted the privilege (S.).

company imperiled the health and lives of his entire household, the plaintiff having no right to damages for any injury or inconvenience the members of his family may have suffered, independently of that he sustained as a consumer in being deprived of his means of providing himself and his household with water for domestic uses. To this extent, the special demurrer was properly sustained. It was not, however, incumbent on the plaintiff, as the defendant urged by way of special demurrer, to specifically state the manner in which he computed his damage to be in the amount sued for. All a pleader is required to state are the facts upon which he relies for a recovery, when general damages are claimed; though, when special damages are averred, it is necessary for him to specify the particular items for which he sues. From the very nature of things, general damages are incapable of segregation into different items.

In his amendment the plaintiff did allege special damages in the sum of \$1, the cost of restoring the water connection; and, in all other respects, the amended petition met the special objections pointed out in the demurrer, in so far as these objections were well taken.

Judgment reversed.

All the Justices concur.

ALABAMA SUPREME COURT.

ELLA DANIELS, Admr., etc., of John Daniels, Deceased, Appt.,

v.

LOUISA A. CARNEY.

(— Ala. —, 42 So. 452.)

Steamboat — negligent operation — allegations of complaint.

1. A complaint in an action to hold the owner of a steamship liable for negligence in its operation so as to cause the capsiz-

ing of a small boat by the waves generated by it after knowledge of the peril of the small boat must allege not only that the small boat was actually seen by those in charge of the steamboat, it not being sufficient to allege that it was in plain sight of them, but also that the peril was known to them.

Same—duty to avoid injury.

2. Those in charge of a steamship creating waves which endanger the lives of the occupants of a small boat near it are bound to stop the normal operation of their boat until the small boat has passed out of the zone of danger.

Same—complaint—allegation of authority.

3. The complaint in an action to hold the owner of a steamship liable for injuries caused to the occupants of a small boat by its negligent management must allege that at the time of the accident those in charge of the boat were acting within the scope and line of their authority.

(November 15, 1906.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Mobile County sustaining demurrers to the complaint in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Fitts & Stout, for appellant:

The prior negligence of the small boat's crew in going into the place of danger is necessarily a remote cause.

Central R. & Bkg. Co. v. Vaughan, 93 Ala. 210, 30 Am. St. Rep. 50, 9 So. 468; Highland Ave. & Belt R. Co. v. Sampson, 91 Ala. 563, 8 So. 778; Foster v. Holly, 38 Ala. 76; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045.

When large steamers proceed up or down a river at a speed dangerous to small craft,

Case Note.—Duty of steamer to avoid imperiling small boat by swells: — Steamers are generally held liable for injury caused to smaller craft by swells or waves created by navigating at a high rate of speed (The Tiger Lily, 11 Fed. 744; The Drew, 22 Fed. 852; The Monmouth, 44 Fed. 809; The Connecticut, 45 Fed. 374; The Havana, 100 Fed. 857; The Kaiser Wilhelm Der Grosse, 134 Fed. 1012. Reversed on other grounds in 76 C. C. A. 374. 145 Fed. 623; The Asbury Park, 138 Fed. 617. Affirmed in 71 C. C. A. 684. 142 Fed. 1037; The Asbury Park, 138 Fed. 925; The Asbury Park, 147 Fed. 194. Reversing 136 Fed. 269); or at full speed (The Columbia, 55 Fed. 766. Affirmed in 9 C. C. A. 455, 17 U. S. App. 508, 61 Fed. 220; The Rhode Island, 24 Fed. 295; Ross v. Central R. Co. 146 Fed. 608); or at an unnecessary rate of speed (The Southfield, 19 Fed. 7 L.R.A. (N.S.)

841); or faster than customary (The Majestic, 44 Fed. 813. Affirmed in 1 C. C. A. 78, 1 U. S. App. 16, 48 Fed. 730).

Especially is this true when it appears that, by reducing the steamer's speed to a reasonable degree, dangerous swells may be avoided. Ross v. Central R. Co. supra.

It is the steamer's duty to slow down when passing so near a small boat that the displacement waves may endanger its safety. De Lelle v. The Atalanta, 34 Fed. 918; The Columbia, 9 C. C. A. 455, 17 U. S. App. 508, 61 Fed. 220. Affirming 55 Fed. 766.

And she must use all reasonable precaution to avoid doing damage to the smaller boat (The Tiger Lily; The Drew; and The Southfield.—supra; The Rotherfield, 123 Fed. 460); or, as stated in some of the cases, she must use the customary and requisite precaution (The Monmouth and The Ma-

and cause such swells that barges or other small craft are sunk, they are liable.

The *New York*, 34 Fed. 757; *De Lelle v. The Atalanta*, 34 Fed. 918; *The Southfield*, 19 Fed. 841; *The Kaiser Wilhelm Der Grosse*, 134 Fed. 1012.

Even if the plaintiff's intestate was a trespasser on the domain of the defendant, and unlawfully got in the way of the defendant's steamboat, still, if those in charge

of the steamboat could have prevented running over him and injuring him, it was their duty to do so.

Central R. & Bkg. Co. v. Vaughan, supra; *Highland Ave. & Belt R. Co. v. Sampson*, supra; *Louisville & N. R. Co. v. Webb*, 97 Ala. 310, 12 So. 374; *Alabama G. S. R. Co. v. Guest*, 136 Ala. 352, 34 So. 908; *Haley v. Kansas City, M. & B. R. Co.* 113 Ala. 649, 21 So. 357.

jestic, supra; *The Asbury Park*, 138 Fed. 617, Affirmed in 71 C. C. A. 684, 142 Fed. 1037).

The fact that the steamer's displacement waves do not render the navigation of small boats more perilous than would a high wind does not relieve the steamer of her duty to slow down or stop her machinery, if necessary. *The Monmouth*, supra; *The Majestic*, 1 C. C. A. 78, 1 U. S. App. 16, 48 Fed. 730.

Where the danger from the swells to the smaller craft is seen, or should be seen, and it can be avoided only by stopping the propeller or paddle wheels, this then becomes the duty of the steamer. *The New York*, 34 Fed. 757; *The St. Paul*, 124 Fed. 103.

When the danger is signaled to the steamer, she is bound to use not merely one means, but all reasonable means, in her power that may be in fact necessary to avoid it. *The Drew*, supra.

But a large raft of boats in tow in broad daylight is not required to signal the steamer. *The Monmouth* and *The Columbia*, supra.

The steamer is bound to know the effect of her swell. *The Rotherfield*, supra; *The Asbury Park*, 138 Fed. 925.

She is also bound to know the extent of her swell, and to pass at a distance far enough off to prevent injury from it, when there is room for her to do so. *The Drew*, supra.

And she is bound to know the depth of water in a narrow channel where she overtakes and attempts to pass a tow of boats, and the amount of suction and swell she would create by passing in such water; if she cannot pass in that place without causing injury by her swell, she is bound to wait until beyond the narrow place. *The C. H. Northam*, 7 Ben. 249, Fed. Cas. No. 2,689, Affirmed in 13 Blatchf. 31, Fed. Cas. No. 2,690.

In *The Daniel Drew*, 13 Blatchf. 523, Fed. Cas. No. 3,565, it was held that, if an overtaking steamer in prudent navigation creates such swell and suction as are to be expected in the ordinary navigation of a rapid vessel, equipped and constructed in a suitable manner; and if the overtaking steamer has no reason to apprehend that she will do an injury, and a tow is injured thereby,—the overtaking steamer is not responsible.

In the preceding case it was said that there is no law which prescribes how much swell a steamer may cause; and that a large vessel is not, under all circumstances, 7 L.R.A. (N.S.)

absolutely liable for an injury caused by its swells to an inferior vessel.

The rule laid down in the preceding case was quoted in *Bell v. New Jersey S. B. Co.* 54 App. Div. 526, 66 N. Y. Supp. 1031, and the court held that, while it was proper to charge that it is the duty of a steam vessel passing near docks, or other mooring places, to pass at such a rate of speed that no danger will be likely to result from her swells, provided she has timely notice of the presence of other vessels at such docks as are likely to be damaged from the suction and swells, it was error to charge that, in navigating rivers where small boats are accustomed to ply and may be reasonably expected, a steamboat is bound to navigate with caution and at a rate of speed sufficiently slow to avoid danger from her attending swells.

The court, however, in *The Asbury Park*, 144 Fed. 553, refused to follow the doctrine of the *Daniel Drew* Case, and held the steamer liable for the damage done by her swells, although she reduced her speed.

In *Fawcett v. The Natchez*, 3 Woods, 16, Fed. Cas. No. 4,703, it was held that river steamers have the right to follow the usual channels, and that it is incumbent on those who have rafts, barges, or other water craft moored to the banks to foresee and provide against accidents liable to result from the swell of passing steamers.

But in *The Morrisania*, 13 Blatchf. 512, Fed. Cas. No. 9,838, it was held that, where the channel at the place of passing was over 1,000 feet wide, and open to the steamer's navigation to that width, and she passed so near and at such a rate of speed that the swell she created injured a bark securely fastened to a pier, she was liable for the damage.

In *The Majestic*, 1 C. C. A. 78, 1 U. S. App. 16, 48 Fed. 730, Reversing 44 Fed. 813, on this point, it was held that, where those in charge of an overtaken small boat saw and knew the threatening character of the approaching wave, and had time to turn stern to it, they were not in fault for failure so to turn.

In *The Newcastle*, 147 Fed. 534, it was held that, unless the damage done to the small boat can be directly traced to the improper conduct of the steamer, the latter cannot be held liable.

As to the relative duties of steamers and small craft propelled by oars on rivers and in narrow channels, see note in 5 L.R.A. (N. S.) 303.

The steamboat had no paramount and unrestricted right to navigate our water highways.

The *Southfield*, 19 Fed. 842; The *Morrisania*, 13 Blatchf. 512, Fed. Cas. No. 9,838; The *Alexander Folsom*, 3 C. C. A. 165, 6 U. S. App. 153, 52 Fed. 412; The *Ohio*, 33 C. C. A. 667, 62 U. S. App. 88, 91 Fed. 555.

It is negligence to fail to keep a proper lookout.

East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 435, 54 Am. Rep. 69; *Louisville & N. R. Co. v. Posey*, 96 Ala. 262, 11 So. 423; *Mobile & B. R. Co. v. Kimbrough*, 96 Ala. 129, 11 So. 307; *East Tennessee, V. & G. R. Co. v. Baker*, 94 Ala. 632, 10 So. 211; *Louisville & N. R. Co. v. Webb*; *Alabama G. S. R. Co. v. Guest*; and *Haley v. Kansas City, M. & B. R. Co.*—supra.

Messrs. Gregory L. Smith and H. T. Smith, for appellee:

No person can be made liable for the acts of his servants until it appears that such acts are within the scope of their employment.

Western R. Co. v. Milligan, 135 Ala. 205, 93 Am. St. Rep. 31, 33 So. 438; *Myer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620, 116 Ala. 637, 22 So. 859.

Dowdell, J., delivered the opinion of the court:

The complaint as originally filed contained two counts, and was afterwards amended by the addition of the third count, which latter count was subsequently amended. The complaint was demurred to, both as originally filed and as amended, which demurrers being sustained by the court, the plaintiff declined to further plead, and thereupon judgment was rendered for the defendant, from which judgment the present appeal is prosecuted. The court's ruling on the demurrers constitutes the basis of the first four assignments of error; the fifth and last assignment being based on the final judgment rendered.

The suit is to recover damages for personal injury, resulting in the death of plaintiff's intestate by drowning, through the negligence of defendant's servants in the operation of defendant's steamboat, causing the small boat in which plaintiff's intestate was riding to be capsized in Mobile river. The theory of plaintiff's case is that the death of plaintiff's intestate was the proximate result of the failure of defendant's servants to exercise due care in the operation of defendant's steamboat after the discovery of the peril of said intestate. There is no pretense of any prior negligence in the operation of said steamboat

whereby the accident resulted. On the contrary, it is averred that the steamboat was being operated in the usual and normal way. The theory, as well as the insistence in argument, of plaintiff's counsel, is that it was the duty of the servants, after the discovery of the peril, to cease the normal operation of the steamboat, by stopping the revolution of the propeller or paddle wheels of said boat, in order to prevent the creation of waves; which, it is alleged, caused the swamping or capsizing of the small boat in which said intestate was riding.

To charge one with subsequent negligence, there must exist a prior knowledge on the part of the defendant of the peril of the person injured. The first count of the complaint, in counting on the failure of the defendant's servant or servants to exercise due care by the stopping of the revolutions of the paddle wheels of the said steamboat to prevent the creation of a succession of large waves, was defective, and subject to demurrer, in not averring knowledge on the part of the servant of the peril of the deceased, which knowledge was necessary to impose the duty claimed under the facts and circumstances stated. The count avers that the small boat, with its occupants, in which the intestate was riding, was plainly visible to defendant's servants. This may all be true, and yet the small boat, with its occupants, may not, as a matter of fact, have been seen by defendant's servants. To say that an object was plainly visible is not the equivalent to saying that it was seen. Such an averment leaves the main fact, that of actually seeing, and hence a knowledge on the part of defendant's servants of the perilous situation of plaintiff's intestate, to rest merely in inference. Good pleading requires that the facts which constitute the cause of action relied on should be stated in the complaint, and not left to inference. Facts, when averred, may be established inferentially from other facts shown in evidence; but this is a rule of evidence, and not of pleading. In pleading, the facts themselves, whether they are to be established directly or inferentially, should be stated. The second count, while it avers that the small boat, with its occupants, was seen by the defendant's servants and in time to avoid the injury, does not aver that the peril of the deceased was an obvious one, or that it was known to defendant's servants. By the pleading this latter fact was left merely in inference, which rendered the count faulty. Both the first and second counts were, for the reasons above stated, subject to demurrer.

By the amendment of the third count the defects above pointed out were met and ob-

viated by proper averments. The Mobile river is navigable water and a public highway, and, under the law, the right to navigate the same is equally guaranteed to everyone. Const. 1901, § 24; Code 1896, § 2515. The exercise and enjoyment of this right is as much guaranteed to the small craft as to the great steamer. Each one owes the other the duty of the observance of due care, so as to avoid inflicting wrong and injury upon the other. Injury resulting from the violation of this duty, whether intentional or through negligence, carries with it the legal responsibility of answering in damages. *Foster v. Holly*, 38 Ala. 76. The defendant's servants, in the operation of the steamboat, whereby large waves were created by its propeller or paddle wheels, sufficient to swamp or capsize a smaller boat in passing, thereby endangering the lives of the occupants of the small boat, owed to the latter the duty of avoiding the danger, by ceasing the normal operation of the steamer and stopping the revolution of its paddle wheels or propeller, until the smaller boat had passed without the zone of danger of waves from the larger boat. This principle seems to be settled both upon reason and authority. *De Lelle v. The Atalanta*, 34 Fed. 918; *The New York*, 34 Fed. 757; *The Southfield*, 19 Fed. 841; *The Kaiser Wilhelm Der Grosse*, 134 Fed. 1012. In *Wright v. Brown*, 4 Ind. 95, 58 Am. Dec. 622, where a small craft was caught by the swell of a passing steamer, the case was considered just as though there had been a collision, and the court said: "We shall consider this case as one of collision between the vessels; for it must be the same thing in principle whether the steamboat ran upon the flat boat or forced some other object upon it to produce the injury." In the case at bar, it cannot, as matter of law, be said that the plaintiff's intestate, on the facts stated in the complaint, was guilty of negligence that contributed proximately to his death. It appears from the complaint that the small boat or skiff in which he had taken passage to cross the river, laden as it was, was nevertheless safe in the absence of an unusual disturbance of the water, and that the water at the time and before the defendant's steamer approached was smooth. The plaintiff's intestate had the right to assume that the navigators of large crafts would observe their duty under the law toward the small boat in which he had taken passage in avoiding the infliction of injury.

The third count was, however, in another respect faulty for lack of proper averment, whereby it was rendered subject to the de-
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murrer interposed. The count fails to aver that the servant or servants who were operating the steamboat at the time of the alleged wrong and injury were acting within the scope and line of their authority. *Non constat* these servants were at the time and place acting in utter disregard of authority of the master, in which event no responsibility could attach to the master on account of their negligent operation of the steamboat. In the case of *Lampkin v. Louisville & N. R. Co.* 106 Ala. 287, 17 So. 448, the plaintiff was a passenger on defendant's train, and while a passenger was assaulted by a brakeman on said train. It was held in that case that the facts stated in the complaint were sufficient, without stating in terms that the employee by whom plaintiff was assaulted was acting within the scope of his duties. In *Woodward Iron Co. v. Herndon*, 114 Ala. 214, 21 So. 430, that suit was brought under the employers' liability statute, and the court ruled that, where the complaint averred that the engineer was in charge and control of an engine, which he was at the time running over a track of the company, this was *prima facie* sufficient to show that he was in the discharge of his duties under such employment. The facts in the case before us, we think, differentiate the case from the foregoing cases cited and relied on by the appellant. In the *Lampkin* Case the relationship of carrier and passenger is shown, with the duties and responsibilities attaching to such relation under the law; and the further fact is shown that the assaulting party was an employee and brakeman on defendant's train. In the *Woodward Iron Co. Case*, the suit being under the employers' liability statute, the court ruled that the averments in the complaint as to superintendence, etc., were within the terms of the statute. In the case before us no relationship existed between the plaintiff's intestate and the defendant, and the suit is for a common-law liability, and not under the statute. In *Postal Teleg. Cable Co. v. Brantley*, 107 Ala. 684, 18 So. 321, it is said: The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly inferred from the nature of the employment and the duties incident to it. In the plaintiff's complaint it is not charged that the defendant was guilty of negligence, but the negligence complained of was that of defendant's servant. We think it perfectly clear that the defendant could not be made liable for any acts of her servants, done by them without the scope of their employment, and not by her authority. If these servants undertook to

operate her steamboat down the river without her authority, she could not be made liable for their wrongful acts. This being true, it follows, in order to fix a liability upon her for the negligent conduct of the servants, it should be averred and shown that they were acting with her authority or within the scope and line of their employment.

Finding no errors in the ruling of the court on the demurrers, the judgment appealed from will be affirmed.

Weakley, Ch. J., and Haralson and Denson, JJ., concur.

ARKANSAS SUPREME COURT.

LANE & BODLEY COMPANY, Appt.,

v.

F. G. TAYLOR.

(— Ark. —, 97 S. W. 441.)

Attorney and client—account stated.

A charge for services by an attorney, which is accepted by the client, becomes an account stated, and cannot be reopened except for fraud or mistake, although the account of collections in which it is embodied is disputed, so that it becomes a matter of litigation.

(October 22, 1906.)

APPEAL by plaintiff from a judgment of the Circuit Court for Clay County in defendant's favor in an action brought to recover funds which were alleged to have been collected by defendant for plaintiff. Reversed.

The facts are stated in the opinion.

Mr. G. B. Oliver for appellant.

Mr. J. F. Gantney for appellee.

Case Note.—Effect of dispute as to certain items of an account upon assent to other items: —The mere fact that one item in an account is disputed does not, as a general rule, prevent the account from becoming an account stated as to all the items admitted to be correct. *Mulford v. Caesar*, 53 Mo. App. 263.

And an objection to particular items of an account rendered a debtor is an admission of the correctness of the rest of the items, and the account becomes stated as to those items. *Burns v. Campbell*, 71 Ala. 271; *Joseph v. Southwark Foundry & Mach. Co.* 99 Ala. 47, 10 So. 327; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884.

But in *State, Weigel, Prosecutor, v. Hartman Steel Co.* 51 N. J. L. 446, 20 Atl. 67, the court said: "The notion that there can be an account stated of certain items of the account, while other items of the same account are questioned and left open for further adjustment or litigation, . . . cannot be supported upon any rational view of the nature of an account stated. It confounds every admission with an account stated."

Hill, Ch. J., delivered the opinion of the court:

This case is a contest between an attorney and his client. The client was not satisfied with the statement of money collected and expenditures made, and refused to accept the check sent to it, and this suit resulted. The amount of collections was admitted, and the difference grew out of the amount that should be allowed as credits.

Passing all other questions, and going to the heart of the case, it is found that on January 27, 1903, the appellee, Taylor the attorney, submitted to his client a statement, and transmitted a draft for \$342.10 as the balance due the client after paying various items and his fee, which were set forth in the statement. The fee charged was \$200, and in regard to that the appellee said in his letter: "You will remember that there were four trials in the case,—two in the circuit court and two in the Supreme Court,—and, while the fee of \$200 seems large, it is not, when the work done is taken into consideration. This does not include the two other trials,—one in the circuit court at the outset of the litigation and one some time after in the chancery court,—making in all six trials. Hoping this will be satisfactory," etc. In reply to this, the client, who was represented by home counsel, who conducted the correspondence, wrote refusing to accept the check for \$342.10, and calling attention to matters that had been overlooked, which are not material here, and asked that the account be recast, and, in regard to the fee, said: "We do not object to your fee, except that we think we are entitled to one third of it. Please send us corrected statement," etc. On February 13th the appellee

not be supported upon any rational view of the nature of an account stated. It confounds every admission with an account stated."

An instruction to the jury that, if an itemized statement of account was presented to defendant, and he agreed to pay a portion thereof, such portion became an account stated which plaintiff is entitled to recover, was held, in *King v. Machesney*, 88 Ill. App. 341, to be an erroneous statement of the law. The court said it is not enough to constitute an account stated that it may contain some items conceded to be correct, when at the same time the account as a whole is in dispute; for an account stated is an agreement between the parties that all items of the account are true and the balance as struck correct, together with a promise, express or implied, for payment of such balance.

As to what constitutes an account stated, see exhaustive note in 27 L.R.A. 811.

wrote them, stating that he would look into some matters referred to in the letter not material to this issue, and said nothing in regard to the fee. On February 26th he again wrote, remitting \$393.50, having added \$50.40 to his previous remittance for matters explained in the letter, and added: "There are some costs that I find that I paid, but I will let that go, and count the matter even. All costs are paid." On March 7, 1903, upon learning that his check had been returned, and the claim against him placed in the hands of an attorney for collection, he wrote a full history of the litigation which he had conducted, with circumstantiality and detail, which is apparently a correct and truthful history of the case. The gist of the letter was an insistence upon the correctness of the charge that he had made. To this the appellant's attorneys replied on March 11th, in which they said: "We are in receipt of your favor of the 7th instant, and in answer beg to say that it is not a question of fees at all that compelled us to put the matter of Lane & Bodley Company v. J. W. Leonard in the hands of Mr. Oliver. On that point we refer you to our letter of January 29, 1903, but solely for the reason that you failed to send us money that you had collected, and when you did send check you did not send the correct amount," etc. On March 25, 1903, the appellee wrote further in regard to costs and other matters, and concluded as follows: "I certainly think I ought to have every cent of the fees that I have charged, and that you should take your charges out of the amount that I sent you, and then I will not have enough to pay my personal expenses in looking after the litigation; and besides, I paid \$150 of that to associate counsel." Subsequent correspondence between the parties followed. No dispute or difference developed as to the fee, but the matter was not adjusted, and suit was brought. In said suit the defendant answered, admitting the collection of the three items, to wit, \$129.60, \$100, and \$553.50, which were charged in the complaint to have been collected by him, and said that the same had been paid, and, by way of cross-complaint, he alleged that the appellant was indebted to him in the sum of \$155 as attorneys' fees and expenses in collecting said sums of money and the litigations concerning the matter. On trial before a jury a verdict resulted in the sum of \$5 in favor of appellee, and the appellants brought the case here.

The court sent the case to the jury upon instructions directing them to charge the appellee with the three items collected by him, with interest, less a remittance of \$79.60, and then credit him with the court costs paid by him, and also credit him with

whatever fee he was entitled to for his services, under the evidence, including expenses, and return a verdict for the party for the difference between the charges in whatsoever side the difference stood. Various other instructions were given, principally upon the question of the amount of fee to be allowed the appellee, and upon that point the testimony of attorneys had been taken, which presented a wide conflict as to the proper amount to be charged.

It was error to submit to the jury this question of the amount of fee to be found to be due upon a *quantum meruit*, because the correspondence which has been just detailed shows that that was a closed incident. It had become an account stated between appellant and appellee, and the appellee was only entitled to recover the \$200 which he had charged, and which was agreed to by the attorneys conducting the correspondence on behalf of the appellant. They expressly disclaimed any difference with him over the amount of fee, and said that the reason they would not accept his check for \$393.50 was on account of other items, and not on account of the fee which he had charged. After making this charge and remitting \$393.50, which was not accepted, but returned to the appellee, he then made a charge in this litigation for his services and expenses which would more than absorb the collections made, and leave due him \$155, and sustained that charge by some evidence that the same would be reasonable for the services performed. But he was not at liberty to reopen this question, and recover upon the *quantum meruit*. When an attorney makes a charge for services, and the same is accepted by the client, it becomes an account stated between them, and may be sued upon as such by him. *Wilcox v. Boothe*, 19 Ark. 684; *Pulliam v. Booth*, 21 Ark. 421. Necessarily the converse is true, and the client's rights likewise fixed. The rendition of an account is not of itself sufficient to make it an account stated, but, where the other party goes over the account and assents to its correctness, then it becomes a settled matter. See this subject fully discussed in 1 Cyc. Law & Proc. pp. 370-372. When it is thus settled, it can then only be reopened for fraud or mistake. *Roberts v. Totten*, 13 Ark. 609; *Lawrence v. Ellsworth*, 41 Ark. 502; *St. Louis, I. M. & S. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704; *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592; *Glascock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379. The only uncertain element in this account was the fee. The other matters were mere ascertainment of the correct expenditures and costs to be charged against the collection, and were not matters open for contract or adjustment like the fee matter then stood. But, even aside

from the rules governing an account stated, growing out of its rendition and acquiescence, and considering this, not as an account, but as a negotiation between the parties, it is evident that a contract was consummated. Taylor offered, upon his part, to accept \$200, which he then retained, in full for legal services growing out of the numerous lawsuits involved in the collection of the claim, and his client accepted that proposition. This ended the matter, so far as the fee was concerned, as both parties were capable of contracting in regard to the subject-matter, and did contract in regard to it, and there is no evidence authorizing the reopening of that contract upon the ground of fraud, undue advantage, mutual mistake, or any other ground which sets aside a contract.

The court gave the jury the following instruction: "(2) If you find from the evidence that the defendant rendered a statement in which he charged a less sum for his services than he now asks, that does not prevent him from recovering whatever amount his services were worth. Or, if you find that the defendant rendered his statement for services through mistake caused by reason of his books and papers being misplaced, and he could not find them, and did not remember about the cases sufficiently to fix the proper amount, then he is not necessarily bound by the statement that he made." This instruction was improper, as it does not correctly state the law, and, even if it did, there was no evidence to justify the issue being presented to the jury. The correspondence at the time the fee was fixed and while the negotiation was pending about it showed an intimate knowledge of the services performed, and a recitation of those services to the client to satisfy him that the fee was reasonable. The testimony of Mr. Taylor does not state the extent and nature of his services any more definitely than his letters did at the time he was fixing this fee; merely gives more detail. It is true that he testifies that it was some two years from the time he got the money until he made this settlement, and that he had misplaced his docket and letters, and could not get the data necessary to make a statement, and says that he had forgotten about paying his associate counsel \$150. One month after making the second remittance, and as a reason for assuring his client that the charge of the transmitting attorneys should not come out of the amount retained by him, he says that he would not have enough to pay his personal expenses in looking after the litigation, and besides, that he had paid \$150 to associate counsel. At this time he did not ask that the matter be reopened on account of this oversight, and merely insists 7 L.R.A. (N.S.)

that for these reasons the charge that he had made was a proper one. Doubtless, there were other matters, as shown in his testimony, that he was deprived of having the benefit of in his settlement by reason of his lost docket and correspondence and failing to remember details, but those matters did not go to the only matter subject to negotiation,—the fees,—they were matters that went merely to a proper accounting for the money received and proper credits in his own behalf, and they were subject to adjustment upon the ascertainment of those amounts at any time.

Other questions were discussed in the case in regard to the instructions, but it is not necessary to notice them. The view the court takes of fees renders the other unimportant.

Objection was made to the bill of exceptions not showing all the testimony, but, since those objections were made, the bill of exceptions has been amended by the trial court, and the omitted matters have been inserted.

For the error in submitting to the jury the question of the fee, the cause is reversed and remanded, with directions to grant a new trial.

GEORGIA SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Plff. in
Err.,
v.
E. N. CHAMBERS.

(126 Ga. 404, 55 S. E. 37.)

Injury to business—liability.

1. Malicious injury to the business of another will give a right of action to the injured party.

Same—liability of employer.

2. A licensed drayman had contracts with merchants to haul their freight from the depot of a railway company to their places of business. The depot agent of the railway company at the place in which the drayman was licensed to do business, knowing of the existence of such contracts, willfully and maliciously refused to deliver to the drayman goods of such merchants, notwithstanding orders, oral and written, to that effect were communicated to the agent. As a consequence of this wrongful conduct of the agent, the drayman was damaged in his business, and his business practically destroyed. Held, that the railway company

Headnotes by COBB, P. J.

Case Note.—Liability of railroad company for malicious refusal of freight agent to deliver freight: —A diligent search has failed to disclose any other case in point. The case of *Bowen v. Illinois C. R. Co.* 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306, is some-

was liable for such damages to the business of the drayman as flowed from the wrongful conduct of its agent.

Same—scope of authority.

3. A corporation is not liable for the malicious acts of an agent, unless such acts were expressly authorized by the corporation, or were within the scope of the duties of the agency, or were in themselves a violation of the duty owed by the corporation to the party injured, or such acts were ratified by the corporation.

Same—customer—insult.

4. A railway company is liable to one who goes to a depot of the company to deal with the depot agent as to matters connected with the business of the company, who, while in the course of the transaction, is insulted and humiliated by the language and conduct of the agent. *Aliter*, if the insult results from the conduct of the agent at a place other than that to which the public is invited by the establishment of the agency, and such conduct is neither authorized nor ratified by the company.

Pleading—election.

5. When a petition contains two or more counts, and each sets forth a separate and distinct cause of action, the plaintiff will not be required to elect upon which count he will proceed.

Instruction—absence of evidence.

6. When there is no evidence as to the worldly circumstances of the parties, it is erroneous in any case to charge upon the subject. Where there are two counts in a petition, and an instruction on worldly circumstances of the parties is appropriate as to one, and not appropriate as to the other, the instructions of the judge should be such as to inform the jury that the worldly circumstances are to be considered as to one, and not as to the other.

(August 17, 1906.)

ERROR to the City Court of Carrollton to review a judgment in plaintiff's favor in an action brought to recover damages for alleged injury to his business. Reversed.

Statement by Cobb, P. J.:

Chambers sued the Southern Railway Company for damages. Objection was made

to the petition as originally filed upon the ground that it set forth two separate and distinct causes of action and that each was not set forth in a separate count. This defect was remedied by an amendment, and the petition as amended contained two counts. The first count alleged that plaintiff was a licensed drayman of the town of Villa Rica, and had purchased the necessary outfit for that business; that the most profitable part of his business consisted of hauling the freight of merchants shipped over the line of defendant; that he had contracts with a majority of the merchants to haul their freight from the depot to their places of business; that the defendant, through its depot agent at Villa Rica, refused to deliver him freight to be hauled to the merchants, although such agent knew he was authorized to receive and haul such goods, petitioner presenting written and verbal orders for the same; that "defendant's agent, G. A. Scarborough, would go around to petitioner's customers and beg and persuade them to allow other parties than petitioner to receive and haul said goods, to the injury and damage of your petitioner; . . . that the conduct on the part of the defendant was wilful, malicious, and done for the sole purpose of injuring and damaging your petitioner, and and did injure him and damage him" in a sum stated; and that the conduct on the part of the defendant had destroyed the business of the plaintiff. The second count alleged that on a named day the agent of the defendant, while acting in the discharge of his duty as such agent, and being at the time in the depot of the defendant, in the presence and hearing of certain named citizens, used to and of the plaintiff certain "abusive and malicious words," which are set forth in the petition, for the sole purpose of injuring and harassing him, and did cause him great mental pain and suffering; and that on another occasion, at the store of a merchant, such agent, while in the discharge of his duty as agent, used of and concerning petitioner certain other lan-

what analogous. The court there held that a railroad company was not liable for the wanton act of a station agent who had charge of the freight and express business at its station, in shooting one who called at the station to inquire of the agent as to whether any demurrage would be charged on account of a failure to unload a car of coal that day. Upon being answered in the negative, deceased turned to walk out of the room when the agent called him back, saying there was a package for him, it not appearing whether the package had been received by freight or by express, and, while he was signing a receipt for it, the agent

picked up a pistol and, without a word, shot the party to death. The court said that, if the package had come by express, then there could be no claim that the package pertained to the business of the railroad company; but the court also said, that it is equally certain that the act of the agent in committing the assault was not within the scope of his employment as freight agent, and to hold otherwise would make every employer an absolute insurer of the safety of every person against the wilful and malicious conduct of his servant, and against every injury resulting from a fit of insanity or personal revenge.

guage, which, in effect, charged petitioner with a crime punishable by law. The defendant filed a demurrer, in which it was alleged that no cause of action was set out, and that the petition was defective for the reason that the acts of the agent were entirely outside of the scope and province of his duties, and without sanction or authority of the defendant. The demurrer was overruled, and the defendant excepted *pendente lite*. The trial resulted in a verdict for the plaintiff. The defendant's motion for a new trial was overruled. The bill of exceptions assigns error upon the exceptions *pendente lite*, and the judgment overruling the motion for a new trial.

Messrs. Coles & McPherson, Hugh M. Dorsey, and Arthur Heyman for plaintiff in error.

Messrs. J. O. Newell and Beals & Adamson for defendant in error.

Cobb, P. J., delivered the opinion of the court:

1-3. When the first count in the petition is taken in its entirety, it is manifest that it was the intention of the pleader to lay a cause of action for damages flowing from the destruction of the business of the plaintiff by the wrongful conduct of the defendant as alleged in the petition. The refusal to deliver freight to the plaintiff, notwithstanding he was clothed with authority from the consignees to receive it, is not alleged for the purpose of recovering damages that might result from the refusal to deliver in any particular case; but this constant and continuous refusal is alleged for the purpose of showing the effect upon the plaintiff's business as a drayman. The count alleged that the plaintiff's business was entirely destroyed. This resulted from two causes: First, the refusal of the agent to deliver freight which the plaintiff was authorized by the consignees to receive; and, second, the conduct of the agent in going to the merchants of Villa Rica and persuading them to discontinue their contracts with the plaintiff. It is alleged that this was done maliciously. In other words, the count when taken in its full effect, charges that the business of the plaintiff was maliciously destroyed by the wrongful conduct of the defendant. Malicious injury to the business of another has long been held to give a right of action to the injured party. *Barr v. Essex Trades Council*, 53 N. J. Eq. 115, 30 Atl. 881. See also, in this connection, *Lumley v. Gye*, 2 El. & Bl. 217; *Ryan v. Burger & H. Brewing Co.* 37 N. Y. S. R. 287, 13 N. Y. Supp. 600; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. 7 L.R.A. (N.S.)

Rep. 755, 16 S. W. 111; *Jackson v. Stanfield*, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505. Our Code declares: "When the law requires one to do an act for the benefit of another, or to forbear the doing of that which may injure another, though no action be given in express terms, upon the accrual of damage the party may recover." Civil Code 1895, § 3809. The petition alleged that the plaintiff had contracts with the merchants of Villa Rica to deliver their freight for them, and that the defendant, through its agent, maliciously procured the merchants not only to abandon their contracts, but to violate them while they continued. It has been held that the malicious procurement of a breach of a contract of employment resulting in damages, where the procurement is during the subsistence of the contract, is an actionable wrong. *Employing Printers' Club v. Dr. Blosser Co.* 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353.

If this suit had been against Scarborough in his individual capacity, there would be little question about the fact that a cause of action was set forth, not only as regards the refusal to deliver freight, but also as regards his conduct in persuading the merchants of Villa Rica to abandon their contracts with the plaintiff. But is the railway company responsible for the conduct of Scarborough? Is the malice of Scarborough the malice of the company? It is not alleged that the railway company expressly authorized that to be done which is charged against Scarborough. It appointed Scarborough its agent. It placed him in a position where it was his duty to deliver freight to consignees or their authorized agents. Those things which were done in connection with this duty were within the scope of his agency. The railway company would be responsible for the wrongful conduct of Scarborough in dealing with the consignees or their authorized agents in delivering freight to them. If he refused to deliver freight when he ought to have delivered it, his act was the act of the railway company. If he maliciously refused to deliver, and the consequence of this malice was damage to him who had a right to receive, the malice of Scarborough became the malice of the railway company. So far as the cause of action rests upon the malicious act of Scarborough in refusing to deliver freight to the plaintiff upon orders, verbal and written, from the consignees, the action is well laid. But was the action well laid so far as it relates to the conduct of Scarborough in going

to the merchants of Villa Rica and procuring them to abandon their contracts with the plaintiff? It is alleged that he is the agent of the railway company. It is alleged that as such he went to the merchants of the town of Villa Rica, and interfered with the plaintiff's business by begging and persuading his customers to allow other parties to haul their goods which came over the line of road represented by him. What he did in this respect was his individual act. It was beyond the scope and authority of his agency, and the company would not be responsible, unless it appeared that it was done by its direction and authority, or that it ratified his acts in reference thereto. If the plaintiff seeks to hold the company responsible for the acts of the agent under such circumstances, it must distinctly appear from his petition that the company authorized the acts, or that they were within the scope of his employment, or, if beyond the scope of his employment, they were approved and ratified by the company after a full knowledge of his conduct. So far as that portion of the first count relates to the conduct of the agent in persuading the merchants to discontinue business with the plaintiff, nothing appears in the petition bringing the case within this rule. The count was to this extent defective.

4. A corporation is not liable for damages resulting from speaking false, malicious, and defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question. *Behre v. National Cash Register Co.* 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986. See also *Osborn v. Woolworth*, 106 Ga. 460, 32 S. E. 581. If the second count of the declaration be construed as an action for slander, it set forth no cause of action. While certain portions of the count might be so construed, when the count is taken as a whole it is apparent that damages were also claimed as resulting from an insult to the plaintiff, growing out of the abusive and defamatory language used to him while he was engaged in conversation with the agent of the defendant, in a matter relating to the business of the company. The Code declares that a railway company is liable for any damage done by any person in its employment or service, unless the agents of the company have exercised all reasonable care and diligence. Civil Code 1895, § 2321. This section has been construed to create a cause of action in favor of a widow whose husband was slain by a depot agent while as

a customer he was lawfully at the depot on business pertaining to the agency. *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216, 97 Ga. 56, 25 S. E. 411. It has also been held that a railway company was liable for an assault and battery committed by an agent upon a person who was at the depot of the company transacting business with the agent in connection with the agency. *Georgia R. & Bkg. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565. It has also been held that a railway company was liable to a passenger for damages resulting from the conduct of the conductor in using to the passenger opprobrious words and abusive language tending to cause a breach of the peace and humiliate the passenger and subject him to mortification. *Cole v. Atlanta & W. P. R. Co.* 102 Ga. 474, 31 S. E. 107. That portion of the second count which alleges that the agent of the railway company at the depot used to the plaintiff abusive and insulting language, when the plaintiff was upon the premises of the defendant, in conversation with the agent upon business connected with his agency, set forth a cause of action against the company. In the case where the railroad was held liable for the homicide committed by the agent, the agent was at his place of business. In the case where the railroad company was held liable for an assault, the assault was committed upon the premises of the company at the place where it had placed its agent upon duty. In the case where the railroad company was held liable for the insult by the conductor, the insult was upon the train where the company had placed the conductor upon duty. None of the cases, so far as our attention has been called to them, has gone to the extent of holding that the company would be liable for the tort of the agent at other places than where the agent was placed by the company for the discharge of the duties of his agency. If the agent insulted the plaintiff upon the streets of Villa Rica, or at any place of business of the merchants or others of the town of Villa Rica, the act would be the individual act of the agent, and the company would not be liable for such insult, even though at the time of the insult the agent was transacting the business of the company. When one goes to the agency of a corporation, the corporation owes him a duty to protect him from the wrongful acts of the agent in charge of the agency. But, when one who is an agent of the corporation commits a tort at places other than the place of agency, the company is not liable for the tort, unless it appears that it authorized the act or ratified it after its commission.

The first ground of the demurrer simply alleged that the petition set forth no cause of action. The second ground related to the matter of paragraphing and the division of the petition into counts, which, as has been said, was cured by amendment. The only remaining ground of the demurrer was in the following language: "Defendant prays that the petition of plaintiff be dismissed, because it affirmatively appears that, if the acts attributed to the agent were by him committed, they were entirely outside the scope and province of the duties for which he was employed, and entirely without the sanction or authority of the defendant. Wherefore defendant prays that said case be dismissed." If this ground of the demurrer can be properly construed to be a special demurrer objecting to certain specific paragraphs in the petition, it should have been sustained; for, as has been shown, there was in the first count a paragraph which should have been stricken, and also in the second count, which really embraced two causes of action, a cause of action which should have been stricken. But this ground of the demurrer cannot be properly construed as a special demurrer. It attacked the whole petition. It pointed to no particular part of it. It covered the whole pleading. It was simply an amplification of the general demurrer. As against a general demurrer, the petition in both counts sets forth a cause of action, and the judgment overruling the demurrer will not be reversed.

5. There was no error in refusing to require the plaintiff to elect upon which count he would proceed. The law allows a plaintiff to embrace in one petition as many causes of action as he sees proper, provided that they are all of the same character; that is, all sound in tort or all sound in contract. He may proceed upon the petition with all the counts, and recover upon one or all, as the law and facts may authorize.

6. The judge charged the jury: "The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." This charge was assigned as error for the reason that there was no evidence to authorize it. We find no evidence to authorize an instruction upon the subject of the worldly circumstances of the parties. The charge was erroneous, and prejudicial to the defendant, and requires the granting of a new trial. *Georgia R. & Electric Co. v. Baker*, 125 Ga. 562, 54 S. E. 639. If upon another trial there should be evidence as to the worldly circumstances of the parties, the charge would be appropriate so far as the cause of action in the second count is concerned; for that count seeks to recover

damages for wounded feelings and humiliation only. The judge should, however, distinctly instruct the jury that the worldly circumstances of the parties are to be considered only in reference to the cause of action set forth in the second count, and should not be considered in reference to the cause of action set forth in the first count.

The evidence as to the conduct of the agent of the defendant, when acting as agent for the express company in reference to packages which the plaintiff had authority to receive, was irrelevant, and should not have been admitted. The case involved the acts of the defendant as agent of the railway company, and therefore evidence as to his conduct in reference to a package of freight, when it did not distinctly appear from the testimony whether it was in his custody as agent of the railway company or as agent of the express company, should have been excluded. Except as above indicated, no material error seems to have been committed in any of the instructions complained of in the motion for a new trial. Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

IOWA SUPREME COURT.

JOHN BECK

v.

MINNESOTA & WESTERN GRAIN COMPANY, Appt.

(— Iowa, —, 107 N. W. 1032.)

Lease—want of possession—effect.

1. Possession by the lessor is not essential to the validity of a lease, under statutes permitting the assignment of choses in action and the sale of an interest in land which is in adverse possession of another.

Landlord and tenant—right to question landlord's title.

2. The title of the lessor cannot be questioned by the lessee before the expiration of the lease, while he is in possession

Case Note.—Estoppel of subtenant to question original landlord's title: — It seems to be an established rule of law that one to whom a tenant leases acquires no rights which the tenant could not have acquired, and is as fully estopped to question the original landlord's title as the tenant himself. All the authorities are in accord with *BECK v. MINNESOTA & W. GRAIN CO.* upon that proposition, an extensive search having failed to reveal a single case that casts any doubt upon it. Indeed, this principle seems to be so undoubted that no discussion of it can be found, all the courts

under it, unless based upon some distinct and independent claim to the land.

Same—sublease—possession.

3. A tenant need not be in possession in order to sublet.

Same—right of sublessee to question title.

4. One to whom a tenant leases the premises is as fully estopped to question the landlord's title as is the tenant himself.

Same—purchase of crops—lien.

5. One purchasing crops from the sublessee of a farm takes them subject to the statutory lien for rent.

Agent—authority.

6. One authorized to collect the rent due on a farm has authority to make a demand upon persons who have purchased crops gathered upon it, for the value thereof.

Landlord—lien—termination.

7. A statute preserving a landlord's lien for one year after the year's rent falls due operates to bind crops of a sublessee for one year from the time the rent falls due upon the principal lease, and is not controlled by the terms of the contract between the tenant and sublessee.

(June 12, 1906.)

APPPEAL by defendant from a judgment of the District Court for Lyon County in plaintiff's favor in an action brought to recover the value of crops purchased by defendant from a sublessee of plaintiff's farm. Affirmed.

The facts are stated in the opinion.

Messrs. James V. McHugh and Simon Fisher, for appellant:

Plaintiff must either have title to the land in question, or have the right of possession.

Cutter v. Fanning, 2 Iowa, 580; 28 Am. & Eng. Enc. Law, 2d ed. p. 657; Stephenson v. Little, 10 Mich. 433; Vanderburgh v. Bassett, 4 Minn. 242, Gil. 171; Hodge v. Eastern R. Co. 70 Minn. 196, 72 N. W. 1074.

A purchase of property by defendant in which plaintiff has a qualified right, as mortgagor or lienor, does not constitute a conversion.

Nickelson v. Negley, 71 Iowa, 546, 32 N. W. 487; Comfort v. Creelman, 52 Minn. 280, 53 N. W. 1157; Dean v. Cushman, 95

contenting themselves with a mere statement of the rule without comment. The rule is supported by the following cases. Standley v. Stephens, 66 Cal. 541, 6 Pac. 520; Doty v. Burdick, 83 Ill. 473; Newman v. Mackin, 13 Smedes & M. 383; Stewart v. Miles, 166 Mo. 174, 65 S. W. 754; Taylor v. White, 86 Mo. App. 526; Galligher v. Connell, 23 Neb. 391, 36 N. W. 566; Den ex dem. Lunsford v. Alexander, 20 N. C. 166 (4 Dev. & B. L. 40); Doe ex dem. Kluge v. Lachenour, 34 N. C. (12 Ired. L.) 180; Bonds v. Smith, 106 N. C. 553, 11 S. E. 322; Milhouse v. Patrick, 6 Rich. L. 350; Thomson v. Peake, 7 Rich. 7 L.R.A.(N.S.)

Me. 454, 55 L.R.A. 959, 85 Am. St. Rep. 425, 50 Atl. 85.

There was no lawful demand made before action was commenced; and the plaintiff had no right of action until such demand was made.

Cutter v. Fanning, 2 Iowa, 590; Holden v. Cox, 60 Iowa, 449, 15 N. W. 269; 28 Am. & Eng. Enc. Law, 2d ed. p. 711; Hill v. Belasco, 17 Ill. App. 194; Davis v. Buffum, 51 Me. 160; Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749; Johnson v. Couillard, 4 Allen, 446; Robinson v. Hartridge, 13 Fla. 501; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Bowman v. Eaton, 24 Barb. 528; Whitney v. Slauson, 30 Barb. 276; Taylor v. Lyon, 10 Sadler (Pa.) 175, 13 Atl. 739.

The tenancy or lease of Kresten, the subtenant, expired by operation of law when his crop was harvested and he abandoned the land. The action was, therefore, not commenced in time.

Iowa Code 1897, § 2992; Nickelson v. Negley, supra; Kyte v. Keller, 76 Iowa, 34, 39 N. W. 928; Johnson v. Shank, 67 Iowa, 115, 24 N. W. 749; Tantlinger v. Sullivan, 80 Iowa, 218, 45 N. W. 765.

The rights of a subtenant are not to be determined by the provisions of a lease between the landlord and the original tenant.

Dassance v. Cold, 101 Iowa, 610, 70 N. W. 719; Collamer v. Kelley, 12 Iowa, 319.

Mr. C. J. Miller, for appellee.

Ladd, J., delivered the opinion of the court:

The plaintiff leased to N. A. Walquist in writing, 160 acres of land for the term of one year, beginning March 1, 1903, at the agreed rental of \$525, to be paid October 1st, of that year. Thereafter Walquist sublet the premises to one Kreston, who raised 974 bushels of oats thereon, and sold them to the defendant for \$265.85; this being the market price. Walquist failed to pay the rent, and in this action recovery of the value of the oats is sought by the landlord. The appellant contends: (1) That, as plaintiff did not prove title to the land in himself, the court erred in holding that he had

L. 353; Blake v. Howe, 1 Aik. (Vt.) 306, 15 Am. Dec. 681.

Whether or not the rule applies to an assignee of a tenant, or to one who, by collusion with the tenant, has obtained possession, or to whom the tenant has attorned, presents questions not within the scope of this note. The question as to the particular facts and circumstances necessary to call for an application of the rule to subtenants is likewise beyond the scope of the note, for the reason that it depends upon the same principles that would apply as between the landlord and the original tenant.

a landlord's lien on the crop; (2) that in any event, no demand for the property or its value was proved; and (3) that the lien had expired before the action was begun.

1. The land had no buildings or other improvements thereon. No evidence tending to prove plaintiff's title, save a contract of purchase from one Converse, was introduced; nor was it made to appear who was in the actual or constructive possession prior to the execution of the lease. In these circumstances, a demise to a tenant at common law might not have been valid. *Taylor, Land. & T.* §§ 84 et seq. The reason for the rule was that, as a chose in action could not be assigned, the lease of land in the possession of another was void. But, under the statutes of this state, authorizing the assignment of choses in action and the sale of an interest in land, though in the adverse possession of another, possession is not essential to the validity of a lease. *Section 2916, Code; Foster v. Young*, 35 Iowa, 27, 40. The relation of landlord and tenant is created by contract, either expressed or implied, by the terms of which one person designated "tenant" enters into possession of the land under another known as "landlord." 1 *Taylor, Land. & T.* § 14. The landlord may not have any interest in the title to the demised premises, but whether he has or not cannot be questioned by the tenant before the expiration of his lease, and whilst in possession under it, unless based upon some distinct and independent claim to the land. *Bowditch v. Dubuque*, 38 Iowa, 341. Possibly a want of consideration might be pleaded in such a case to defeat the claim for rent, but, under the law of this state, a consideration is implied from the fact that the lease was in writing. Nor is it essential that the tenant should have been in possession in order to sublet. The lessee, having an *interesse termini*, may make a good lease, without entering into possession. *Section 85 of the above work.* The rule by which the tenant is estopped from denying his landlord's title is also applicable against all persons entering into possession through or under the tenant; and therefore one to whom the tenant leases the premises is as fully estopped from questioning the landlord's title to the land as the tenant himself. *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Merchants' Bank v. Clavin*, 60 Mo. 559; *Ellsworth v. Hale*, 33 Ark. 633; 18 Am. & Eng. Enc. Law, p. 417. See also *Hardin v. Jones*, 86 Ill. 313; *Bertram v. Cook*, 44 Mich. 396, 6 N. W. 868; *Stewart v. Roderick*, 4 Watts & S. 188, 39 Am. Dec. 71. As between the plaintiff and Walquist, the relation of landlord and tenant existed, and, with reference to the rent, § 2992 of the Code provides that "a landlord shall have a lien for his rent

upon all crops grown upon the leased premises, and upon any other personal property of the tenant, which has been used or kept thereon during the term, and not exempt from execution, for the period of one year after a year's rent, or the rent of a shorter period, falls due. But such lien shall not in any case continue more than six months after the expiration of the term." The oats were grown "on the demised premises," and plaintiff had a lien thereon for the payment of his rent. *Houghton v. Bauer*, 70 Iowa, 314, 30 N. W. 577; *Evans v. Collins*, 94 Iowa, 432, 62 N. W. 810; *Church v. Bloom*, 111 Iowa, 319, 82 N. W. 794; *Richardson Bros. v. Petersen*, 58 Iowa, 724, 13 N. W. 63. When, if at all, was this lien terminated? The defendant purchased the oats from the subtenant. It acquired the title which the seller then had. That title was subject to the plaintiff's lien. The defendant acquired nothing more, and in appropriating the property became liable to the plaintiff for the value of the encumbrance.

2. It is argued that, as defendant merely acquired the title Kresten had (*Nickelson v. Negley*, 71 Iowa, 546, 32 N. W. 487), a demand was essential as a condition precedent to the maintenance of an action for conversion. Conceding without deciding this, we think a proper demand was made. One McDowell testified that, prior to the commencement of the suit in 1905, he demanded the value of the oats raised upon the leased premises of defendant's agent, who responded that he had no authority to pay therefor.

Upon cross-examination McDowell testified:

Q. You met Mr. Kruger (the agent) and took a little walk with him, did you?

A. Walked to the office with him, yes.

Q. Didn't you say "there is a little bill, and I presume you don't want to pay it, do you?" Isn't that the language you used?

A. Well, I would not say.

Q. And he laughed and said, "Not by a damn sight." Wasn't that his reply?

A. I presume so.

Q. And that was all that occurred in relation to the presenting of the claim that you are testifying about?

A. Similar to that, yes.

Q. That is what you mean when you say you made a demand upon him?

A. Yes, sir.

On redirect:

I think he understood what I was making a demand for. I don't know as I told him I was acting for Mr. Beck. I was not acting for Mr. Beck. Well, I had been instructed by Mr. Beck before that time to collect the rent.

It is apparent from this evidence that the

witness intended to say that, though he had not been specially authorized to make the demand, he had been instructed by plaintiff to collect the rent. This necessarily included the making of the demand, and was sufficient authority for so doing. The demand was fully proved. The defendant's agent must have understood from what was said that McDowell was asking for the payment of the oats. The language employed might not have been as explicit as would have been employed between persons less intimate, but clearly indicates what both had in mind, and was fully understood in that a demand for payment was being made and refused.

3. The subtenant was a mere cropper, and had not entered upon the land after September 15, 1903. The action was commenced August 29, 1904, more than a year after the subtenant's rent became due; but within a year from the time the rent of the tenant should have been paid, and within six months of the termination of his lease. The appellant argues the case on the theory that the period within which suit must be begun under the statute, to enforce the lien, should be computed from the time the subtenant agreed to pay the tenant rent; but this is not so. There was neither privity of estate nor privity of contract between the lessor and the sublessee, and therefore the lessor could not sue the subtenant upon the tenant's covenant to pay rent. *McFarlan v. Watson*, 3 N. Y. 286; *Harvey v. McGrew*, 44 Tex. 412; note to *Fulton v. Stuart*, 15 Am. Dec. 542. The action was necessarily based upon the contract with the tenant, and its purpose was to enforce a lien created by statute on "all crops grown upon the demised premises," and it is immaterial whether these crops were raised by tenant or subtenant. *Houghton v. Bauer*, supra; *Foster v. Reid*, 78 Iowa, 205, 16 Am. St. Rep. 437, and note, 42 N. W. 649.

The lien was by virtue of the lease from plaintiff to Walquist, and it is not important under what arrangement the subtenant, Kresten, raised the crop; for the lien of the landlord cannot be affected by any agreement between a lessor and a sublessee. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Rutledge v. Walton*, 4 Yerg. 458. As the action was begun within a year from the maturity of the rent sued for, and within six months of the termination of the lease upon which the action was based, it was in time. Some exceptions were taken to the rulings on the admissibility of evidence. Even though these should be conceded erroneous, enough was proved to justify the court in directing a verdict for plaintiff, and for this reason they are not considered.

Affirmed.

Petition for rehearing overruled.
7 L.R.A.(N.S.)

KANSAS SUPREME COURT.

SILAS S. EVANS, Plff. in Err.,
v.
CITY OF CONCORDIA.

(— Kan. —, 85 Pac. 813.)

Municipal corporation—ice on sidewalk—injury—liability.

In an action against a city for injuries from a fall upon a sidewalk covered with ice and snow, where it appears from plaintiff's opening statement that the ice, which accumulated from natural causes, was less than an inch in thickness, and plaintiff knew when he went upon it that the ice was smooth and slippery, and he fell by reason of its smooth and slippery condition, and no other defect is claimed, a judgment for costs against plaintiff in favor of the city will be upheld.

(June 9, 1906.)

Headnote by PORTER, J.

Case Note.—Liability of municipal corporation for injuries from smooth, level ice or snow accumulating from natural causes on a sidewalk not otherwise defective: —

It is a trite saying that a municipality is not an insurer of the safety of its sidewalks and cross walks. It is required simply to exercise ordinary and reasonable care to keep the walks in a reasonably safe condition for public travel. Whether or not a city has complied with this duty of making its sidewalks reasonably safe must necessarily depend upon the circumstances of each case,—the location of the walk, the uses to which it is put, the amount of travel over it, etc. While no general rule can be laid down as to the liability of a municipality where ice and snow have accumulated on its streets in ridges or uneven surfaces, or where an alleged defective condition of the sidewalk unites with the accumulations of snow and ice to cause an injury, it is well established that the mere slipperiness of a sidewalk, occasioned by the presence of glare ice or snow resulting from natural causes, is not sufficient to charge the municipality with liability for an injury resulting therefrom, where the walk itself is properly constructed and there is no such accumulation of ice and snow as to constitute an obstruction. 2 Dill. Mun. Corp. 4th ed. § 1006, p. 1260; Elliott, Roads & Streets, 2d ed. § 625, p. 665; 5 Thomp. Neg. 2d ed. § 6183; *Chicago v. McGiven*, 78 Ill. 347; *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Gibson v. Johnson*, 4 Ill. App. 288; *Aurora v. Parks*, 21 Ill. App. 459; *Mareck v. Chicago*, 89 Ill. App. 358; *Chicago v. McDonald*, 111 Ill. App. 437; *East Dubuque v. Brugger*, 118 Ill. App. 421; *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Broburg v. Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789; *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523; *Smyth v. Bangor*, 72 Me. 249; *Stanton v.*

ERROR to the District Court for Cloud County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Theodore Laing, for plaintiff in error:
The city was guilty of negligence.

Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832; Canterbury v. Boston, 141 Mass. 215, 4 N. E. 808; Dooley v. Meriden, 44 Conn. 117, 26 Am. Rep. 433; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

Messrs. A. L. Wilmoth and Earl V. D. Brown for defendant in error.

Porter, J., delivered the opinion of the court:

In an action for damages for injuries received in a fall upon an icy sidewalk, the trial court rendered judgment in favor of the city and against plaintiff in error for costs, upon the opening statement to the jury of the facts which plaintiff in error expected to prove. Error is predicted upon this ruling of the court.

In his statement plaintiff in error followed the averments of his petition, which were, in substance, that on the night of January 19, 1904, and on the following day, as the result of rain, sleet, and snow flurries, the walks of the city became covered with a sleety ice to the depth of less than an inch and more than half an inch, which was then, and continued to be, smooth and slippery

Springfield, 12 Allen, 566; Johnson v. Lowell, 12 Allen, 572; Hutchins v. Boston, 12 Allen, 571; Nason v. Boston, 14 Allen, 508; Gilbert v. Roxbury, 100 Mass. 185; McKean v. Salem, 148 Mass. 109, 19 N. E. 21; Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026; Bell v. York, 31 Neb. 842, 48 N. W. 878; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; Kinney v. Troy, 108 N. Y. 567, 15 N. E. 728, Reversing 38 Hun, 285; Ayres v. Hammondsport, 130 N. Y. 665, 29 N. E. 265; Tobey v. Hudson, 49 Hun, 318, 2 N. Y. Supp. 180; Keane v. Waterford, 17 N. Y. S. R. 658, 2 N. Y. Supp. 183; Gram v. Greenbush, 20 N. Y. S. R. 370, 3 N. Y. Supp. 76; Blakeley v. Troy, 18 Hun, 167; Muller v. Newburgh, 32 Hun, 24, Affirmed in 105 N. Y. 668, 13 N. E. 929; Smith v. Brooklyn, 36 Hun, 224, Affirmed in 107 N. Y. 655, 14 N. E. 606; Tracey v. Poughkeepsie, 46 Hun, 569; Kleng v. Buffalo, 72 Hun, 541, 25 N. Y. Supp. 445, Affirmed in 156 N. Y. 700, 51 N. E. 1091; Anthony v. Glens Falls, 4 App. Div. 218, 38 N. Y. Supp. 536, Affirmed in 163 N. Y. 682, 48 N. E. 1104; Buck v. Glens Falls, 4 App. Div. 323, 38 N. Y. Supp. 582, Appeal dismissed in 156 N. Y. 683, 50 N. E. 1115; O'Keeffe v. New York, 29 App. Div. 524, 51 N. Y. Supp. 710; Berger v. New York, 65 App. Div. 394, 73 N. Y. Supp. 74; Kleye v. Oswego, 109 App. Div. 330, 95 N. Y. Supp. 879; Colburn v. Canandaigua, 28 N. Y. Week. Dig. 441, 15 N. Y. S. R. 668; Kenney v. Cohoes, 16 N. Y. Week. Dig. 206; Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738; Chase v. Cleveland, 44 Ohio St. 505, 58 Am. Rep. 843, 9 N. E. 225; Norwalk v. Tuttle, 73 Ohio St. 242, 76 N. E. 617; Vanddyke v. Cincinnati, 1 Disney (Ohio) 532; Leipsic v. Gerdeman, 68 Ohio St. 1, 67 N. E. 87; Mauch Chunk v. Kline, 100 Pa. 119, 45 Am. Rep. 364; Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Allegheny v. Gilliam, 13 Pittsb. L. J. N. S. 431; Scott v. Scranton, 5 Lack. Legal News, 73; Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054; Cook v. Milwaukee, 24 Wis. 270, 7 L.R.A. (N.S.)

1 Am. Rep. 183; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; Chamberlain v. Oshkosh, 84 Wis. 289, 19 L.R.A. 513, 36 Am. St. Rep. 928, 54 N. W. 618; Hausmann v. Madison, 85 Wis. 187, 21 L.R.A. 263, 39 Am. St. Rep. 834, 55 N. W. 167; Beaton v. Milwaukee, 97 Wis. 416, 73 N. W. 53; Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115; Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729; De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Byington v. Merrill, 112 Wis. 211, 88 N. W. 26; Clark v. Chicago, 4 Biss. 486, Fed. Cas. No. 2,817; Forward v. Toronto, 15 Ont. Rep. 370; D'Estimoville v. Montreal, Rap. Jud. Quebec, 18 C. S. 470.

Some of the New York cases cited above seem to lay considerable stress on the fact that the ice was of very recent formation, though one case held that the city was justified in waiting for a thaw to remove the danger, although it had notice thereof.

In Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520, an instruction to the jury that the town was bound at all times to have its highways in a reasonably safe condition for the customary travel, and that it would constitute no answer to the claim of the traveler for damages, who should suffer an injury resulting from a defect in the highway without any fault on his part, that the defect was produced by the elements and the town had no notice of it or opportunity to repair, was held erroneous; and it was held that the jury should have been instructed that, if the injury resulted from the condition of the sidewalk produced by recent sudden action of the elements, the town was not chargeable, unless, under the circumstances, they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so. The court said that the rain falling may instantly become ice, and in a few minutes every part of every street in all the towns and cities, for a circuit of miles, become coated with ice, and the traveler who is passing along the high-

and difficult and dangerous to walk upon; that the walks were permitted by the city to remain in this condition until on the evening of the 25th of January, when plaintiff, who was walking with due care because he knew that the sidewalk was icy, slipped and fell by reason of the icy, slippery condition of the sidewalk in that particular place. When ice and snow accumulate from natural causes upon the sidewalks of a city, and a person is injured by a fall occasioned by its smooth and slippery condition, is the city liable in an action for damages? This is the sole question in the case. No other defect in the sidewalk is claimed. The same question has frequently been before the courts, and with almost entire unanimity it has been held that, where the injuries were caused wholly by reason of the smooth and

slippery condition of the ice and snow, there was no liability for negligence on the part of the city. A distinction has been observed in many cases where the ice or snow has been allowed to form in ridges or uneven places in the walk amounting to an obstruction; but smoothness and slipperiness, being natural conditions, have almost universally been held not sufficient to cast responsibility upon the city. The reasons for the distinction are well stated in *Smyth v. Bangor*, 72 Me. 249, as follows: "In this cold climate, where ice and snow cover the whole face of the earth for a considerable portion of the year, such an inconvenience ought not, and rightfully cannot, be regarded as a defect. No amount of diligence can keep our streets and sidewalks at all times free from ice and snow, and the latter, when trodden smooth and

way when the process commences and while it is going on may necessarily be compelled to travel on at the risk of broken limbs; and that it could not have been intended by the enactment of a statute requiring highways to be kept in good repair, thus to make towns insurers against damages arising from causes which no human foresight could anticipate, no human power could avert, and no human means, without time and opportunity, could remedy.

The leading case on this subject is *Stanton v. Springfield*, supra, which was decided under a statute requiring the streets to be kept "safe and convenient for travelers;" but in 1896 a new statute was passed, providing that no city or town should be liable for any injury on a highway by reason or in consequence of snow or ice thereon, if the place at which the injury was received was, at the time of the accident, otherwise reasonably safe and convenient for travelers.

In the earlier case of *Payne v. Lowell*, 10 Allen, 147, decided a year previous to *Stanton v. Springfield*, the presence of ice on a walk, resulting from a fall of rain, followed by freezing, the night before the accident, seems to have been treated as a defect, although the sidewalks throughout the city were covered with ice formed during the preceding night. In this case the city was allowed to prove that, two hours before the accident, three wagons loaded with sand were sent through the principal streets of the city, and that one of the wagons reached the place of the accident, which was sanded a few minutes after the accident. This was held to be error, on the ground that, if the defect which caused the injury had existed for twenty-four hours, no proof of the attempts by the city to put the way in repair would affect its liability; and that, if the defect had not existed twenty-four hours, then the question was whether or not there had been a reasonable time to repair the defect before the accident took place, which was for the judge to determine; and that, if there was not

reasonable time, then the fact that wagons were on the way with sand did not diminish the liability of the city.

The two principal reasons given for the doctrine that municipalities are not liable for injuries caused by smooth, level ice resulting from natural causes are the impracticability of keeping sidewalks entirely free of snow and ice, and the fact that, where the walks are in a slippery condition as the result of climatic conditions, persons using them are put upon notice of the danger, and are bound to look out for their own safety. Thus, the court, in *Chase v. Cleveland*, supra, says: "In all northern cities and towns storms of snow and sleet producing ice and resulting in slippery walks are of frequent and constant recurrence during the winter season, and accidents . . . are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points to-day, disappear to-morrow, and like dangers appear at other places the next day. They are affected by changes of weather which are likely to occur at any time, and frequently many times within a few hours. . . . To effectually provide against dangers from this source would require a large special force, involving enormous expense; for, to make the protection effective, constant activity and vigilance would be required as well in the ascertainment of the dangers as in their removal upon being known. . . . Slipperiness may arise from a variety of causes. A thin film of mud on the walk will often produce it, and yet liability would hardly be claimed to arise from such a cause. It is not clear on principle that an exception should necessarily be made in regard to slipperiness from accumulations of ice. . . . The law exacts of municipalities only that which is practicable and reasonable in regard to keeping streets open, in repair, and free from nuisance."

The justice of this doctrine is recognized, and the reasons therefor clearly stated, al-

hard, is nearly, and sometimes quite, as slippery as ice, and travelers will often slip and fall when no one is to blame. To hold towns and cities responsible for such accidents would practically make insurance companies of them. A block of ice may constitute a defect the same as a block of wood or stone. So, a ridge or hummock of ice or snow may constitute a defect the same as a pile of lime, or sand, or mortar, upon the sidewalk, would. But we regard it as now well settled that mere slipperiness of the surface of a highway or sidewalk, caused

by either ice or snow, is not a defect for which towns and cities are liable." In *Gilbert v. Roxbury*, 100 Mass. 185, a case like the one at bar, the action of the trial court in directing a verdict was sustained. In *Stone v. Hubbardston*, 100 Mass. 49, it was held that mere slipperiness of surface of a highway properly constructed, and of no unusual slope, was not a defect which would render the municipality liable any more than moisture or mud upon a flagstone or sidewalk. It was said in this case: "But ice, which, by

so, in *Reedy v. St. Louis Brewing Co.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859, where the court distinguishes between cases in which the ice results from natural causes and those in which it is the result of artificial causes, and holds that, where a sidewalk is rendered dangerous because of slippery ice formed from incidental or accidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice thereof, or by the exercise of ordinary care would have discovered the condition.

So, in *Huston v. Council Bluffs*, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130, the court instructed the jury that as a general rule the mere fact that snow or sleet has fallen upon a sidewalk from the clouds, and thereby rendered the sidewalk slippery and difficult to pass over, would not make the city liable therefor, even though such ice and snow so remained upon the walk for an unreasonable length of time after the officers of the city whose duty required them to look after such matters had notice of its existence, or after they, in the exercise of reasonable care in performing their duties, ought to have known of its existence; but that this rule relates only to the natural conditions resulting from rain or sleet falling and freezing upon the walk or snow accumulating upon the walk from natural causes. In this case it appeared that the ice was rough and uneven, and the liability of the city was sustained.

This distinction between a slippery condition resulting from natural causes and the same condition resulting from artificial causes is denied in many cases, and the city held not liable, although the condition of the walk may result from some artificial and local cause, such as a defective hydrant or a conductor discharging on the sidewalk, etc. In *Henkes v. Minneapolis*, 42 Minn. 530, 44 N. W. 1026, the court held that the fact that the ice was partially the result of artificial causes, and not wholly of natural causes, made no difference; that the liability of the city must rest upon some ground of fault or neglect on the part of its officers who have charge of the streets, and that such fault or neglect is no more involved in removing ice formed by water from houses than ice formed by rain from

the clouds. But, on principle, it would seem that a distinction might reasonably be made between slipperiness resulting from natural causes and extending over the whole city and slipperiness resulting from some local cause which the city might easily remove and of which a pedestrian might very likely have no notice. Therefore, the cases in which the ice was the result of artificial causes have not been included here.

That there is some difference of opinion as to what may be regarded as a natural cause is shown by the decision in *Kannenberg v. Alpena*, 96 Mich. 53, 55 N. W. 614. In this case it was held that, where a street was paved so as to form a gutter outside of the sidewalk, and the catch basin in this gutter became filled up or stopped, so that the water did not run, and, the weather being warm, the water accumulated at that point and flowed upon the outer edge of the sidewalk, where it froze, and a pedestrian slipped and was injured, the city was not liable, on the ground that there was no fault in the construction of the catch basin, and that from natural causes, without fault upon the part of the city authorities, the ice had formed from the snow which fell in the highway.

The distinction generally made between smooth, level ice and ice which has accumulated in a rough or uneven surface is repudiated in *Cloughessey v. Waterbury*, 51 Conn. 405, 50 Am. Rep. 38. In inquiring into the reasons upon which the rule rests, the court says that it is obvious that it does not depend at all upon the fact that ice in ridges is dangerous, while smooth ice is not. And, as to the theory that expediency requires the making of such a rule, the court said it did not follow that, because the city might be held responsible under some circumstances for smooth ice on its sidewalks, it must logically be held responsible under all circumstances as well for "the freezing mist of a single night," which glares its entire territory, as for a patch of ice of only a few feet in extent, which has existed in the same condition for weeks. The court said that, where ice is found on the sidewalks to a limited extent in a dangerous condition, whether smooth or otherwise, and the city has ample notice of the fact and can with reasonable expenditure make the passage safe for travel, it ought to do it, and is responsible for

reason of constant or repeated flowing of water, trampling of passengers, or any other cause, assumes such a shape as to be an obstacle to travel, may constitute such a defect." To the same effect, see *Chamberlain v. Oshkosh*, 84 Wis. 289, 19 L. R.A. 513, 36 Am. St. Rep. 928, 54 N. W. 618, and cases cited in note; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; *Luther v. Worcester*, 97 Mass. 268; *Stanton v. Springfield*, 12 Allen, 566; *Mauch Chunk v. Kline*, 100 Pa. 119, 45 Am. Rep. 364; *Kinney v. Troy*,

108 N. Y. 567, 15 N. E. 728; *Harrington v. Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 843, 9 N. E. 225; *Broburg v. Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340. Most of these cases are from the extreme northern and eastern states, where the conditions which usually obtain illustrate more forcibly the manifest propriety of the rule. It is urged by plaintiff in error that the mildness of the winters in Kansas requires a distinction to be made, which has been recognized by some courts, based upon cli-

the consequences if this duty is neglected; but that, if a sudden ice storm covers all the territory of a town, it would be impracticable to apply the remedy, and it should be considered and treated as would an extraordinary inundation of its streets by a flood. The court also said that the standard of duty would not necessarily be the same in cities as in sparsely settled towns; also that the same rule could not be applied to sidewalks as to highways. In this case it was therefore held that, where the place of injury was one of the principal business streets of the city, and the sidewalks on both sides were in good condition, except at the precise place of the accident, which was in a dangerous condition by reason of glare and smooth ice, and had existed in the same condition for a number of weeks prior to the accident, and no sand or other substance had been put upon the ice to make it more safe, as might easily have been done, but it had been permitted to remain during all this time in the same dangerous condition, and the plaintiff, while in the exercise of ordinary care, slipped and fell upon the ice and was injured, the city was liable. But the court added that the decision must be understood to refer only to the particular circumstances found by the court. The court also denied that the decisions in the cases of *Dooley v. Meriden*, 44 Conn. 117, 26 Am. Rep. 433, and *Congdon v. Norwich*, 37 Conn. 414, holding the city liable, must be regarded as based on the fact that in those cases the ice was described as uneven and irregular; saying that the court, in those cases, evidently treated the distinction between smooth and rough ice as immaterial, and relied upon the controlling fact that the ice was slippery and dangerous, and had so remained for a considerable time in both cases.

In the earlier Connecticut case of *Landolt v. Norwich*, 37 Conn. 615, the liability of the city was denied where plaintiff was injured by falling on a street of considerable public travel, because of the presence of ice thereon, resulting from water which ran down from adjoining premises because of a recent rain, the ice being covered by a light fall of snow, although the ice was of very limited extent only. The court said it could not be the rule of duty that all the sidewalks in a city should at all times be kept absolutely free from ice; 7 L.R.A. (N.S.)

that such a rule would involve expense disproportionate to the object to be accomplished, and that the course adopted by the street commissioner, who testified that he first attended to the front of public buildings and to public squares and places, then to the front of vacant lots, trusting that, by force of a city ordinance to that effect, individual citizens would promptly attend to the pavements adjacent to their premises, but that he exercised a general oversight, applying the remedy in case of an occupant's neglect, was correct and reasonable, and seemed to have been faithfully executed.

The distinction between smooth and rough ice is also repudiated in *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, where the court said: "Primarily the ground for holding a municipality liable for injuries sustained by ice on a highway is that it has been negligent in not preventing or not removing it; and, if it has used reasonable care and diligence in those respects, it is not liable. But, if it has been so negligent, and if the ice is dangerous because it is smooth and slippery, why should it not be held liable as well as if the ice be in ridges or mounds? Smooth, even ice is likely to cause more people to fall than when it is rough and uneven. The latter is more easily observed, and a very little snow on the former may entirely conceal it from the observation of a careful pedestrian, and it oftentimes results in dangerous falls." But in this case the ice was in the road, and not on the sidewalk, and was caused by artificial means; and the court also said that, if injury is sustained by reason of the slippery condition of the streets, caused by a recent fall of sleet or snow so extensive as to make it impracticable to remove it by the use of reasonable means, there can ordinarily be no recovery, since municipal corporations are not required to prevent ice and snow from getting on the streets in cold weather, or to do other impossible things.

For the general question of liability of municipal corporations for ice on streets or sidewalks, see note in 21 L.R.A. 263.

As to liability where water accumulates on sidewalk by reason of some unusual condition, to the injury of travelers, see note in 58 L.R.A. 321.

matic conditions; that where the winters are so mild that ice and snow are comparatively infrequent, the municipality should be held to a higher degree of diligence. Thus, it was said, in *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481, cited by plaintiff in error: "Differences of climate and locality are to be considered in determining the liability of municipalities for their failure to exercise care in removing ice and snow from their walks. Each case must be considered with reference to the climate of the place. In Minnesota, where snow and ice exist almost constantly through the winter season, to require municipalities to keep their walks absolutely free of ice and snow would be highly unreasonable. But in other localities, and in a warmer climate, like Utah, where snow and ice, although not unusual, are by no means continuous, to require the municipalities to keep their walks free of ice and snow, especially in particular localities, is by no means unreasonable."

An examination of this case discloses, however, that the decision is not placed upon the reasons stated in the excerpt. It appeared that the ice in question was not formed by natural causes, but by water discharged upon the sidewalk by means of a defective conductor, and that the city had permitted the ice to remain for an unreasonable length of time in a rounded and uneven condition, so the portion of the opinion relied upon seems not to have been necessary to the decision. On the other hand, the supreme court of Missouri, in *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859, a recent and parallel case, arising in a locality not more subject to the natural accumulation of ice and snow than the city of Concordia, Kansas, if we may take notice of the weather reports, recognizes the force of the rule established in the northern and eastern states, although affirming a judgment against the city upon other grounds. It was held that smooth and slippery ice covering a sidewalk at one place, which formed from water running off the roof of an abutting building on account of a leak in a water pipe, is a dangerous obstacle which the city is bound to remove within a reasonable time after notice, where it was not shown that there was any other ice or snow in the city. The court refers to the well-established doctrine that a city is not liable for injuries caused by smooth and slippery ice, where it has formed generally upon the streets and walks, and where no special defect is shown, and mentions two well-founded reasons for it: First, it is not one of the law's reasonable requirements that a city should remove from the many miles of walks the natural accumulation of ice and snow because such a requirement is

impracticable from the nature of things: second, because when these conditions exist generally they are obvious, and everyone who uses the sidewalks at such times is on his guard, warned by the surroundings and the danger of slipping at every step. These reasons meet with our approval. To hold otherwise would cast upon cities a burden for which they are not responsible and greater than their ability to provide for. This rule has reference to a general accumulation of ice or snow from natural causes, where no other defect in the walk is shown, except the natural slippery condition of the ice or snow.

The judgment will be affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

GEORGE W. M. HUNT, Plff. in Err.,

v.

UNITED STATES ACCIDENT ASSOCIATION.

(— Mich. —, 109 N. W. 1042.)

Insurance—accident—indoor baseball.

One running to a base while playing indoor baseball does not voluntarily expose himself to unnecessary danger, within the meaning of an accident-insurance policy, by merely overrunning his base and relying on the wall of the building to stop him when he places his hands and feet against it.

(December 3, 1906.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in defendant's favor in an action brought to enforce payment of the amount alleged to be due on an accident-insurance policy. Reversed.

Statement by Grant, J.:

Plaintiff, thirty-six years of age, was engaged in playing a game of indoor baseball in the gymnasium of the Young Men's Christian Association. The floor was smooth and slippery. The game is played with a soft ball. Plaintiff was batting, and, having ball. Plaintiff was abating, and, having struck the ball, ran to first base, 20 feet from the home plate. The side wall of the

Note.—HUNT v. UNITED STATES ACCI. AS-
so. seems to be the first case to decide the question whether playing ball constitutes an exposure to unnecessary danger, within the meaning of an insurance policy. A discussion of the general question, What constitutes voluntary exposure to unnecessary danger? with a review of the various authorities in which the point has been decided, will be found in a subject note in 40 L.R.A. 432.

gymnasium was between 6 and 10 feet beyond the first base. The pitcher caught the ball, tossed it at plaintiff, and touched him, before he could reach the first base. He ran beyond the base, and put out his foot and hand against the wall, which he had been in the habit of doing, to stop himself. His ankle was broken. He had a policy in the defendant company. In his application plaintiff agreed that the benefits under the policy "shall not extend to or cover voluntary or unnecessary exposure to danger." The court directed a verdict for the defendant, holding that the accident was the result of an involuntary and unnecessary exposure to danger.

He based his direction upon the following testimony, given by plaintiff upon cross-examination:

Q. Now, you were running so hard that you could not stop yourself until you ran against the wall; that was the fact, was it?

A. Well, I would not say as to that.

Q. Why didn't you stop, if that was not a fact?

A. Oh, I was feeling good. I felt like running.

Q. Felt like running against a wall?

A. Not necessarily.

Q. Well, you saw the wall, didn't you?

A. Yes.

Q. You knew you were 35 feet away from it, where you stood?

A. Well, sir, in that neighborhood, I suppose.

Q. You were running so hard that you could not stop yourself until you ran into the wall?

A. Oh, I might, if I had tried.

Q. Why didn't you?

A. I don't know why I didn't. It wasn't necessary.

Q. What's that?

A. I don't know why I didn't. I didn't, though.

Q. You didn't think it was necessary to stop when you were running, to prevent your running against the wall, to prevent yourself running against the wall?

A. I was not running very hard.

Q. Why did you run into the wall, if you were not running very hard?

A. Oh, that was just the way I had of stopping.

Q. What?

A. That was just the way of stopping, was all.

Q. The wall stopped you?

A. Yes.

Q. You didn't stop at all? You didn't stop yourself at all? You ran right into the wall?

A. You might put it that way; yes.

7 L.R.A.(N.S.)

Q. Well, that is the fact, isn't it?

A. I didn't stop until I struck the wall.

Mr. Marvin J. Schaberg, for plaintiff in error:

Contributory negligence has no place in the law of accident insurance.

Fidelity & C. Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869; Cornwell v. Fraternal Acci. Asso. 6 N. D. 201, 40 L.R.A. 437, 66 Am. Rep. 601, 69 N. W. 191; Traveler's Ins. Co. v. Randolph, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 754; Champlin v. Railway Pass. Assur. Co. 6 Lans. 71; Providence Life Ins. & Invest. Co. v. Martin, 32 Md. 310; Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157; Follis v. United States Mut. Acci. Asso. 94 Iowa, 435, 28 L.R.A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; United States Mut. Acci. Asso. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544; Miller v. American Mut. Acci. Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39.

To excuse an insurance company from liability under the clause, "voluntary and unnecessary exposure to danger," something more than a lack of ordinary care must be shown.

Fidelity & C. Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903; United States Mut. Acci. Asso. v. Hubbell, supra; Rustin v. Standard Life & Acci. Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712; Burkhard v. Travellers' Ins. Co. 102 Pa. 282, 48 Am. Rep. 205; Keene v. New England Mut. Acci. Asso. 161 Mass. 149, 36 N. E. 891; Stone v. United States Casualty Co. 34 N. J. L. 371; Hess v. Preferred Masonic Mut. Acci. Asso. 112 Mich. 196, 40 L.R.A. 444, 70 N. W. 460; Johnson v. London Guarantee & Acci. Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115; Irwin v. Phoenix Acci. & Sick Ben. Asso. 127 Mich. 630, 86 N. W. 1036.

Mr. Thomas A. E. Weadock, for defendant in error:

The plaintiff was hurt by voluntarily and unnecessarily exposing himself to danger in violation of the terms of his policy.

Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 449; United States v. Boyd, 45 Fed. 851; Armijo v. Abeytia, 5 N. M. 533, 25 Pac. 777; St. Louis, I. M. & S. R. Co. v. Barnett, 65 Ark. 255, 45 S. W. 550; Crandal v. Accident Ins. Co. 27 Fed. 42; Brown v. Kendall, 6 Cush. 296; Smith v. Preferred Mut. Acci. Asso. 104 Mich. 634, 62 N. W. 990.

No recovery can be had for accidents

which arise from an exposure by the insured to risk of injury, which risk is obvious at the time he exposes himself to it.

Elliott, Ins. § 398; DeLoey v. Travelers' Ins. Co. 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; Johnson v. London Guarantee & Acci. Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945.

Grant, J., delivered the opinion of the court:

That negligence which would defeat a plaintiff in an action for damages on account of the negligence of a defendant finds no place as a defense in the law of insurance against accidents. Such contracts must be shorn of much of their value if ordinary contributory negligence could be interposed as a defense. Thoughtless and inconsiderate acts are some of the very things which these policies are designed to cover. One might easily ascertain whether his gun was loaded before he undertook to clean it. The hunter, in going through the brush, or getting over a fence, or rowing in his boat, should be careful to handle his gun so as to prevent accident. One climbing a ladder should see that the rounds were sound and securely fastened. Ordinary prudence would require these precautions, but hundreds of accidents happen because they are not taken. The term "voluntary exposure to danger" means a realization that an accident will in all probability result, and an injury follow, from the action about to be taken. The danger of injury must be obvious. That point has been decided in this court in Johnson v. London Guarantee & Acci. Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115, where we said: "The term, 'voluntary exposure to unnecessary danger,' as used in an accident policy exempting the insurer from liability for injuries caused by such exposure, means a conscious or intentional exposure, involving gross or wanton negligence on the part of the insured." This is the well-established rule. Fidelity & C. Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903; United States Mut. Acci. Asso. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544; Rustin v. Standard Life & Acci. Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712; Fidelity & C. Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Burkhard v. Travellers' Ins. Co. 102 Pa. 262, 48 Am. Rep. 205; Champlin v. Railway Pass. Assur. Co. 6 Lans. 71; Follis v. United States Mut. Acci. Asso. 94 Iowa, 435, 28 L. 7 L.R.A. (N.S.)

R.A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157.

Plaintiff did not anticipate injury from doing what he had done before, and what others have repeatedly done. There was no obvious danger of injury. Granting that he might have stopped, we cannot say that there would not have been as much danger in trying to stop upon a slippery floor as in running against the wall. A jury would be justified in finding that the plaintiff had no anticipation of an accident, and did not realize that there was any danger. Even if he were careless, and might have avoided running against the wall, but in doing so did not realize any danger, he was entitled to recover. The learned circuit judge was in error in directing a verdict for the defendant.

Judgment reversed, and new trial ordered.

MINNESOTA SUPREME COURT.

CLARA RAASCH, by Guardian *ad Litem*,
Respt.,
v.
ELITE LAUNDRY COMPANY et al.,
Appts.

(98 Minn. 357, 108 N. W. 477.)

Master—duty to relieve servant in danger.

1. An employee, while operating an ironing mangle in a laundry, had her fingers caught between the rollers, and the master, having been notified of the situation, started the machine, thereby drawing her hand farther in and greatly increasing the in-

Headnotes by LEWIS, J.

Case Note.—Duty to relieve servant who, without master's fault, has been caught in a dangerous situation: —There is some conflict of opinion as to a master's duty to his servant who has fallen into a painful or perilous position without the former's fault. Some cases proceed on the theory that when an employee is placed in such a situation the master is under no positive legal duty to exercise all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master, it is declared, cannot be said to be guilty of a tort for the reason that he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is deemed to be one of humanity, and, for a breach thereof, the law does not impose any liability.

This doctrine finds support in the case of Allen v. Hixson, 111 Ga. 460, 36 S. E. 810, which is set out at length by the court in its opinion in RAASCH v. ELITE LAUNDRY Co. The Allen Case is, however, distin-

jury. Held, the master, after notice of the situation, was required to exercise ordinary care to release employee and alleviate her suffering, and whether he did so under the circumstances was a question for the jury.

Same—contributory negligence.

2. The fact that the employee contributed to the injury by her own negligence in assuming the risks of operating the machine, and that the master was not responsible for the injury occasioned in the first instance, does not change the application of the rule.

(June 22, 1906.)

APPEAL by defendants from an order of the District Court for Ramsey County denying a motion for verdict *non obstante veredicto* and granting a new trial because of excessive damages after verdict in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. D. W. Lawler and Frank M. Nye, for appellants:

Defendants owed no duty of rescue to the plaintiff.

Allen v. Hixson, 111 Ga. 460, 36 S. E. 810; Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645; Jones v. Granite Mills Co. 126 Mass. 84, 30 Am. Rep. 661.

In the absence of an obligation to rescue plaintiff, there are in this case no grounds upon which the defendant Elite Laundry Company can be held liable.

Burke v. Syracuse, B. & N. Y. R. Co. 69 Hun, 21, 23 N. Y. Supp. 458; Kantrowitz v. Metropolitan Street R. Co. 63 App. Div. 65, 71 N. Y. Supp. 394; Bittner v. Crosstown Street R. Co. 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044; Benoit v. Troy & L. R. Co. 154 N. Y. 223, 48 N. E. 524; Floyd v.

Philadelphia & R. R. Co. 162 Pa. 29, 29 Atl. 396; Brown v. French, 104 Pa. 604; Sekerak v. Jutte, 153 Pa. 117, 25 Atl. 994.

Messrs. How, Butler, & Mitchell, for respondent:

Where a servant, in the course of his employment, is caught in the master's machinery, and is in a position of danger, the duty is upon the master to extricate him, and to use reasonable care to that end.

Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Arkansas Southern R. Co. v. Loughbridge, 65 Ark. 300, 45 S. W. 907; 20 Am. & Eng. Enc. Law, 2d ed. p. 100; Bessemer Land & Improv. Co. v. Campbell, 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793; Ayers v. Richmond & D. R. Co. 84 Va. 679, 5 S. E. 582; Pannell v. Nashville, F. & S. R. Co. 97 Ala. 298, 12 So. 236; Weitzman v. Nassau Electric R. Co. 33 App. Div. 585, 53 N. Y. Supp. 905; Northern C. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545.

After knowledge of plaintiff's peril defendants negligently failed to exercise due care to avoid inflicting further injury upon her.

Hinzeman v. Missouri P. R. Co. 182 Mo. 611, 81 S. W. 1134; International & G. N. R. Co. v. Royal (Tex. Civ. App.) 83 S. W. 713; Davenport v. F. B. Dubach Lumber Co. 112 La. 943, 36 So. 812.

Carter, after knowledge of plaintiff's peril, acted in such utter disregard for her safety when he started the mangle and thereby injured her that it may be said that he was in law guilty of willfully and wantonly inflicting injury upon her.

Shearm. & Redf. Neg. 5th ed. §§ 99, 151; Studley v. St. Paul & D. R. Co. 48 Minn. 249, 51 N. W. 115; Evarts v. St. Paul, M. & M. R. Co. 56 Minn. 141, 22 L.R.A. 663, 45 Am. St. Rep. 460, 57 N. W. 459; Hepfel v. St. Paul, M. & M. R. Co. 49 Minn. 263, 51 N. W. 1049; Sloniker v. Great

guishable from RAASCH v. ELITE LAUNDRY Co. for the reason that the injury suffered in that instance occurred while the servant was acting the part of a mere volunteer, endeavoring to accomplish something entirely outside of her employment, so that the relation between the parties at the time of the injury was really that existing between strangers; and the proof shows that the injury would not have occurred if the servant had confined herself to the performance of duties pertaining to the service for which she was employed.

A more humane doctrine is asserted in the case of Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645, which is also discussed at length in the opinion in RAASCH v. ELITE LAUNDRY Co.

A case enjoining upon the master the same degree of care as that imposed in RAASCH v. ELITE LAUNDRY Co. is Bessemer Land & Improv. Co. v. Campbell, 121 Ala. 7 L.R.A.(N.S.)

50, 77 Am. St. Rep. 17, 25 So. 793, in which the court held that the failure of a superintendent of a coal mine to adopt reasonable and proper measures to save the lives of miners caught in the mine in which a fire had accidentally broken out rendered the employer liable for their death. The court said it was the duty of the superintendent to do all that an ordinarily prudent and careful man would do under the circumstances, and the employer was liable if he failed to do this and injury resulted to an employee. The court further stated that, to excuse the employer from liability for a neglect of this duty because of the supersensitiveness of the superintendent's nervous system would be to allow employers generally to escape the burden the statute puts upon them, by employing superintendents who are especially excitable and given to losing their heads on important occasions.

Northern R. Co. 76 Minn. 306, 79 N. W. 168; Rawitzer v. St. Paul City R. Co. 93 Minn. 84, 100 N. W. 664.

Lewis, J., delivered the opinion of the court:

Appellant had in use in its laundry an ironing mangle of ordinary pattern, which was heated and operated by steam, and consisted of a steel cylinder about 4 feet in diameter, and a series of felt rolls about 6 inches in diameter, with a number of other rolls, pulleys, aprons, etc. Close to the cylinder was located a small roller, called the "whipper," and its purpose was to separate the articles and fabrics from the surface of the cylinder and cause them to pass, by means of aprons and other appliances, to a delivery platform on the other side of the mangle. It was respondent's duty to feed articles into the machine, and she was assisted by Leone Waldoock, who stood upon the platform to the left of the feeder, and operated the lever under respondent's direction, and applied the power and stopped it upon signals by her. It sometimes happened, while feeding fabrics into the mangle, that they would wind around the whipper, and on the occasion of this accident a couple of sheets wound around it. The machine was stopped by Leone for the purpose of unwinding the articles, and, while respondent was in the act of doing so, Leone, without the usual signal, started the machine, thereby catching the tips of the fingers of respondent's right hand between the cylinder and whipper. Respondent cried out, and the machine was immediately stopped, but she could not extricate her fingers, and Mr. Carter, president and manager of appellant company, was notified and came over to respondent, and for some reason took hold of the lever and started the mangle sufficiently to draw respondent's hand at least 4 or 5 inches farther between the rollers and bring it in contact with the heated cylinder. Respondent again cried out, and the machine was stopped, but before her hand was released serious damage resulted, and this action was based upon the following acts of negligence: That the machine was of a complex construction, difficult of operation, and inherently defective; that necessary tools were not provided for its adjustment; incompetency of assistant, and failure to properly instruct her; and also that, after being notified that respondent's hand was caught between the rollers, appellants negligently started the machine in motion, thereby drawing respondent's hand in still farther between the rollers and causing additional injury. The trial resulted in a verdict of \$8,500 for respondent, whereupon appellants made an alternative motion for judgment

in its favor notwithstanding the verdict, or for a new trial. The motion for judgment notwithstanding the verdict was denied, and a new trial granted, upon the ground that the verdict was excessive and not justified by the evidence, and upon the further ground that the court had committed error in not giving certain requests in respect to appellants' negligence in starting the machine.

The trial court was of opinion that there was no evidence indicating negligence on the part of appellants, except the act of Mr. Carter in starting the mangle after he had been notified that respondent's fingers were caught, and submitted to the jury for their determination whether appellants were in the exercise of ordinary care when Mr. Carter so manipulated the machine as to increase her injuries. The evidence tends to support respondent's claim that after Mr. Carter was notified her fingers were caught in the mangle he came over, took hold of the lever, and started the machine, but there is no evidence to support the suggestion that it was done with any wilful purpose to injure her. It is evident that, if he had not touched the lever and started the mangle, but had resorted to means at his command for loosening the whipper, respondent's hand might have been released with comparatively slight injury. The act of starting the mangle without pausing to investigate the extent to which respondent's hand was caught, and without endeavoring to release it by unfastening the set screw, or by some other method, is difficult of comprehension. Mr. Carter denied that he did move the lever, but the evidence to the contrary is strong, and at least that question was for the jury; but he says that, if he did take hold of the lever and move the machine, it was for the purpose of testing it to see if the motive power was entirely turned off, and, if injury resulted, it was because of mistake in judgment on his part. We are asked by appellants to rule that, under the circumstances presented by this case, it appears, as a matter of law, that Mr. Carter was placed in an emergency, and, there being no evidence to indicate that he was actuated by any wilful purpose against respondent, appellants must be exonerated. In our judgment, the record does not conclusively show that the act of Mr. Carter in starting the machine is to be accounted for solely upon the ground of mistake of judgment. His explanation of why he started the mangle, if he did so, indicates lamentable ignorance on his part of the possible consequences, or extraordinary recklessness, unless he was greatly excited and made a mistake. Mr. Carter was required to use ordinary care to prevent further injury to respondent after discovering that her hand was caught in the mangle, and whether he

did use ordinary care depended upon his knowledge and means of acquiring knowledge of the details of the business. This involved the mechanism of the machine, the different ways in which respondent's hand might have been released, the fact that it had been customary to keep tools in the near vicinity for the very purpose of adjusting the machine, the fact that the safe way to unwind a wrapper was to loosen the set screw and so release it, and the fact that, at the time Mr. Carter was called, the mangle was at rest; all of which have a bearing upon his conduct, and if, in the opinion of the jury, he failed to exercise the care which an ordinarily prudent superintendent would have done, then he and the company were responsible for his act. On the contrary, if the jury were of opinion that, in view of all the facts, Mr. Carter did what he believed to be the proper thing, and that the accident occurred as a result of a mistake, or error in judgment such as ordinary prudence could not have foreseen, then no responsibility followed.

In the case of *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810, a young woman operating a laundry mangle discovered that the rollers were out of adjustment and notified the superintendent thereof, and, in order to show him the real condition, took hold of the unwrapped end of the cloth to raise it and allow an inspection of the rollers, and, by reason of some hidden defect in some part of the machine, a sudden and violent jolt caused a revolution of the rollers instantly drawing her hand between them. As one of the grounds for damages in an action by her against the company, it was claimed that the agents of the company unnecessarily and negligently delayed releasing plaintiff's hand, and that by reason thereof she received additional injuries, with reference to which the court said: "When an employee, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability." This case is relied upon as authority for the proposition that, if appellants were not guilty of any of the acts charged prior to starting the machine, then no new legal duty arose, and Mr. Carter was a mere stranger in what he did, and the company was not bound by his act. We consider this case unsound in prin-

ciple and contrary to the great weight of authority.

A similar case, also relied upon by appellants, is that of *Stager v. Troy Laundry Co.* 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645. There a new trial was ordered by the appellate court upon the ground that the trial court had given an erroneous instruction to the effect that, even if plaintiff was at fault and brought the mischief upon herself, she was nevertheless entitled to recover if defendant failed to do any act which would minimize her injury. The court was of opinion that, under the facts, it appeared that defendant did all it reasonably could to extricate plaintiff as quickly as possible, and could not be held for damages upon that ground. In that instance, the machine was a new one and had been in operation only twelve days before the accident, and the only knowledge defendant's manager had obtained was from seeing it set up by the agent, and from seeing one of the same make operated for a short time in another city. Upon the trial it was admitted by the manager that, if he had better understood the machine, and had known how to quickly unloosen the roller, the injury need not have been so great, and because of their ignorance they had to get a crowbar and pry the roller up before she could be released. The court were undoubtedly correct in ordering a new trial on the ground that the instruction was erroneous; but we cannot agree that the facts stated warranted the court in concluding, as a matter of law, that the company's representatives had done all they reasonably could, and that it conclusively appeared from those facts that they were not liable by reason of the delay. We cannot accept as sound the proposition that a master may set up a dangerous machine, put untrained and ignorant employees at work upon it without giving them proper instructions, and when injury occurs, even on account of their own negligence, be excused upon the ground that he did not understand the machine and did not know how to effect a release of the injured one in the quickest possible manner. We believe the true rule to be that the master is required to take reasonable measures to understand his machinery, know how it operates, and to anticipate possible injury to his employees, and provide the necessary means for controlling and taking it apart in cases of emergency; and in the Oregon case, the fact that no such knowledge was ascertained, that no reasonable precautions had been taken, nor necessary tools provided, were proper elements to be taken into account in determining whether, under the circumstances, after discovery of injury, the master used ordinary care in effecting a release.

We are referred by appellants to *Union P. R. Co. v. Cappier*, 69 L.R.A. 513, and to the note of the editor, where it is claimed the proper rule applicable to such cases is stated: "Feelings of kindness and sympathy may move the good Samaritan to minister to the needs of the sick and wounded at the roadside; but the law imposes no such obligation, and suffering humanity has no legal complaint. . . . Unless, therefore, the relation existing between the sick, helpless, or injured, and those who witness their distress, is such that the law imposes the duty of providing the necessary relief, there is neither obligation to minister on the one hand, nor cause for legal complaint on the other." In that case a trespasser upon the railway tracks was struck down by a moving freight car pushed by an engine, without any fault on the part of the company, and it was held that the failure of the railway employees operating the car and the engine to take charge of the wounded man and give him care and attention was not a violation of the legal duty for which the company was liable, and that the case was distinguished from those where the servants of the railroad company were at fault, and also from those where the injury was occasioned without fault, and the negligent acts or omissions occurred after the company had taken the injured person in charge. The company was charged with negligence in failing to take proper care of the injured person, on account of which he bled to death. In the opinion an attempt was made to distinguish the case from *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, and to justify the latter decision upon the ground that, in that case, the railroad company's employees actually took possession of the injured man and locked him up in a warehouse, and that, having interfered and taken him in charge, the law raised an obligation on their part to see to it that he was properly cared for. This is untenable, and, as we understand the note to the decision, is not approved of by the editor, which seems apparent from the consideration of the cases given under the fifth division, at page 533 of 69 L.R.A., where the authorities are collected and reviewed.

The true doctrine in respect to such cases is applied in *Northern C. R. Co. v. State*, *supra*, where the deceased was run over and injured by a train. After the train was stopped the injured man was found on the pilot of the engine in a helpless and apparently lifeless condition, and was removed and locked up in a warehouse at night by the employees of the railroad, and upon opening the warehouse in the morning the man was found to have regained consciousness during the night and to have after-

wards died from hemorrhage of an artery severed by the collision. It was held that, from whatever cause the collision occurred, it at once became the duty of the railway company's agents in charge of the train to remove the injured person with a proper regard to his safety and the laws of humanity; and if, in removing and locking him up, although he was apparently dead, negligence was committed whereby his death was caused, there was no principle of reason or of justice upon which the railroad company could be exonerated from responsibility. *Weitzman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905, is a similar case, where a child was struck by an electric car and thrown into the fender and carried a considerable distance, and rolled off and was killed by being crushed under the wheels. It was held that, irrespective of whether the child was guilty of contributory negligence in the first instance, when he was thrown into the fender, of which the employees of the company had knowledge, the company became liable for any further injury which could have been prevented by the exercise of "reasonable care." The Alabama court has applied the same principle in *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 298, 12 So. 236, where it was held that, although the injured person was guilty of negligence in attempting to pass between two cars, the company were required to use reasonable care to release him and not cause further injury after discovering his peril, stating the rule as follows: "It is a well-settled principle that, when one person, whether natural or artificial, is about to be the means or instrument of doing an injury to another, that other's negligence contributing proximately to it, does not, *per se*, exonerate the actor from all further effort; does not, *per se*, relieve him or it from all responsibility for the consequences. Supine inaction, or stolid indifference to consequences, the law does not tolerate. The actor, no matter how free from fault, and no matter how negligent the one in peril may have been, must resort to every reasonable means and employ every reasonable agency to avert the catastrophe."

We perceive no vital distinction between cases where the master or his servant make no attempt to relieve the sufferings of an injured person, as in *Union P. R. Co. v. Cappier*, *supra*, and cases where such attempt is made but negligently performed, as in *Northern C. R. Co. v. State*, *supra*; and if there is any distinction between those cases where the master is in no way at fault prior to the accident and those where he was originally negligent, a stricter rule as to subsequent conduct should apply in the latter class, although we do not place our decision

on this distinction. Those who employ methods or instrumentalities which are naturally dangerous, and are liable to be the means of causing injury to the ignorant and unfortunate, should be required to take reasonable means to alleviate the suffering occasioned by an accident, although up to that time the master is under no legal duty to respond in damages. In this case the evidence tends to indicate that appellants were culpably negligent in failing to instruct respondent and her assistant how to properly loosen the whipper, and in failing to keep on hand a set of tools for that purpose; and, although there is evidence tending to show that respondent assumed the risk of working with her assistant under those conditions, thereby relieving appellants from the consequences of their negligence, yet the duty remained with them to use all reasonable means to provide their employees with reasonably safe surroundings and means of accomplishing their work, and take all reasonable means to prevent further injury, and alleviate the suffering of an injured employee in case of an accident.

The trial court, in laying down the test by which appellants were to be judged, stated that it was the duty of appellants, upon discovering that respondent's hand was caught in the rollers, to exercise reasonable care to release it,—such care as men of ordinary prudence exercise under similar circumstances. And, further, in determining that question, the jury should consider the excitement, if any, attendant upon the situation, and of the circumstances in the case, and decide whether or not Mr. Carter was exercising reasonable care in releasing respondent's hand. As bearing upon the question of the degree of care, appellants requested the court to give the following instruction: "If you find that the defendant Carter by mistake started the machine, and you believe that was a mistake which a person of ordinary care and caution would, under the circumstances of excitement attending the occasion, have done, or have been likely to do, then you should find it was not a failure on his part to exercise ordinary care, and no recovery on that account can be had." The court was of opinion, in granting the motion for a new trial, that this request should have been given. In order to avoid possible confusion hereafter, we may say that the request was proper as bearing upon the principal question, whether or not Mr. Carter was exercising that degree of care which prudent men would exercise under like circumstances. It necessarily follows that, if the act which he performed was such an act as would have been performed by a person of ordinary care and caution under such circumstances, then it meets the test

of ordinary care. A person is not liable for a mistake in judgment actuated by an emergency and under excitement; but whether or not that be the real explanation is only ascertained by the application of the usual test, *viz.*, What would a prudent man do under similar circumstances? *Bittner v. Cross-town Street R. Co.* 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044.

Order affirmed.

NEBRASKA SUPREME COURT.

LOTTIE G. NORTON, Appt.,

v.

JAY H. BRINK.

(— Neb. —, 110 N. W. 669.)

Partnership—agreement to contribute.

1. A parol agreement between two persons to purchase a single tract of land together, or "in partnership," where the purchase is finally made by one of them, who pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him one half thereof on demand, does not create a partnership between such persons.

Same—statute of frauds.

2. Such a contract is within the inhibition of § 3 of chapter 32 of the Compiled Statutes of 1905 (*Cobbey's Anno. Stat. 1903*, § 5952), commonly called the "statute of frauds," and is void.

Resulting trust—partnership in real estate.

3. In such a case no resulting trust arises in favor of one who contributes nothing to the payment of the purchase price.

(December 7, 1906.)

APPEAL by plaintiff from a judgment of the District Court for Buffalo County in defendant's favor in an action brought to secure a share of the profits of an alleged partnership in real estate. Affirmed.

A decision was reached and an opinion handed down in this case on January 18, 1906, reversing the judgment of the court below, but a rehearing was granted, and, upon further consideration, the court reached the opposite conclusion, and affirmed the judgment of the trial court, thereby making immaterial the former opinion.

The facts sufficiently appear in the opinion.

Headnotes by BARNES, J.

Note.—As to what constitutes a partnership to deal in real estate, see case note in 5 L.R.A.(N.S.) 503.

As to validity of parol partnership to deal in real estate, see case note in 4 L.R.A.(N.S.) 427.

Mr. Lewis P. Main, with Messrs. John N. Dryden and E. C. Calkins, for appellant:

The subject-matter of the agreement was one which might be covered by a contract of partnership.

1 Lindley, Partn. Rapalje's Am. ed. p. 49; 1 Bates, Partn. art. 302; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; Dale v. Hamilton, 5 Hare, 369; Essex v. Essex, 20 Beav. 449; Bunnell v. Taintor, 4 Conn. 568; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; Snyder v. Wolford, 33 Minn. 175, 53 Am. Rep. 22, 22 N. W. 254; Everhart's Appeal, 106 Pa. 349; Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47.

If the premises were paid for in whole or in part by plaintiff's money, a trust in her favor arises by operation of law, which is without the statute of frauds.

Pom. Eq. Jur. § 1037; Bear v. Koenigstein, 16 Neb. 65, 20 N. W. 104; Leader v. Tierney, 45 Neb. 755, 64 N. W. 226.

And it matters not how it is paid,—whether by money on hand or borrowed, or by the promises or obligations of the *cestui que trust* herself, or of some other person procured by her for the purpose.

Page v. Page, 8 N. H. 187; Pearl v. Whitehouse, 52 N. H. 254; Ferrin v. Errol, 59 N. H. 234; Crowley v. Crowley, 72 N. H. 241, 56 Atl. 191.

Mr. Frank E. Beeman, for appellee:

Where the contract is one to purchase jointly, it is within the statute.

Browne, Stat. Fr. 5th. ed § 261g; 1 Bates, Partn. § 302; Roughton v. Rawlings, 88 Ga. 819, 16 S. E. 89; Morton v. Nelson, 145 Ill. 586, 32 N. E. 916; Parsons v. Phelan, 134 Mass. 109, Clawwater v. Tetherow, 27 Mo. 241, Levy v. Brush, 45 N. Y. 589; Meason v. Kaine, 63 Pa. 339; Wilhite v. Skelton, 5 Ind. Terr. 621, 82 S. W. 932, Nagengast v. Alz, 93 Md. 522, 49 Atl. 333; Schultz v. Waldons, 60 N. J. Eq. 71, 47 Atl. 187; Slevin v. Wallace, 144 N. Y. 635, 39 N. E. 494, Affirming 64 Hun 288, 19 N. Y. Supp. 87; Clarke v. McAuliffe, 81 Wis. 104, 51 N. W. 83; Wheeler v. Hall, 54 App. Div. 49, 66 N. Y. Supp. 257; Allen v. Caylor, 120 Ala. 251, 74 Am. St. Rep. 31, 24 So. 512; Nash v. Jones, 41 W. Va. 769, 24 S. E. 592; Henderson v. Hudson, 1 Munf. 510; Arnold v. Ellis, 20 Tex. Civ. App. 262, 48 S. W. 883; Bowen v. Sayles, 23 R. I. 34, 49 Atl. 103; Benton v. Roberts, 4 La. Ann. 216; Russell v. Briggs, 165 N. Y. 500, 53 L.R.A. 556, 59 N. E. 303; Burch v. Burch, 20 Ky. L. Rep. 1614, 49 S. W. 798; Goodman v. Malcolm (Kan. App.) 58 Pac. 564; Vick v. Vick, 126 7 L.R.A. (N.S.)

N. C. 123, 35 S. E. 257; Woods v. Ward, 48 W. Va. 652, 37 S. E. 520; Chisholm v. Butler, 19 Pa. Co. Ct. 550; Farnham v. Clements, 51 Me. 426; Hook v. Turner, 22 Mo. 333; Bartlett v. Pickersgill, 4 East, 578, note.

Parol evidence is inadmissible to prove real-estate transactions between partners, or between one member and the firm.

Ridgway's Appeal, 15 Pa. 177, 53 Am. Dec. 586; Pitts v. Waugh, 4 Mass. 424; Lefevre's Appeal, 69 Pa. 122, 8 Am. Rep. 229; Ebbert's Appeal, 70 Pa. 79; Goodwin v. Richardson, 11 Mass. 469; Hale v. Henrie, 2 Watts, 143, 27 Am. Dec. 289; McCormick's Appeal, 57 Pa. 54, 98 Am. Dec. 191; Otis v. Sill, 8 Barb. 102; Harding v. Devitt, 10 Phila. 95; Everhart v. Everhart, 8 Luzerne Legal Reg. 217; Brewer v. Cropp, 10 Wash. 136, 38 Pac. 866; Holt's Appeal, 98 Pa. 257; Second Nat. Bank's Appeal, 83 Pa. 203.

A mere community of interest in real or personal property does not constitute a partnership, even where they agree to divide gross receipts.

1 Bates, Partn. §§ 63, 64; Austin v. Thomson, 45 N. H. 113; Quackenbush v. Sawyer, 54 Cal. 439; Sears v. Munson, 23 Iowa, 380; Treiber v. Lanahan, 23 Md. 116; Farrand v. Gleason, 56 Vt. 633; Goell v. Morse, 126 Mass. 480; Oliver v. Gray, 4 Ark. 425; Millett v. Holt, 60 Me. 169; Huckabee v. Nelson, 54 Ala. 12; Porter v. McClure, 15 Wend. 187.

A resulting trust does not arise from the payment of the purchase money, unless it is clearly and specifically shown that the money or consideration was actually paid, or secured to be paid, at or before the purchase.

Ducie v. Ford, 138 U. S. 587, 34 L. ed. 1091, 11 Sup. Ct. Rep. 417; McElroy v. Swope, 47 Fed. 380; Cameron v. Nelson, 57 Neb. 381, 77 N. W. 771; Arnold v. Ellis, supra; Alexander v. Kimbro, 49 Miss. 529; Wheatley v. Calhoun, 12 Leigh, 272, 37 Am. Dec. 654; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Kobarg v. Greeder, 51 Neb. 365, 70 N. W. 921; Klamp v. Klamp, 51 Neb. 17, 70 N. W. 525; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Sayre v. Townsend, 15 Wend. 647; Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019.

Mr. H. M. Sinclair also for appellee.

Barnes, J., delivered the opinion of the court.

This case was originally submitted to department No. 2 of the commission, and an opinion was written, filed, and announced reversing the judgment below. See Norton v. Brink, 106 N. W. 668. A rehearing has been allowed, and the case has been reargued

and submitted to the court, and the question now is, Shall we adhere to our former decision? In order to determine that question it is proper to set forth the contract sued on, which the appellant claims has been established by the evidence.

The action was commenced by the appellant against J. H. Brink, the son, and only heir at law, of one C. D. Brink, deceased, and the petition recites, in substance, that the said plaintiff and said Brink, the deceased, entered into a verbal contract, wherein and whereby it was mutually agreed that the W. $\frac{1}{2}$ of section 30, township 10, range 15 W., in Buffalo county, should be purchased in partnership, each party to pay one half of the purchase money, expense of operating the same, and upon sale divide the profits or loss, as the case might be; that it was further agreed that said Brink should advance the entire purchase money, take the legal title in his name; and that plaintiff should, upon demand, reimburse the said Brink for half of the purchase price so advanced, with interest at 6 per cent per annum. The petition further alleges that said premises were purchased for the sum of \$4,000, said Brink paying the entire purchase price, the legal title being vested in the said Charles D. Brink, as aforesaid; that, on the 30th day of November, 1902, and before any demand had been made for the repayment of the purchase money, and before any settlement had been had between the plaintiff and the said C. D. Brink, in respect to said partnership, as aforesaid, the said C. D. Brink, departed this life, leaving his son his sole heir at law, the defendant herein; that, since the death of the said C. D. Brink, the plaintiff has at all times been ready and willing to pay her share of the said purchase money, and interest upon the same, but that the defendant refuses and continues to refuse to accept the same; that, on or about the 15th day of May, 1903, said defendant sold said premises for the sum of \$6,400, and refused to recognize said partnership agreement, and refuses to pay the plaintiff any portion of the profits realized upon the said land as aforesaid. The petition concludes with a prayer for an accounting of the purchase money, for the rents and profits, and that the defendant be required to pay her the sum of \$1,200 with interest from May 15, 1903, as her share of the profits realized from the sale of said lands. Upon the contract thus set forth the right of the appellant to maintain this action must stand or fall.

Her first contention briefly stated, is that the contract established a partnership between herself and the deceased, and comes 7 L.R.A. (N.S.)

within the rule announced in *Dale v. Hamilton*, 5 Hare, 369; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Pennybacker v. Leary*, 65 Iowa, 220, 21 N. W. 575, and other cases, which hold that a contract entered into for the purpose of speculating in lands is not within the statute of frauds, and need not be in writing; that, where the parties have contracted to engage in the venture of buying lands which are to be held in trust for both of them, and they are to have equal interests and shares in the common speculation, such agreement constitutes a partnership, and an action by one partner against the other for an accounting as to the partnership transactions may be maintained, although the partnership funds may be invested in land. While the authorities are divided on this question, we deem it unnecessary to express any opinion as to the soundness of this rule, because it seems clear to us that the agreement here in question is not embraced therein. It will be observed that nothing is said in this contract about entering into a general or special partnership, or that the purpose thereof was to sell the land for profit. Its language is: "It was mutually agreed that said land should be purchased in partnership." Buying land together does not make the purchasers partners, nor does the transaction constitute a partnership with its rights, duties, and obligations as defined by law. "A partnership is the contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals, for the purpose of joint profit." *Bates*, Partn. § 1. To constitute a partnership there must be a mutual agency, and a communion of profit and loss, and the parties must assume the partnership relation. It seems clear to us that the contract to purchase the land in question "as partners," conceding for the purpose of this opinion that such contract was established by the evidence, together with the purchase of the land by Brink, the deceased, and payment therefor with his own money, did not establish a partnership between the appellant and the deceased. Again, the appellant did nothing upon her part; contributed nothing, risked nothing, and there was no consideration to support the contract.

It will be observed that, under the agreement, a sale of the land was not obligatory upon anyone. In short there is nothing in the contract that distinguishes it from the ordinary agreement of two or more persons to purchase land together, not for the profits of speculation on resale, but for the profits arising out of the ownership of the land itself; and this must be held to be the true

meaning of the contract. But, however this may be, there was no sale of the land by the alleged partnership; neither was there any sale of it by the deceased, who, it is claimed, was one of the partners, and by his death the partnership, if one ever existed, was terminated. The petition discloses that Brink died on the 30th day of November, 1902, and within five months after he purchased the land in question. After his death the partnership could not sell the land, because, if there ever was a partnership, it had then ceased to exist. The appellant could not sell the land as a surviving partner, because, according to the theory advanced by counsel to support her case, she had no interest or estate therein. At any rate she had no title to convey. Again, counsel has not pointed out to us any rule of law or equity that authorizes the appellant to maintain a suit for an accounting against the heir of her alleged deceased partner. It seems to us that this case falls within the rule of *Bates on Partnerships*, § 302, where it is said: "A parol agreement by the buyer of lands to admit another into partnership with him is void under the statute of frauds, as not different from the contract of buyer and seller." There is a clear distinction between the case at bar and those cases where a partnership was formed to deal or speculate in lands, and lands are bought with partnership funds in pursuance of such an agreement. In *Levy v. Brush*, 45 N. Y. 589, it was said: A verbal contract between two parties by which one is to purchase land on joint account of both, and each to contribute a moiety of the purchase money, the title to be made to both, is void under the statute of frauds. In that case the defendant bid off the land in his own name, and took a contract therefor, but refused to convey one half of the contract to the plaintiff, and it was held that no action would lie to compel the execution of the agreement because such an arrangement did not constitute a partnership between them; that the defendant had made no valid contract, and had a perfect right, both in law and equity, to refuse performance. In our former opinion it was said, on the authority of *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288, "that, in cases of this character, where the agreement relating to the land has been fully completed and nothing remains to be done but to distribute the profits of a sale made, then the partnership relation may be established by parol;" and the judgment of the trial court was reversed mainly upon that authority. It would seem that the learned commissioner who wrote the opinion over-

looked the allegations in appellant's petition charging the defendant with refusing to recognize her rights, and with repudiating the alleged contract of partnership. Again, an examination of *Smith v. Putnam*, supra, discloses the fact that the contract there was an oral agreement between the plaintiff and the defendants that plaintiff should investigate desirable timbered lands and on defendants' approval they would purchase and either sell or log them. The agreement was that the plaintiff should take charge of the driving of the logs, which contemplated his rendering material and valuable services as his contribution to the partnership funds. They entered upon the agreement, and the plaintiff did render services of value to the partnership. It was held that this agreement constituted a partnership; and, where the contract had been fully completed and executed, and nothing remained but to divide the profits, an action for an accounting and to recover such profits would lie. If the rule there announced could be applied in the case at bar, it could be applied to any case of oral contract to purchase land on joint account. If the transaction would otherwise be within the statute of frauds, it would only be necessary for the parties to stipulate that it should be a partnership, and the statute would be avoided. So we are constrained to hold that the contract here in question did not create or constitute a partnership.

2. Appellant next contends that, while the contract does not create an interest in the land in question, and therefore is not within the statute of frauds, yet, by the agreement, and the facts relating to the purchase, a resulting trust was created in her favor; that, by reason of such trust relation, she acquired a half interest in the land, and is entitled to recover one half of the profits arising from the sale thereof, from the defendant, who took the title to the land by inheritance. It would seem that her position is not maintainable. The fact that the appellant paid or contributed nothing towards the purchase price of the land is fatal to her contention. The rule is that, in order to establish a resulting trust of this class, it is necessary that the person paying the purchase money should have actually paid it as his own, as a part of the original transaction, at or before the time of the conveyance. The whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one when the title is taken in the name of another. 10 Am. & Eng. Enc. Law, p. 8; 2 Pom. Eq. Jur. 2d ed. § 1037. And we are not aware that the soundness of this rule has ever been seriously questioned.

In *Brooks v. Fowle*, 14 N. H. 249, it was said: "A purchase of real estate completed on the credit of two, and afterwards paid for wholly by one of them, does not of itself give rise to a resulting trust." In *Hackney v. Butts*, 41 Ark. 393, it was held that, where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. The rule of equity is that a resulting trust must have arisen at the time the purchase was made, and the money or consideration must have been paid, or secured to be paid, by such third party at or before the purchase. *McElroy v. Swope* (C. C.) 47 Fed. 380. The same rule has prevailed in this court since the decision of *Hoehne v. Breitreitz*, 5 Neb. 110, to the present time. In *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771, Commissioner Irvine said: "Next, there are cases where two men join in the purchase of land, taking title in one who is to resell and divide profits. Such contracts are usually enforced, although not in writing; but it will be seen there is, in such cases, a resulting trust from contributing to the purchase money." It is urged that the case of *Johnson v. Hayward* (Neb.) 103 N. W. 1058, sustains our former opinion. An examination of that case discloses that it was one where a person employed an agent to negotiate the purchase of certain real estate for him; that the agent, while acting as such, became himself the purchaser, and it was held that he should not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself; and, if he makes such purchase, he will be considered as holding the property in trust for his principal. So it seems clear that the rule there announced has no application to the facts in the case at bar. We are, therefore, of opinion that the contract, the purchase of the land, and the facts surrounding the transaction were insufficient to create a resulting trust in favor of the appellant.

Counsel for the appellee insists that the appellant's right to recover has been adjudicated by the county court of Buffalo county in the matter of the claim filed by her against the administrator of the estate of C. D. Brink, on account of the purchase of the land in question, adversely to such right; that the judgment in that case is a bar to her right to recover in this action. We deem it unnecessary to determine that question, because we are constrained to hold: First, that no partnership was created by the transaction in question between the appellant and the deceased, C. D. Brink; 7 L.R.A. (N.S.)

that the contract relied on by the appellant is within the inhibition of § 3 of chapter 32 of the Compiled Statutes of 1905, commonly called the "statute of frauds." Second, that no resulting trust in favor of the appellant was created thereby. It also seems clear that, in order to maintain this action against the heir of the deceased, appellant must have had an interest in the land in question which she could follow into his hands, and either compel him to convey to her, her interest therein, or account to her for the profits arising from the sale thereof. For the want of such interest, as well as for the other reasons above stated, she cannot maintain this action.

Our former judgment is therefore vacated, and the judgment of the District Court dismissing the appellant's cause of action is affirmed.

Letton, J., concurring:

I concur in the conclusion reached. I think the action cannot be maintained for two reasons:

1. Granting that the relation between the plaintiff and the deceased was a partnership relation, the plaintiff's interest was not in the land itself, but in the profits derived from the transaction. This was a personal liability of the deceased, and consequently a liability of his estate for which the administrator was answerable out of the estate. To hold that the plaintiff could follow the land itself would be to say that the alleged oral contract gave her an interest in the land, which would be obnoxious to the statute of frauds. If the alleged partnership had been to deal in live stock or merchandise, the title to which was taken in the name of the deceased, his estate would be liable on account to the other partner. The fact that the property which is alleged to have been the subject of the partnership was real estate does not change the rule. It is not the property itself, but her interest in the profits derived from the same, which the plaintiff is seeking to recover; and this, in my view, is the only theory upon which she may maintain such an action. *Everhart's Appeal*, 106 Pa. 349; *Bunell v. Taintor*, 4 Conn. 572; *McElroy v. Swope* (C. C.) 47 Fed. 386.

2. The plaintiff properly filed her claim in the county court of Buffalo county against the estate for her share of the profits. A demurrer to this claim was filed, was sustained by the county judge, and her action dismissed. No appeal was taken, and this judgment stands in full force and effect. The county judge testified, in substance, that the attorney for plaintiff said he would withdraw it or it

could be dismissed, but that, a demurrer or objection having been filed, he thought he would make some order upon it, and he made the order dismissing or disallowing the claim; that there never was any hearing upon the merits. This testimony is not sufficient to vacate, set aside, or annul the adjudication of the claim, as shown upon the records. If the judgment was inadvertently rendered or made by mistake, the plaintiff's remedy was to have it set aside by the means provided by law for that purpose. Until this is done it stands as an adjudication, and cannot be obliterated by parol testimony either of the judge who rendered it, or of any other individual. As it now stands, it finally adjudicates the plaintiff's claim against her, and she cannot maintain another action upon the same cause.

NORTH CAROLINA SUPREME COURT.

JOHN VASSOR, Appt.,

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

[142 N. C. 68, 54 S. E. 849.]

Railroad conductor—authority.

1. The conductor of a freight train has no implied authority to engage the services of a person to assist in handling freight for which he is to receive passage on the train, so as to entitle such person, in case of his injury, to hold the carrier liable as an employee.

Same—burden of proof.

2. The burden of showing authority on the part of a conductor of a freight train to employ an assistant is upon one asserting such authority, and the railroad company has not the burden of disproving it.

Carrier—injury to one on train—liability.

3. One injured while riding on a freight train is not entitled to have his action for damages go to the jury on the theory that the carrier owed him the measure of duty prescribed for either a passenger or an employee, in the absence of any evidence showing the existence of either relation.

Note.—The subject of the liability of a railroad company for injury to one wrongfully on a train by collusion with an employee is covered in a case note in 5 L.R.A. (N.S.) 1025.

In the case of *O'Donnell v. Kansas City, St. L. & C. R. Co.* 197 Mo. 110, 95 S. W. 196, reported after that note was prepared, the court held, in accordance with the doctrine of the cases in that note, that one who gained passage on a freight train by an agreement with a brakeman to assist in loading and unloading freight at stations
7 L.R.A. (N.S.)

Conductor—employment of assistant—ratification—evidence.

4. Evidence that, several months after the injury to one riding on a freight train, the railroad company issued to him a pass describing him as an injured employee, is not admissible as tending to show ratification of the conductor's act in permitting him to ride in consideration of services to be rendered in handling freight.

(Clark, Cn. J., dissents. Hoke, J., dissents from proposition 2.)

(September 18, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Northampton County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Connor, J.:

Action for personal injury sustained by plaintiff while on defendant's freight train. The plaintiff testified that on the 26th day of May, 1902, he boarded defendant's local freight, running from Rocky Mount to Richmond, at Garysburg, North Carolina. He then described the circumstances under which he went upon the train: "As I was going to Richmond I asked the conductor on the train if I could come back with him the next day on his train. Capt. Moody had charge of the train going to Richmond. He said 'Yes.' I was to help unload freight and load freight. I went to Richmond to take another man's run. He told me he would give me his place for ten days. He was a brakeman. I was expecting to get his place that night and come back next day. Did not get it, as he decided not to give it to me. I got on train between Richmond and Manchester after it started. I did not see conductor that day. Could not say he was on that day. It was the same train that I went to Richmond on, known as 'No. 90.' Capt. Moody was conductor on train that blew me up. The train stopped in Manchester yards, when I got on. William Savage was there. I got on flat car not loaded, next to car

along the route was a trespasser on the train, and that the agreement of the brakeman was a fraud on the railroad company and beyond the scope of his employment; and the former cannot recover for personal injuries suffered in a collision. And the facts that the conductor knew the plaintiff was riding on the freight train, saw him at work, and directed him where to put the freight, did not make the plaintiff a passenger, or give him any of the rights of a passenger.

loaded with barrels. Box car behind us. The conductor did not know whether I was on train or not. I saw engineer, fireman, and first brakeman when I got on train day I was hurt, but did not speak to anyone except Savage. The train was local freight, passed Garysburg every day coming and going. I could see it. Same train Mr. Gwaltney was engineer on. He saw me on the train. Two of the brakemen saw me, but did not speak to but one of them. He told me to get on and help unload barrels at next station, Clopton. The brakemen unloaded the car. The engine exploded not more than ten minutes after I got on the car." There was testimony in regard to the extent of injury and value of services. Plaintiff offered to introduce pass issued by defendant September 16, 1902, to plaintiff as an "injured employee" from Richmond to Garysburg. Upon defendant's objection it was excluded. Plaintiff excepted. Upon the conclusion of plaintiff's evidence defendant moved for judgment of nonsuit. Motion allowed, and plaintiff appealed.

Messrs. Peebles & Harris for appellant.

Messrs. Day & Bell, T. W. Mason, and Murray Allen for appellee.

Connor, J., delivered the opinion of the court:

The correctness of his Honor's ruling depends upon whether the defendant sustained any contractual relation to the plaintiff from which a duty arose to him. The testimony presents no question of public duty or duty to the public as discussed in *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L. R. A. 227, 47 S. E. 765, and other cases in which persons were permitted to go upon passenger trains or mixed trains on which passengers were taken. It is too well settled to call for the citation of authority that a railroad company has the right to classify its trains and assign to them such service as is reasonable. That in the exercise of this right it may operate trains exclusively for carrying freight, and that, when it has done so, no person has a right to demand that he be carried upon such trains as a passenger. It is equally well settled that, before a person can enter upon such a train and acquire the rights of a passenger, he must show some contract made with some servant or agent of the corporation authorized to make such contract. Such authority may be shown either by express grant or necessary implication growing out of the nature or character of the employment. In view of these general and well-settled principles, the question arises whether the conductor, Moody, in charge of the freight train upon which plaintiff was injured, had any authority to estab-

lish any contractual relation between plaintiff and the defendant corporation, either as passenger or servant, and impose any duty upon defendant the breach of which, followed by injury, gave a cause of action. The plaintiff insists that by the permission granted him to go upon the train to Richmond and return he became a passenger, or, if he is in error in this, he was, by the agreement with the conductor, made the employee or servant of the corporation. For the purpose of disposing of this appeal, it is not important, or even necessary, to discuss the question whether he became a passenger or an employee, because if he was, at the time of the injury, either, his right to go to the jury on the question of negligence would be the same. We are of the opinion that he was neither a passenger nor an employee.

Assuming, for the purpose of the discussion, that the conductor undertook to employ plaintiff, and that such employment extended to the return trip, the question of power is presented. Elliott, in his work on Railroads, says: "The authority of the conductor ordinarily extends to the control of the movements of his train and to the immediate direction of the movements of the employees engaged in operating the train. . . . His authority does not, ordinarily, extend to making contracts on behalf of the company, but there may be cases of urgent emergency where he may make a contract for the company. He is to administer the rules of the company rather than make contracts for it. . . . The conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties." Elliott, Railroads, § 302. In *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513, it is said: "It is a fallacy to argue that a conductor is a general agent for this purpose, assuming that his power would, as a rule, place him under the class of general agents; he only holds that position for the management of a freight train. The fact that the same word, 'conductor,' is used to designate servants in two kinds of business, which the defendant has made perfectly distinct, tends to confusion. There is no real analogy between the duties of a conductor of a passenger train and those of the manager of a strict freight train. A different class of men would naturally be employed in the two cases. The defendant has a right to assign specific duties to the one distinct from those performed by the other. It is a familiar rule in such a case that an agent cannot increase his powers by his own acts;

they must always be included in the acts or conduct of the principal. . . . No act of a conductor of a freight train will bind the company as to carrying passengers, unless the principal in some way assents to it." In the same case it is said: "The employment of brakemen is no part of the ordinary duty of a conductor. The company gave him no power to make any arrangement of the kind. . . . It is not one of those cases where he has an apparent authority, including the act in question, but, owing to a secret fact, does not have it in the particular case." In *Baldwin on American Railroad Law*, page 248, it is said: "While he may at times have occasion to make or construe, or even vary, contracts of the company, that is not his chief office. He holds, however, a somewhat analogous position to that of a ship master. The owners of the railroad have put him in charge of the persons and property on board of his cars. In case of an emergency, when prompt action, if any, must be taken to protect the interests confided to his care, his ordinary powers may become greatly enlarged." In *Files v. Boston & A. R. Co.* 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311, it is said: "In the case at bar, the conductor had no general authority, so far as shown, to take passengers on the locomotive engine, or any special authority to take the plaintiff. The conductor was not only in charge of a freight train, but on a road intended solely for the transportation of freight. The locomotive engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risks of so doing, whether he did so by the license or on the invitation of the conductor. It was not within the apparent scope of the freight conductor's authority to permit persons to ride on his freight train, far less on the locomotive engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight agent and a conductor were known by the plaintiff to have ridden on the locomotive engine, make the defendant responsible for accidents which occurred thereby." To the same effect are *Smith v. Louisville, E. & St. L. R. Co.* 124 Ind. 395, 24 N. E. 753; *Gardner v. New Haven & N. Co.* 51 Conn. 143, 50 Am. Rep. 12. In *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118, the question was discussed at length, and it was said: "If the conductor of a freight train, made up of cars suitable alone to carry freight, can, without authority of the railway company, expressly or tacitly given, receive passen-

gers upon such train and bind the railway for the risk of transportation, a conductor of a passenger train may with equal propriety load the coaches of his train with cotton or grain, and make the company liable as a common carrier of freight." The distinction between the powers and rights of the conductor of a freight train and of a passenger train are clearly pointed out in the opinion in this case. It is, however, suggested that the burden would be upon the defendant to show that the conductor had no authority to make the contract of service.

The authorities are to the contrary. In *Eaton v. Delaware, L. & W. R. Co.* supra, it is said: "There is nothing in the business of a conductor which could lead to the conclusion that he had authority to make contracts with persons to act as brakemen. His apparent duties are to carry forward a train after it is organized. The business of organizing it is, in its nature, wholly distinct. It is, in fact, committed to a 'train despatcher.' Under such circumstances there is no act on the part of the defendant by which he can be estopped from showing the conductor's real authority any more than a commercial house would be if one of its travelers, in the course of a journey, assumed to hire a clerk to do business for his employers at home." In *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123. *Sanborn, Ch. J.*, says: "In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier, that is evidently not designed for the transportation of passengers, is unlawfully there, and is a trespasser." In *Cooper v. Lake Erie & W. R. Co.* 136 Ind. 368, 36 N. E. 272, *Howard, Ch. J.*, said: "While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of appellant. . . . No custom, rule, or regulation of the appellee company is shown by which appellant might pay his way by working on the train, assisting the brakeman or other employee. . . . At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to so receive him. Any dangers to which he thus became exposed were wholly at his own risk. The company could become liable only for wilful injury to him." In *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 440, in an opinion of Mr. Justice Devens, it is said: "It was held in *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11, that

the invitation there given by the defendant's servant to the plaintiff to ride on the horse car which the servant was driving was within the general scope of his employment, and, even if it was contrary to the instructions of the driver, she was not a trespasser. In the case at bar, the plaintiff was not on a passenger train, and he was riding in the caboose of a freight train, in a place which he could not have failed to know was not intended or adapted for the use of passengers, but solely for the accommodation of the defendant's employees engaged in managing the train. Even if, therefore, the plaintiff had an invitation from the conductor of the freight train, he could not have supposed that the conductor was acting within the general scope of his employment, or that, independently of any rules of the corporation, the conductor had any authority to extend such an invitation. The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains, or to accept them as passengers." In *Eaton's Case*, supra, Dwight, Ch. J., speaking of a contention similar to that of plaintiff's says "The contention of the plaintiff must go to the length of maintaining that the company was bound by the act of the conductor to take the plaintiff into its service. . . . The conductor's authority to carry can only be incidental to his power to make a valid engagement for the plaintiff's service. The admission of such a doctrine would subvert familiar rules of the law of agency." We have been unable to discover any authority in which it is held that a conductor of a freight train has any power, save in case of an emergency, to employ servants to assist him in operating his train.

We do not deem it necessary to consider the liability of the defendant if there had been wanton or wilful injury; there being no evidence of either. It is said that the case should have gone to the jury. This suggestion is based upon the theory that there was evidence of a contractual liability imposing upon the defendant the measure of duty prescribed for either a passenger or employee. As we have seen, neither relation existed. There was therefore no question to be submitted to the jury. The plaintiff having failed to lay the basis upon which any such duty arose, there was no inference to be drawn from the testimony by the jury. The effect of the agreement made between plaintiff and conductor was for the court. There is no uncertainty as to its terms or legal signification. As was said in *Eaton's Case*, supra: "The solution of the questions at issue is not to be sought in the rules of law appertaining to common carriers. It must be obtained from the principles of the

law of agency. The true inquiry is whether the conductor, as an agent of the defendant, had the power to take the plaintiff upon the train in such a way as to bind the defendant as a carrier to him as a passenger,"—and, we may add, "or an employee." The answer to this question being in the negative, and there being no evidence of wanton or wilful injury, his honor correctly directed judgment of nonsuit.

We find no error in the ruling of his Honor excluding the pass. The fact that, several months after the injury, the defendant issued to the plaintiff a pass from Richmond to Garysburg, describing him as an injured employee, does not tend to show any ratification of the attempted employment by the conductor. The exception cannot be sustained.

No error.

Hoke, J., concurring:

I concur in the disposition made of this case for the reason that it affirmatively appears from the testimony that the plaintiff, at the time he was injured, was neither a passenger nor employee of the company, and the facts disclose no breach of duty on the part of the defendant. I do not assent to the position maintained in the principal opinion, as I understand it, that when a conductor of a freight train employs an ordinary hand to assist him in its operation, and the hand, while so engaged in the company's work, is injured by the company's negligence, that a presumption exists that the employment is without authority, and the burden is on the injured employee to show the contrary. A conductor of a freight train is necessarily given very extended authority over a train under his control while being operated on the road away from the general offices of the company, and frequently without present means of communication with them. He has under such circumstances the general right to employ a hand whenever it becomes necessary in the proper management of his train, and he must from the nature of the case be given very large discretion in determining when such necessity exists. There are so many and various cases where the power may arise that I think, when a conductor does employ a hand who engages in the company's work, there should be a presumption that he is acting within the scope of his authority till the contrary is made to appear, and at times such authority will be implied as a matter of law. The decisions cited in the principal opinion are chiefly cases where the question was on the authority existing in the conductor of a freight train to confer on an injured party the position of passenger on his train; and the power of such conductor

to employ help in the operation of his own train was in no way involved. While not directly in point, I think the position here contended for finds support in two well-considered decisions: *Sloan v. Central Iowa R. Co.* 62 Iowa, 736, 16 N. W. 331; *Georgia P. R. Co. v. Propst*, 83 Ala. 525, 3 So. 784. In the first case, and on this question, Seever, J., for the court, says: "It is said that the plaintiff was not an employee of the receiver, but an intermeddler, and therefore he cannot recover. The undisputed facts are that one Voorhees was a brakeman in the employ of the receiver, and he desired to have a rest for a week or more, and the plaintiff took his place on the train with the knowledge and consent of the conductor on the 1st day of July, and continued to perform the duties of brakeman until the 6th day of said month, when he was ordered by the conductor to perform the duty in discharging which he was injured. The conductor testified that to properly manage the train two brakemen were required, and that there was but one other on the train besides the plaintiff. This evidence is not controverted. It does not clearly appear that the receiver, or any of his employees, other than those on the train, had knowledge that the plaintiff was acting as brakeman. An intermeddler is a person who officiously intrudes into a business to which he has no right. The distinction between an intermeddler and a trespasser is not in any case very great. Under the circumstances of this case, if the plaintiff was an intermeddler, he was a trespasser. But, as he was on the train and discharged the duties of brakeman for six days with the knowledge and consent of the conductor, he was not either. The train, when passing between stations and distant from any other officer, is in charge of the conductor, and he has authority to eject such persons therefrom. So far from so doing, the conductor availed himself of the services of the plaintiff, and required him to perform duties which were necessary and essential to the safe operation of the train. The regular brakeman was absent, and it is immaterial whether with or without cause. The conductor consented that the plaintiff should perform his duties. We think, when the regular brakeman is absent, and the proper and safe management of the train so required, the conductor has authority to supply the place of the absent brakeman, and for the time being such person is an employee of the conductor's principal. Of necessity, it seems to us, the conductor must have such authority." In the second case, Stone, Ch. J., for the court says: "The conductor testified that he had no authority from the superintendent, or from the defendant, to engage or utilize the

services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency there must be discretion and authority somewhere to supply the place of disabled or missing servants, and no one could exercise this power so well or so prudently as the conductor in charge of the train. We will therefore treat the plaintiff as the lawfully employed servant of the company."

I am of opinion that, when the conductor of a freight train employs an ordinary hand to assist in the operation of his train, the presumption should be that his act is rightful till the contrary is made to appear. And in many instances such hiring, being within the scope of his apparent authority, will conclusively bind the company so far as third persons are concerned, who act without notice.

Clark, Ch. J., dissenting:

Stephen Vassor, the plaintiff's minor son, was injured by the explosion of the engine on defendant's train, whereby he "lost both feet; one leg being cut off below and the other above the knee, one of his legs being broken in three places, his arm cut, and two holes knocked in his head." These injuries being caused by an explosion, there is a presumption of negligence, which always arises when the injury is caused by a collision, derailment, or explosion. In such cases, the doctrine of *res ipsa loquitur* applies. The only question, therefore, which arises on this motion to nonsuit is whether the relation of the injured party to the defendant was such that, taking the plaintiff's evidence to be true and in the aspect most favorable to him, the defendant was liable to plaintiff for the injury caused by its negligence, when it was not a wanton or wilful act. The evidence of the injured boy is that, with permission of the conductor of the freight train, he went to Richmond to take the place of a hand working for the defendant; that, not getting the place, he started home the next day on the same train. He testified: "The conductor said 'Yes' when I asked him if I could come back with him. I was to help unload freight and load freight. We had some barrels to unload at Clopton, and me and two brakemen got aboard second car so we could unload them quickly when train got there. The engine exploded not more than ten minutes after I got on the car. The engineer and fireman saw me after I got on the train. They were looking at me when I got on." This evidence must be taken to be true, with the most favorable inferences to be drawn from it. The injured

boy was certainly not a trespasser. He was on the car by the express permission of the conductor, the supreme representative of the company on that train. He was there with the tacit consent of the engineer and fireman, and was there under an agreement that he was to help load and unload freight. It is immaterial whether he was passenger or employee. The defendant owed him the duty not only to refrain from wilfully and wantonly injuring him, as in the case of a trespasser, but not to injure him by its negligence. This was the ruling laid down in the rehearing of *McNeill v. Durham & C. R. Co.* 135 N. C. 718, 67 L.R.A. 227, 47 S. E. 765. The plaintiff's pass, it is there said, "had expired, if it had ever legally existed." The conductor permitted him to travel in violation of a statute, without any payment of fare or promise to pay. The injury was not caused by any wilful or wanton act, yet the defendant was held liable. Here the conductor also permitted the injured party to ride free, but not illegally nor without pay. The explosion occurred in Virginia, where it is not shown that free passage was prohibited; besides, the boy who was so badly injured by the defendant's negligence was not riding really free, but was either by agreement paying his way by loading and unloading freight, or was an employee receiving pay for his work by getting transportation. Besides, when the injured man was discharged from the hospital, the defendant's superintendent gave him a pass home, styling him "an injured employee." This was a declaration against interest, and was erroneously excluded. It should have been submitted to the jury together with the other evidence.

WISCONSIN SUPREME COURT.

JOSEPH STEFANOWSKI, by Guardian *ad Litem*, Appt.,
v.

CHAIN BELT COMPANY, Resp't.

(— Wis. —, 109 N. W. 532.)

Master and servant—injury—proximate cause.

The invention, by a thirteen-year-old boy, of a device to protect his fingers from the discomfort of handling links upon which he is employed to operate a drill, and which become heated and require handling because of defects in the drilling apparatus, which invention is unprecedented in experience, and the use of which results in the entangling of the boy's hand with the

machinery to its injury, is such an intervening cause as to destroy the proximity of the defect in the drill as a cause for the injury, and to relieve the master from liability therefor.

(November 7, 1906.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Dodge, J.:

Plaintiff, when thirteen and one-half years of age, was employed in the factory of the defendant, which was engaged in making chain belts composed of U-shaped links joining the jaws of one to the base of another by a transverse bolt running through holes in the jaws of the one link and the straight base of the other. These links were about two inches long and two inches wide. They were roughly cast, with a transverse hole through each of the jaws and through the straight base, and plaintiff was set to work with a drill at reaming out these holes. The machine had a table on which the link was placed, and from above descended a vertical revolving shaft having at the lower end a sharpened drill, rapidly revolving, which penetrated these holes and smoothed them. Upon the table was a jig or bar of iron calculated to just fit within the jaws of the link, and to hold it rigid so that the descending drill would exactly strike and penetrate the holes. The drill was caused to descend by pulling upon a lever with the left hand of the operator. The link was placed upon the jig with the right hand of the operator, who, under most circumstances, was also required to squirt, from an ordinary oil can, water upon the drill to keep it from heating. Plaintiff's testimony tends to show that the jig on the machine in question had become somewhat worn so that it did not hold the link in perfect position, but needed the aid of his hands; also that the water can worked badly so that the process of drilling made the link too hot to be comfortably touched with bare fingers; also it is claimed that the drill supplied him had been worn so short that it would not reach the hole in the lower jaw of the link when in position, so that after drilling a hole in one jaw the link had to be withdrawn, turned over, and again pushed onto the jig in order to bore the hole in the other jaw. Plaintiff's fingers became sore from repeated contact with the hot links. He complained of the situation and of this trouble and asked to be put at other work, but was commanded to go back to this work

Note.—A search of the authorities has failed to reveal any other case presenting the specific question decided in the above case.

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or go home. He accordingly returned to the work, and at noon constructed a device of his own invention, consisting of a small wire one end of which he bent at right angles to constitute a hook to insert in the hole through the base of the link to pull it away from the machine. At the other end he bent the wire into a loop to fit round the two middle fingers so as to hang there during other operations with the right hand, thus avoiding delay of laying the hook down and picking it up each time. This wire, as it was attached to the fingers, was necessarily brought into close proximity to the vertical revolving drill in each operation of turning over the link and reinserting it on the jig. After about a half hour's use it caught thereon, and the wire was rapidly wound around the drill shaft, and plaintiff's two middle fingers pulled off. After trial and overruling motions for nonsuit and for direction of a verdict in favor of the defendant, the jury found a special verdict to the effect that plaintiff was not sufficiently instructed of danger, and had not sufficient knowledge to comprehend the risk of the wire hook used by him, and was not guilty of any want of ordinary care; that the drill press was defective and defendant charged with knowledge thereof, and, in answer to the seventh question, that the insufficient condition of the drill press was the proximate cause of the plaintiff's injury. Plaintiff's motion for judgment was denied, and defendant's motion to reverse the answer to the seventh question was granted, and judgment rendered in favor of the defendant, from which plaintiff appeals.

Mr. W. S. Frazier, with Messrs. Loyal H. McCarthy and Charles G. Woolcock, for appellant:

From the insufficient condition of the drill press, there is established a natural and continuous chain of events, without a missing link, leading directly up to the accident.

Winchel v. Goodyear, 126 Wis. 271, 105 N. W. 824; *Darcey v. Farmers' Lumber Co.* 87 Wis. 245, 58 N. W. 382; *Shepherd v. Morton-Edgar Lumber Co.* 115 Wis. 522, 92 N. W. 260; *Yess v. Chicago Brass Co.* 124 Wis. 406, 102 N. W. 932; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 3 L.R.A. 385, 15 Am. St. Rep. 596, 20 N. E. 466.

Messrs. Roemer & Aarons, for respondent:

If any event is produced by independent, intervening circumstances, not put in operation by the wrongful acts alleged as the cause of an injury, no legal responsibility attaches.

Morey v. Lake Superior Terminal & Trans-
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fer Co. 125 Wis. 148, 103 N. W. 271; *Missouri P. R. Co. v. Columbia*, 65 Kans. 390, 58 L.R.A. 399, 69 Pac. 338; *Marvin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L.R.A. 506, 47 N. W. 1123; *Nelson v. Narragansett Electric Lighting Co.* 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep. 711, 58 Atl. 802; *Stephenson v. Corder*, 71 Kan. 475, 69 L.R.A. 246, 80 Pac. 938; *Fishburn v. Burlington & N. W. R. Co. (Iowa)* 98 N. W. 380; *McFarlane v. Sullivan*, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Conley v. American Exp. Co.* 87 Me. 352, 32 Atl. 965; *Hope v. Fall Brook Coal Co.* 3 App. Div. 70, 38 N. Y. Supp. 1040; *Pryor v. Louisville & N. R. Co.* 90 Ala. 32, 8 So. 55; *East Tennessee, V. & G. R. Co. v. Reynolds*, 93 Ga. 570, 20 S. E. 70.

The master may assume that the servant will obey instructions and use appliances in the manner directed.

Goff v. Chippewa River & M. R. Co. 86 Wis. 237, 56 N. W. 465; *Goss & P. Mfg. Co. v. Suelau*, 35 Ill. App. 103; *Spencer v. Ohio & M. R. Co.* 130 Ind. 181, 29 N. E. 915; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Punkowski v. New Castle Leather Co.* 4 Penn. (Del.) 544, 57 Atl. 559; *Gillen v. Rowley*, 134 Pa. 209, 19 Atl. 504; *Arizona Lumber & Timber Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952.

Dodge, J., delivered the opinion of the court:

The sole error assigned is that the court held, as matter of law, that the defective condition of the drill was not the proximate cause of plaintiff's injury, against which holding appellant's counsel presents a forcible and plausible argument. While every act or event, without which some result would not have been reached, is, in colloquial sense, a cause thereof, not every such act or event is the legal cause of the injurious result in the law of torts. That legal proximate cause which, when it involves negligence of another, results in his liability, has been often defined and last carefully discussed in the two opinions in *Winchel v. Goodyear*, 126 Wis. 271, 105 N. W. 824. The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury

to some person might probably result therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and probable, and provided the probability of injury might be reasonably anticipated. In both the *Winchel v. Goodyear and Yess v. Chicago Brass Co.* (124 Wis. 406, 102 N. W. 932), cases the intervening event was a slipping of the person injured by reason of surrounding conditions, thus bringing himself within the peril which the defendant had created; and it was held that such events might, by a jury, be considered natural and probable under all the circumstances. A similar holding was made in *Morey v. Lake Superior Terminal & Transfer Co.* 125 Wis. 148, 103 N. W. 271, where the intervening event was a fainting or falling of the injured person caused by fright at the sudden apparition of an unnotified and negligently rapid railroad train. In the last-cited case, at page 155 of 125 Wis., and page 273 of 103 N. W., was adopted a carefully framed description of such an intervening event as will break the chain of legal proximity between an earlier negligent act and the injury. "Whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

The question here presented is whether the use by plaintiff of the wire hook could, by any reasonable mind, be deemed such a natural and probable event so that a chain of legal causation between the defective condition of defendant's drill and the injury to plaintiff's fingers was unbroken. Of course we are not advanced much towards an answer to this inquiry by the obvious fact that, but for the use of such wire, the injury would not have happened. It is equally true that but for the fainting or slipping in the cases just mentioned the injury would not have occurred, and yet it is doubtless essential to a holding that the use of the wire, instead of being one of a chain of natural and probable events, was, in fact, the legal cause of the injury, that we should discover that the injury would not have happened without it; therefore, it is proper to mention that entirely obvious fact. Another fact which is of some cogency, though not in all cases conclusive, is that there was no close causal connection between the

defective drill and the use of the wire invented by the plaintiff and used upon his own volition. But causation of every act, circumstance, or condition which participates in the chain of events leading to the injurious result need not be by the event or act which is held the proximate cause, for in both the *Yess* and *Winchel* cases the slipping of the plaintiff was in no wise caused by the defect in the machine from which he suffered. Their efficacy was merely to bring about a condition subjecting plaintiff to the perils negligently created by the defendants in the respective cases, acting naturally and probably. It does, however, appear in the present case that in the operation of the drill in question there was no likelihood or danger of plaintiff's fingers being brought in contact therewith if he operated it in any matter within the knowledge or experience of any person; that the only way in which his fingers were in fact brought into that peril was by reason of the use of a device unique and unprecedented, and which cannot but be considered the result of very unusual ingenuity and invention by the plaintiff himself. So far as appears by the evidence, no one had ever thought of using a hook for pulling the links away from the machine; but that is not all of the peculiarity involved in plaintiff's device. A mere hook which was to be laid down pending the other operations with the right hand, and picked up again when used, would not have brought about the injury, but it would have been inconsistent with the rapidity with which the operations of the insertion, turning, and removal of the links needed to be performed. To obviate this latter difficulty plaintiff's invention went to the extent of devising a loop on one end to place over his fingers in such a position that the hook end would be out of the way while he was manipulating the links with his fingers, and yet not involve the delay of laying it down and picking it up again. But it was this very circumstance of the arrangement of the wire with this loop, so that in a certain position of his hand it was brought into close proximity to the vertical shaft of the drill, that enabled it to come in contact with that revolving shaft and thus tear away his fingers. Obviously here was such novelty of invention as would almost, if not quite, satisfy the most hypercritical patent examiner. Surely it cannot be that an event which never occurred before in years of human experience, and which could not happen without what amounts to a spasm of inventive genius in an inexperienced boy, is either probable or within reasonable anticipation. The contrast presented by *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568, is instructive.

There, the intervening act or event which immediately rendered the defect in a lathe efficient to injure was the application of a file by the injured man, but that act was one known by the employer to be customary and frequent with operatives, and the file had been provided for that purpose. Further interesting instructive cases have been gathered by respondent's counsel. *Nelson v. Narragansett Electric Lighting Co.* 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep. 711, 58 Atl. 802; *Stephenson v. Corder*, 71 Kan. 475, 69 L.R.A. 246, 80 Pac. 938; *Fishburn v. Burlington & N. R. Co.* 127 Iowa, 483, 103 N. W. 481; *Conley v. American Exp. Co.* 87 Me. 352, 32 Atl. 965; *Pryor v. Louisville & N. R. Co.* 90 Ala. 32, 8 So. 55; *East Tennessee, V. & G. R. Co. v. Reynolds*, 93 Ga. 570, 20 S. E. 70; *McFarlane v. Sullivan*, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Holdridge v. Mendenhall*, 108 Wis. 1, 5, 81 Am. St. Rep. 871, 83 N. W. 1109.

We conclude that the trial court correctly decided that the evidence conclusively established that the act of the plaintiff in using the wire device was the efficient cause of the injury, and that it was neither probable nor within reasonable anticipation of an ordinarily prudent and intelligent person, and, as a result, that the defects in the drill were not proximately connected with the injury so as to make them the legal cause thereof.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

CHARLES ALLEN, Plff. in Err.,
v.

ÆTNA LIFE INSURANCE COMPANY of
Hartford, Connecticut.

(76 C. C. A. 265, 145 Fed. 881.)

Indemnity insurance—liability to injured person.

1. A clause in a policy undertaking to indemnify assured against loss by reason of liability on account of injuries to em-

ployees, by which the insurer undertakes to defend proceedings against the insured, or settle the same, unless it elects to pay the provided indemnity to the assured, does not make the contract one guaranteeing payment of an obligation of the insured, rather than one of indemnity, where another clause of the policy provides that no action shall be brought against the insurer unless by the insured himself to reimburse him for loss actually sustained and paid, the former clause being merely an additional privilege for the protection of the insurer.

Same—garnishment.

2. Under a contract by which an insurer undertakes to indemnify an employer for loss paid because of injury to an employee, there is no obligation on the part of the insurer which can become the subject of garnishment in proceedings by an employee to enforce a judgment which he has secured against the insured.

(May 18, 1906.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of defendant in a garnishment proceeding to reach the alleged obligation of an insurance company to an employer on account of injury to an employee. Affirmed.

The facts are stated in the opinion.

Argued before Dallas and Gray, Circuit Judges, and Lanning, District Judge.

Messrs. Latimer P. Smith, Walter C. Douglas, Jr., and Francis Fisher Kane for plaintiff in error.

Messrs. Robert W. Archbald, Jr., and Simpson & Brown, for defendant in error:

This insurance is not for the benefit of the employee.

Bain v. Atkins, 181 Mass. 240, 57 L.R.A. 791, 92 Am. St. Rep. 411, 63 N. E. 414.

Where an insurance company reinsures a risk, and thereafter becomes insolvent, the assured has no claim against the reinsured direct.

Goodrich's Appeal, 109 Pa. 523, 2 Atl. 209; *Herckenrath v. American Mut. Ins. Co.* 3 Barb. Ch. 63; *Carrington v. Commercial F. & M. Ins. Co.* 1 Bosw. 152;

Case Note.—Injured employee's right to reach fund under employer's liability policy:

—Attempts have been made in various ways by injured employees to reach an obligation of an insurance company to an insured on account of an injury to employees of the latter. In determining the liability of the insurer in such proceedings, the courts have adopted the rule that, if the policy is one which insures against loss or damage by reason of liability, or, in other words, is a contract of indemnity, the action cannot be maintained against the insurance company, on the theory that the amount of

insurance does not become due and payable until the insured has paid the loss. But, if the policy is one which insures directly against liability, then the courts hold the view that the insurer is liable, on the theory that the amount of the policy up to the extent of the liability incurred by the employer on account of the accident becomes, immediately upon the happening of the event upon which the liability depends, an asset of the insured, which, in the absence of any provisions to the contrary in the policy, may be assigned by him or taken for his debt.

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Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235; Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 74.

The plaintiff, like any other attaching creditor, stands exactly in the shoes of his debtor.

Willis v. Curtze, 203 Pa. 111, 52 Atl. 5.

There is a well-taken distinction between agreements to indemnify against liability and agreements to indemnify against loss.

Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359.

This policy falls within the second class.

Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; Traveller's Ins. Co. v. Moses, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49

Atl. 720; Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2; Cushman v. Carbondale Fuel Co. 122 Iowa, 656, 98 N. W. 509; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; O'Connell v. New York, N. H. & H. R. Co. 187 Mass. 272, 72 N. E. 979; Munro v. Maryland Casualty Co. 48 Misc. 183, 96 N. Y. Supp. 705; Burke v. London Guarantee & Acci. Co. 47 Misc. 171, 93 N. Y. Supp. 652; Henderson v. Maryland Casualty Co. 29 Pa. Super. Ct. 398.

Lanning, District Judge, delivered the opinion of the court:

On December 13, 1902, the Ætna Life Insurance Company issued to Gilman & McNeil, a corporation, a policy of insurance, by which it agreed "to indemnify" that

Garnishment proceedings were resorted to in the case of ALLEN v. ÆTNA L. INS. CO., and in Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, which is set out at length in the opinion in the former case; but the court held that these cases were governed by the first rule, and therefore the insurer was not liable as garnishee. The same decision was rendered in Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, in which the contract of indemnity involved contains practically the same agreements construed in ALLEN v. ÆTNA L. INS. CO.

The following cases fall within the second rule, and hold the insurer liable to garnishment: The policy involved in Hoven v. Employers' Liability Assur. Corp. (Hoven v. West Superior Iron & Steel Co.) 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46, recited that it was issued on an application for indemnity against claims for compensation for personal injuries, and provided that "the company shall not be sued upon this policy in any court after six years from the time that the injury occurred, upon or by reason of which the cause of action accrued, unless at the expiration of said time some suit brought by the injured employee be then pending against the employer, in which case an action may be brought within six months after the termination of such suit, and not later." This language the court construed as plainly indicating that payment of the injured employee's claim was not a condition precedent of the right to maintain an action against the insurer to enforce payment of the policy, given to indemnify the employer for sums for which he "shall become liable" to employees. And the fact that no way was provided by which the insurer could be relieved of his liability, under a condition of the policy by which it assumed entire charge and responsibility for the settlement of loss and of any legal proceedings, and for the payment of costs thereof, was considered to be inconsistent with any reasonable theory other than that the contract of insurance was one of indemnity against liability. Substantially the same kind of a 7 L.R.A. (N.S.)

policy was under consideration in Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353. In this instance, the policy provided, first, that it insured against all liability on account of injury suffered by an employee; second, that the insurer would, at its own expense, take upon itself the settlement of any loss; and, "if legal proceedings have been taken against the insured to enforce a claim for damages, the insurer shall have entire charge of the case;" third, that the insured shall not settle any claim without the consent of the insurer; and fourth, that "no action shall lie against the company after the expiration of the period within which an action for damages on account of the given injuries, or death, might be brought . . . against the assured, unless, at the expiration of such period, there is a suit . . . pending against the assured." In construing these terms of the policy, the court said that it may be seen from the very terms of the instrument that it was not merely an agreement to indemnify the insured against any act of the employee; but that, in case of an accident whereby a cause of action arose in favor of the employee against the insured, the insurer would assume all responsibility.

The insurer's defense, that it did not consent to an assignment of any interests of the insured to an injured employee of the latter, required by the terms of the policy to be given in writing in order to be valid; and that the insured has not suffered any loss, and therefore cannot give to such employee any better right against the insurer than the insured would have,—was held, in Fritchie v. Miller's Pennsylvania Extract Co. 197 Pa. 401, 47 Atl. 351, not to be an answer to a judgment against the insured, recovered by such employee, after the insured has become insolvent and has ceased to do business; nor was it considered an obstruction to the issuance of an attachment proceeding, and the service of the same upon the insurer as garnishee, where the policy was issued against all liability for damages on account of fatal or nonfatal injuries suffered by any employee of the insured. The

corporation, for one year from the date of the policy, subject to certain "general agreements" contained in the policy, "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured," etc. On February 27, 1903, within the term covered by the policy, Allen, the plaintiff in error, then employed by the Gilman & McNeil Company, the assured, received bodily injuries, for which he subsequently obtained judgment against the assured. After the date of his accident, and

before commencing his suit, the assured was placed in the hands of a receiver, and, after obtaining his judgment, he caused an attachment execution to be issued against the assured, as defendant, and the insurer, as garnishee, which was returned *nihil habet* as to the defendant and "served" as to the garnishee. On this proceeding the circuit court gave judgment for the garnishee, and the writ of error brings that judgment before us for review. There is a general rule in garnishment proceedings that the plaintiff in the suit acquires no greater rights against the garnishee than the defendant himself possesses. A few exceptions to the

court thus held, as in the two preceding cases, that the policy was one insuring directly against liability, and that the provision against an assignment did not make it one insuring to the benefit of the insured alone.

In other instances injured employees have sought, by suits in equity, to reach the fund under the employer's liability policy. In these cases the courts have applied the rule as stated at the beginning of the note. In *Frye v. Bath Gas & Electric Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395, the court held that a contract to indemnify an employer against loss by reason of liability for accidental injuries to employees does not inure to the benefit of the injured employee, so that he can maintain a bill in equity to enforce payment in case the employer becomes insolvent before the employee recovers judgment, so that the judgment cannot be enforced,—especially where the contract provides that no action shall arise against the insurer as respects any loss under the policy, unless it shall be brought by the insured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. Similar policies were construed, and the same decisions rendered, in *Burke v. London Guarantee & Acci Co.* 47 Misc. 171, 93 N. Y. Supp. 652; *Beyer v. International Aluminum Co.* 101 N. Y. Supp. 83; and *Kinnan v. Fidelity & C. Co.* 107 Ill. App. 406.

But, under a policy containing a similar provision as to when a right of action shall lie against the insurance company as respects any loss under the policy, the court, in *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720, held that an injured employee could maintain a suit in equity against the insurer by way of cross bill, setting up the same facts stated by her employer's trustee in bankruptcy, who prayed that the sum due from the insurer be paid directly to the injured employee, to reach so much of the policy as represents her proportionate share in the bankrupt estate of her employer to which she is entitled under her judgment, on the ground that the transfer of the insolvent estate to a trustee under the bankruptcy

act operated to make the trustee in bankruptcy her trustee, to the extent of her share in the assets of the estate, and that this payment in property was a sufficient compliance with such terms of the policy.

A policy indemnifying an employer against a "loss actually sustained and paid in satisfaction of a judgment after the trial of an issue" was construed in *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509, as not giving an injured employee a right to maintain a suit in equity to recover the amount of his judgment from the guaranty company, since there was no breach of the covenant, and no liability on the part of the insurer arose until the judgment against the employer had been actually paid.

And insurance against loss through liability for personal injuries was held, in *Bain v. Atkins*, 181 Mass. 240, 57 L.R.A. 791, 92 Am. St. Rep. 411, 63 N. E. 414, not to constitute a trust fund for the benefit of the injured person; and he cannot maintain a bill in equity against the insurer to reach such fund, although, by reason of the insolvency of the insured, the claim would be otherwise unenforceable,—especially where, before his claim against the insured is established, the insurer satisfies its obligation under the policy.

Insurance of an employer against loss of life or injury to person, either to employees or to other persons, caused by a peril insured against, making the insurance payable to him for the benefit of the injured person, or his legal representatives in case of death, and not contingent upon his legal liability, does not create any right in favor of an employee or his legal representatives to enforce payment by the insurer,—especially in case of one who was not employed when the insurance was taken. The court further held that only one recovery is permitted under the policy, and therefore a recovery against the employer precludes any right of action against the insurer under the policy. *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212.

On the general subject of the garnishment of unliquidated claims, see exhaustive note in 59 L.R.A. 353.

rule exist, one of which is in a case where the defendant has fraudulently transferred property to the garnishee; but in the present case the general rule is applicable. The service of a garnishment order does not operate as an assignment, legal or equitable, of a debt due from the garnishee to the defendant, nor establish as between the plaintiff and the garnishee the relation of creditor and debtor. It simply gives to the plaintiff the statutory right to collect from the garnishee a debt due from the garnishee to the defendant, not in excess of the amount due from the defendant to the plaintiff, and, in default of voluntary payment by the garnishee, the right to have execution therefor. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596, 619, 38 L. ed. 565, 573, 14 Sup. Ct. Rep. 710; *Drake, Attachm.* 6th ed. § 458; *The Olivia A. Carrigan*, 7 Fed. 507. If, then, the assured, or its receiver, has no present right of action against the insurer, the judgment of the circuit court must be affirmed.

The counsel for the insurer contend that the policy of insurance is a contract of pure indemnity against actual loss sustained by the assured, and that it is not a contract by which the insurer guaranteed the payment of any obligation or liability of the assured. The distinction between a contract to indemnify against loss and one to pay a liability has often been pointed out. Some of the cases on the subject are referred to in the opinion of the learned judge who tried this case in the circuit court. See 137 Fed. 136. But the counsel for the plaintiff in error, not denying the reasonableness of this distinction, contend that, in the present case, the policy of insurance is a contract to pay a liability, and not a mere contract of indemnity against loss. This contention is based on the language of the second and third clauses of the "general agreements" of the policy. The legal effect of these clauses can be understood only by reading them in connection with the first and seventh clauses. These four clauses are as follows:

"(1) The assured, upon the occurrence of an accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, to the home office of the company at Hartford, Conn., or to its duly authorized local agent. He shall give like notice, with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered 7 L.R.A. (N.S.)

by this policy, the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein. [Clause A limits the indemnity to \$5,000.]

"(3) The assured shall not settle any claim except at his or its own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company, previously given in writing; but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information, evidence, and the attendance of witnesses and in effecting settlements and in prosecuting appeals. . . ."

"(7) No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages, unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within sixty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, sustains the position of the plaintiff in error. In that case, which was one in equity, it appears that judgment in an action at law had been obtained by the plaintiff against the assured for personal injuries received while in the employment of the assured; that the insurer had issued a policy similar to the one before us, and had assumed the defense of the action at law until the rendition of the judgment, but took no writ of error and prosecuted no proceedings for review; that the property of the assured had been sold, under execution issued upon the judgment, for \$1; and that nothing more had been recovered for the plaintiff. In the equity suit, the plaintiff contended that the policy was a contract, not to indemnify against

loss, but to pay a liability; that, as the judgment exceeded the amount of the insurance, the insurer was indebted to the assured in the full amount of the insurance; and that a court of equity had the power to require the indebtedness of the insurer to the assured to be applied, *pro tanto*, to the satisfaction of the indebtedness of the assured to the plaintiff. The supreme court of New Hampshire held that, by the second clause of the "general agreements," the insurer agreed (1) to defend, (2) to settle, or (3) to pay the assured, and that the second and third of these engagements plainly provided for the performance of the contract of indemnity before the assured had suffered loss by actual payment of the judgment obtained against him. In holding that the obligation "to defend," which is the first of the above-mentioned engagements, was not performed merely by contesting the suit until the rendition of judgment, the court said: "In this case there has been execution, upon which the paper company's property has been sold. That the amount of the sale was nominal is immaterial. The fact discloses the abandonment of defense by the insurance company, their failure to settle the claim, and hence their liability to pay the insured the amount of the indemnity provided, unless it be established, that the rendition of the judgment excuses the insurance company from further defense of the proceedings. Further evidence to the contrary is to be found in the provisions of the contract [see the third clause of 'general agreements'] that the assured shall not settle any claim except at his own cost, nor interfere in any negotiation for settlement or in any legal proceeding. The substance of these provisions is that, after notice of the suit to the insurer, unless the company pay him the indemnity, the assured's control over the matter ceases. He cannot settle the claim, nor can he conduct or direct the litigation. If the company settle or defeat the claim, the liability under which he labors is assumed and discharged by the insurer. In every possible event except the defeat of their effort to prevent judgment against the insured, the company agree to perform their contract without the previous payment of anything by the insured. If an exception were intended in this case, it seems probable that it would be plainly stated, or some good reason would be apparent for the different undertaking. None is perceived."

In considering the meaning of the eighth clause of the "general agreements" of the policy in that case (being the same as the seventh clause of the policy in the present case), the court said: "The purpose of

clause 8 was, therefore, to provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured."

We have given to the opinion from which we have made the above extracts the very careful consideration demanded by the high authority from which it came, but we cannot concur in it. It seems to us not to give due effect to the language of the policy that the insurer agreed "to indemnify" the assured "against loss from common-law or statutory liability for damages on account of bodily injuries," or to the seventh clause that "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue." By compliance with the first clause of the "general agreements" the insured puts the insurer upon inquiry as to whether the accident is one covered by the policy. By the second clause the assured is required, immediately after the commencement of suit, to forward the summons to the insurer. If the insurer insists that the accident is one not covered by the policy, it is manifestly his duty to give to the assured prompt notice of that fact to the end that the assured may himself take charge of the defense. If no such notice be given, the assured may assume that the insurer, will, as required by the second clause, defend the suit, or settle the claim, or pay the indemnity to the assured. But the engagement to defend the suit does not mean that, when the insurer has undertaken the defense and judgment has been rendered against the assured, the insurer must either prosecute a writ of error or pay the judgment. It means what a defendant means when he files a plea saying he "comes and defends" the suit, or what is meant when counsel are retained to defend a suit. When an insurer undertakes to defend an action brought against the assured, the real object of the undertaking is not to defeat a judgment against the assured, which is only incidental to the real object, but to save himself from the obligation of the policy to reimburse the assured for loss actually sus-

tained by him in paying the judgment. If the insurer deems the plaintiff's cause of action so well founded and the plaintiff's claim for damages so reasonable that it would be unbusinesslike to expend money in a defense, he may, under the provisions of the second clause, pay the claim of the plaintiff directly to him, or pay the amount of the indemnity to the assured. But if the insurer, for any reason, prefers to defend the suit, he has the right, under the second clause, to do so at his own cost; and in such event the assured is required by the third clause not to interfere. We think such a construction of the first, second, and third clauses is in accord with their fair meaning, and that it relieves us from the necessity of giving to the seventh clause the restricted construction adopted in *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.*

We are confirmed in the construction thus given to the policy before us by the opinion in a similar case rendered by the supreme court of Massachusetts in *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981. There the court said: "The object of this second clause is plain when taken in connection with the third,—it is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons insured, respectively. This does not result in the necessity of writing into clause 2 the qualifying words 'until final judgment,' as the plaintiff contends, for, when final judgment is rendered, ordinarily all defense is at an end. Nothing remains but a writ of review or a writ of error, and, if such a proceeding were necessary, it might well be held to be covered by the obligation to defend. But when the defense is ended, and, in spite of the defense, judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against the defendant is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause [the same as the seventh clause in the policy before us] in terms provides that no action shall lie for 'any loss under this policy,' unless brought by the assured 'to reimburse him for loss actually sustained, and paid by him in satisfaction of a judgment after trial of the issue.' In the case at bar *Bell* 7 L.R.A.(N.S.)

has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company."

As thus construed, the seventh clause is not inconsistent with the second and third clauses. The insurance company had the right to defend the action brought against the Gilman & McNeil Company, and is not estopped by that mere fact to deny its liability. Until the judgment shall have been paid by the Gilman & McNeil Company,—or, possibly, by its receiver, concerning which no opinion is expressed,—there exists no valid claim against the insurance company. The garnishment proceedings are therefore founded on a false theory. There is nothing due from the insurer to the assured. Consequently, there is nothing that can be the subject of garnishment proceedings as against the insurer. This conclusion renders it unnecessary to consider whether the plaintiff in error is not restricted, in his remedy, to a presentation of his claim to the assured's receiver, and whether, in the event of payment of a percentage of the judgment by the receiver, the receiver himself would not be entitled to recover from the insurer the amount paid by him under the rule established in *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720. Nor is it necessary to consider the point argued in the brief of the plaintiff in error concerning the power of a court of equity to compel payment of a debt by one who has assumed it, and thereby, in equity, become the principal debtor, since this is a suit at law, and not one in equity, and since, by our conclusion, the insurer has not assumed the indebtedness of the assured.

The judgment of the Circuit Court will be affirmed, with costs.

KENTUCKY COURT OF APPEALS.

JOHN THOMAS, by Next Friend, Appt.,

v.

CITY OF SOMERSET.

(— Ky. —, 97 S. W. 420.)

Electricity—imperfect insulation—injury.

A municipal corporation maintaining an electric-light plant, which for compensation installs in a business place a light

Note.—The degree of care required of one furnishing electricity, toward persons rightfully on the premises supplied, is treated in a case note in 6 L.R.A.(N.S.) 459.

The measure of duty toward a trespasser or licensee on premises on which electric wires are maintained is treated in a case note in 3 L.R.A.(N.S.) 983.

which is imperfectly insulated, is liable to an employee of the consumer for injuries caused by his coming in contact with an electric current when, to warm his hand, he puts it to the globe. -

(November 22, 1906.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Edwin P. Morrow and W. Boyd Morrow, for appellant:

Defendant owed the duty not only to appellant, to keep and maintain the socket safe, but to any and all who might come in contact with it.

Wharton, Neg. § 90; Haynes v. Raleigh Gas. Co. 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; McLaughlin v. Louisville Electric Light Co. 100 Ky. 193, 34 L.R.A. 812, 37 S. W. 851; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432; Conley v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 402, 12 S. W. 764; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; Lexington R. Co. v. Fain, 24 Ky. L. Rep. 1443, 71 S. W. 629; Owensboro v. Knox, 116 Ky. 451, 76 S. W. 191; Schweitzer v. Citizens' General Electric Co. 21 Ky. L. Rep. 608, 52 S. W. 83; Macon v. Paducah Street R. Co. 110 Ky. 680, 62 S. W. 496.

Messrs. O. H. Waddle & Son, for appellee:

An electric company is not responsible to a trespasser, or to one to whom it owes no duty.

15 Cyc. Law & Proc. p. 475; Hector v. Boston Electric Light Co. 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773; Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718.

Carroll, C., filed the following opinion:

The city of Somerset owns an electric-light plant, and rented or leased to Elmer Burton for compensation an electric globe with a brass socket, which was installed by it in a booth kept by him in the sale of confections. The globe was inside the booth, and so high that appellant, a boy seventeen years of age, who was employed by Burton, could only reach it by elevating his hands over his head. He testified, in substance, that, on the evening the injury occurred, it was rather cold and damp, had been raining, and there being no fire in the booth, he put his hand up to the globe for the purpose of warming it, when one of his fingers came in

contact with the brass socket, injuring him quite severely. Children and other persons were in the habit of visiting the place for the purchase of candies and nuts, and the globe was so situated that it might have been reached by a man of ordinary size standing on the sidewalk of the city. An electrical engineer, introduced as a witness for appellant, said that the lamp and socket was not properly insulated or protected, and that the dampness of the atmosphere added to the danger incident to coming in contact with it; that, if it had been properly insulated, there would be no danger in handling or touching it; but that, if exposed to dampness as this light was, the socket would become charged with electricity, and dangerous to handle or touch. Upon the conclusion of the testimony for plaintiff, appellant here, the court peremptorily instructed the jury to find for appellee, defendant below. It is argued for appellee that the condition of the lamp was unknown to the city, that it had received no request to repair it, nor had any notice that the dampness rendered it dangerous; and, further, that appellant was not required by his duty or business to handle or touch the lamp or socket, and in so doing was a trespasser, and the city owed him no duty, and therefore he could not recover. It was held by this court in *McLaughlin v. Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851, to be the duty of electric lighting companies or persons operating such plants, at points where people have the right to go for work, or business, or pleasure, to have the insulation or protection perfect; and for failure in this respect they must respond in damages. This doctrine was followed and approved in *Schweitzer v. Citizens' General Electric Co.* 21 Ky. L. Rep. 608, 52 S. W. 830; *Overall v. Louisville Electric Light Co.* 20 Ky. L. Rep. 759, 47 S. W. 442; *Owensboro v. York*, 117 Ky. 294, 77 S. W. 1130; *Lexington R. Co. v. Fain*, 24 Ky. L. Rep. 1443, 71 S. W. 628.

Applying the rule announced to the facts of this case, we are of the opinion that it was error to take the case from the jury. The electric globe or light by which appellant was injured was not perfectly insulated, or even properly protected. If it had been, the injury would not have occurred. Appellant was not a trespasser. He had the right to be where he was; but if he had been passing along the street, and had touched the globe with his hand as he might have done, the city would be equally liable, as it committed a breach of duty in failing to have and keep this electric globe, that was placed in a position where it might have been touched by persons walking along the streets, perfectly insulated. It is said by

counsel that the evidence does not show that the city had any control of the globe, or that it was its duty to keep it in repair. The evidence, however, does establish that the globe was installed by the city and compensation was received by it from Burton, and this imposed upon the city the duty exacted of owners and operators of electric-light plants; and it cannot escape responsibility upon the plea that the evidence did not show whose duty it was to keep this globe properly insulated. *Thomas v. Maysville Gas Co.* 108 Ky. 224, 53 L. R.A. 147, 56 S. W. 153.

The judgment is reversed, with directions for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ADDIE L. SHUTE

v.

JOSEPHINE M. BILLS et al.

(191 Mass. 433, 78 N. E. 96.)

Landlord—liability for defects.

1. The owner of property is not liable for injury to his tenant due to a hidden defect in a gutter on the property, unless he knew or ought to have known of the defect.

Same—negligent repairs.

2. A property owner may be found to have been negligent in making repairs to the gutter of a leased building to stop a leak, if the leak continued after the repairs the same as before.

Same—custom as to control of property.

3. A custom for property owners to retain control of the outside portions of property leased by them is bad.

Same—landlord's control—unchanged condition.

4. The mere fact that a property owner retains control of the roof and gutter of a building leased by him does not render him liable for injury to the tenant through their defective condition, if they remain in as good condition as when let.

(May 14, 1906.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to re-

Note.—The liability of a landlord for injuries from the defective condition of the roof when he retains the control of the same is treated in a case, note in 4 L.R.A. (N.S.) 1142.

As to the question of the liability of the landlord for injuries received in a common passageway, see case note in 3 L.R.A. (N.S.) 316.

7 L.R.A. (N.S.)

cover damages for injuries alleged to have been caused by defendant's negligence. Sustained.

The facts are stated in the opinion.

Mr. Frank H. Noyes, for plaintiff:

By virtue of being landlords, the defendants were liable for a defect in a portion which they agreed to keep in repair, though found not to retain control.

Flynn v. Trask, 11 Allen, 550; *Coupe v. Platt*, 172 Mass. 458, 70 Am. St. Rep. 293, 52 N. E. 526; *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336.

If the defendants retained control of the defective portion, they were liable.

Watkins v. Goodall, 138 Mass. 533; *Coupe v. Platt*, supra; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Lindsey v. Leighton*, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901.

If they undertook to repair, and the defect existed by reason of their neglect or want of due care and skill in making the repair, the defendants are liable.

Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548.

If the tenant took the house with a concealed defect then existing, of which neither she nor the plaintiff was notified, the plaintiff did not assume the risk of that defect, although continuing to occupy after subsequently discovering it.

Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122; *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469, 14 N. E. 117.

The custom that the owner shall be bound to make all outside repairs must be taken to be a part of the contract of letting.

Bliven v. New England Screw Co. 23 How. 420, 432, 16 L. ed. 510, 513; *Lowry v. Russell*, 8 Pick. 360; *Jones v. Hoey*, 128 Mass. 585.

Messrs. Frank N. Nay and Leon M. Abbott, for defendants:

No obligation to repair can be inferred from the fact that the owner from time to time, to keep his tenant, sees fit to make repairs.

McLean v. Fiske Wharf & Warehouse Co. 158 Mass. 473, 33 N. E. 499; *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *Kearnes v. Cullen*, 183 Mass. 298, 67 N. E. 243.

Defendant's duty to the plaintiff was no greater than their duty to Mrs. Tabor.

Roche v. Sawyer, 176 Mass. 71, 57 N. E. 216; *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909.

There is no implied duty on the landlord's part to make things better than they are.

O'Malley v. Twenty-Five Associates, 178 Mass. 558, 60 N. E. 387.

Sheldon, J., delivered the opinion of the court:

The plaintiff, with her husband and mother, occupied a one-family dwelling house owned by the defendants and situated in Roxbury, the house being hired by her mother under an oral arrangement with the defendants' agent. Early in the evening of Sunday, December 8, 1901, while she was leaving the house by the front door, she slipped upon the top step, fell, and was injured. It had snowed shortly before, and the jury might have found that her fall was due to water having dripped during the day from a leak in a gutter overhead and frozen after sunset, leaving a thin skimming of ice upon the step. She contends that the defendants are liable for her injuries, on the ground that this leak in the gutter constituted a concealed defect existing at the time when the defendants let the house, of which they then knew, or should have known, but of which they gave no information either to the plaintiff or to her mother, the tenant; and also on the ground that on its discovery after occupancy had begun the defendants' agent was notified and requested to repair it, but neglected so to do, although bound to make such repairs by express contract and also by contract implied from a general custom, by which they were bound to keep the roof and gutter in repair; and also upon the ground that the roof and gutter did not pass by the contract of letting, but remained in the control of the defendants; and that, having undertaken to repair, the defendants repaired the roof and gutter in a negligent manner.

1. Assuming, without deciding, that there was a leak in the gutter which might have been found to be a hidden defect, there was absolutely no evidence that its existence was known, or ought to have been known, before the letting, to the defendants. But, to sustain the action upon this ground, it must appear that the defendants either knew, or ought to have known, of the existing danger. *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Cutter v. Hamlen*, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 397; *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469, 14 N. E. 117; *Bowe v. Hunking*, 135 Mass. 381, 46 Am. Rep. 471; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122. Even if the landlord should discover such a defect after the beginning of the tenancy, he is under no obligation to communicate it to the tenant. *Bertie v. Flagg*, 161 Mass. 504, 37 N. E. 572. The action cannot be maintained upon this ground.

2. There was evidence from Mrs. Tabor that, after she had moved into the house, "when the roof leaked and run down through into the chambers, from the gutter

on the front steps," she spoke to the defendants' agent about that, and he sent a man who put some new shingles, and she thought pieces of tin, on the roof, and cleaned out some of the gutter. The defendants' agent also testified that he had had repairs made on the roof and the gutter, and that the shingles of the roof had been repaired and the gutter cleaned out and put in order. The plaintiff's husband also testified that he saw a cleat which had been nailed to the thick outer edge of the gutter, but there was nothing to show whether this was or was not there before the beginning of the tenancy. The plaintiff's mother also testified that the defendants' agent promised, when she hired the house, to do "any repairing needed, anything within reason." The plaintiff also put in evidence, against the objection and exception of the defendants, that there was a known custom or usage in Boston by which, when houses are entirely let without any written lease to a single tenant at will, the owner does the outside repairs, such as the roof, and gutters, and conductors. We cannot say that this evidence was incompetent, or that such a usage, if the jury found its existence to be proved, would be a bad one. See *Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081; *Hutchins v. Webster*, 165 Mass. 439, 43 N. E. 186; *A. J. Tower Co. v. Southern P. Co.* 184 Mass. 472, 69 N. E. 348. Taking all the evidence together, we think that the jury might have found that the defendants had assumed the obligation to make repairs, at any rate such outside repairs as might be needed in the roof and gutters; that notice of the alleged leak in the gutter had been given to their agent, and that they, acting through their agent, undertook to repair this leak, but that, in spite of the repairs which were made, the leak continued as before. It is true that the plaintiff herself testified that no repairs were made upon the gutter; but the jury might have believed the testimony of the defendant's agent upon this question. In that event, the defendants' liability in this action would depend upon whether or not the repairs upon the gutter were made negligently. "The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them." *Lathrop, J., in Galvin v. Beals*, 187 Mass. 250, 252, 72 N. E. 969, and cases there cited. If these facts are established, the plaintiff's rights to maintain this action would be measured by those of her mother, the tenant. *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; *O'Malley v.*

Twenty-Five Associates, 178 Mass. 555, 60 N. E. 387; Roche v. Sawyer, 176 Mass. 71, 57 N. E. 216.

The only evidence that these repairs, if made by the defendants' agent, were made negligently, was some testimony introduced by the plaintiff that, after they had been completed, the leak continued in the same manner and to the same extent as before. Doubtless the jury might have inferred from the testimony that no repairs were in fact made upon the gutter; but this was not the only possible inference. We are of opinion that, if the jury found that such repairs were made, they then might find that the work done was ineffectual to stop the leak at all; and, in view of the apparently simple character of what was needed to be done, might have inferred from this that the work was negligently done; that the carpenter who had been sent to make repairs upon the roof and gutter did his work so negligently as not to stop the leak, but to leave it as bad as before. They might have inferred, from the fact that the leak was as bad as before, that the work was improperly done. Accordingly, for the reason that the jury might have found for the plaintiff upon this ground, if, as we think they might have done, they found that she herself was in the exercise of due care, the plaintiff's exceptions must be sustained.

3. There was no evidence that the defendants retained control of the roof and gutter; but the plaintiff asked one witness whether, in houses which are let as this one was, "there is any known and established usage or custom in Boston as to who shall retain control of the outside, yard, roof of the houses;" and saved an exception to the exclusion of this question. The parties have treated the question as if a formal offer had been made to prove a custom by which, in such cases, the landlord retains control of the outside, including roof and gutters. But we think that the evidence was plainly inadmissible. It contradicts both the agreement of the parties and the rule of the law. Such a custom would be a bad one. *Boiszweski v. Middlesex Mut. Assur. Co.* 186 Mass. 589, 72 N. E. 250; *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *Benson v. Gray*, 154 Mass. 391, 13 L.R.A. 262, 28 N. E. 275; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Com. v. Cooper*, 130 Mass. 285. Moreover, if it were shown that the defendants did retain control of the roof and gutter, yet they could not be held liable upon that ground alone in this action, for it does not appear but that the gutter remained in as good condition as when it was let. *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497; *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 735.
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As there must be a new trial, we have passed upon all the questions raised by the exceptions which seem likely hereafter to be material. *Tully v. Fitchburg R. Co.* 134 Mass. 499, 505.

Exceptions sustained.

WASHINGTON SUPREME COURT.

R. CUNNINGHAM et al., Respts.,
v.

HARRY KRUTZ et al., Appts.

(41 Wash. 190, 83 Pac. 109.)

Homestead—patent—title—law governing.

1. The question, What title passes by a patent to a homestead settler on public land? must be solved by the law of the United States.

Same—right of wife.

2. A homestead settler who, after the death of his wife pending the homestead period, commutes the homestead entry, and, upon paying cash for the land at the government price, receives a patent therefor, acquires the absolute title free from any homestead interest under the laws of the state, which might pass by the will of the deceased wife.

(December 27, 1905.)

Case Note.—Effect of the contracting or dissolution of marriage after the initiation, but before the consummation, of right under homestead entry: —Section 2291 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1390), relating to homesteads, reads as follows: "No certificate, however, shall be given, or patent issued, therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his widow, or, in case of her death his heirs or devisee, or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit," etc.

As shown by the foregoing opinion, the interpretation of the above section of the Revised Statutes by the United States Supreme Court in the case of *McCune v. Essig*, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78, definitely determines the right of the widow of the homesteader where he dies pending the period of occupation required by the homestead law, or before the final proofs are filed. She succeeds to all the rights of the homesteader in the homestead to the exclusion of his heirs. From the Washington cases cited in *CUNNINGHAM v. KRUTZ*, it is apparent that the contrary rule formerly prevailed in that state. In

A PPEAL by defendants from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to partition real estate. Reversed.

The facts are stated in the opinion.

Mr. George Fowler, for appellants:

The question whether or not the plaintiffs have any interest in the premises in dispute depends entirely upon the interpretation to be placed on the Federal statutes.

McCune v. Essig, 118 Fed. 273, Affirmed in 122 Fed. 588; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244;

other states, however, the courts, even in cases decided prior to the Federal case, took the same view. Crist v. Cosby, 11 Okla. 635, 69 Pac. 885; Chapman v. Price, 32 Kan. 446, 4 Pac. 807; Newkirk v. Marshall, 35 Kan. 77, 10 Pac. 571; Perry v. Ashby, 5 Neb. 291; Richard v. Moore, 110 La. 435, 34 So. 593; Jarvis v. Hoffman, 43 Cal. 314; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017.

In Hayes v. Carroll, supra, where the homesteader died before the filing of the final proofs, the court held that his heirs, to whom the patent had been issued by mistake, held the land in trust for the widow, in whom was the equitable title; and a court of equity would enforce the trust.

As pointed out in CUNNINGHAM v. KRUTZ, the principle declared in the McCune Case seems broad enough to establish the proposition that the homesteader, in the event of the death of the wife before final proof, will take the title as his sole and separate property, unaffected by any rights that the heirs or devisees of the deceased wife would have therein according to the local law: although that specific point was not decided.

In Hall v. Hall, 41 Wash. 186, 83 Pac. 108, decided at the same term of court, and declaring the same principles as CUNNINGHAM v. KRUTZ, the wife of the homesteader secured a divorce from her husband during the period of occupation, and after the death of the husband, which occurred after the patent had been issued, attempted to secure a one-half interest in the homestead because of her relations with the homesteader at the time of the entry; but the court held that, as the marriage relation terminated before the patent issued, the wife would have no interest in the estate. After citing McCune v. Essig, the court said: "True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entry man, and that the entry man only acquires an undivided one-half interest on the death of the wife under identical circumstances. The manifest object of our community-property system is to place husband and wife on an equal footing as to their property rights; and perhaps the law should be so administered as to accord to each the same property rights on the death of the other. Furthermore, it is a well-known fact that our community system is

Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504.

When Federal statutes have been interpreted by the Federal courts, such interpretation will be adopted by this court.

Elmendorf v. Taylor, 10 Wheat. 159, 6 L. ed. 292; Hoyt v. Thompson, 3 Sandf. 416; Hoyt v. Shelden, 3 Bosw. 267.

The patent, if issued at the expiration of the homestead period, must have issued to Carlson, and must have vested the entire title in him.

Shiver v. United States, 159 U. S. 491,

utterly ignored in the administration of the Federal land laws." But the contrary view was taken in the earlier Washington case of Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005, decided prior to McCune v. Essig.

Where the death of the wife of the homesteader did not occur until after five years of occupation had expired and final proofs had been made, it was held, in Brown v. Fry, 52 La. Ann. 58, 26 So. 748, that the homestead fell into the community. This case, however, is not necessarily in opposition to the principal case, as the court distinctly based its decision upon the fact that all of the rights of the homesteader and his wife were complete, and the only reason that the legal title had not passed to the community was the fact that the government had not yet issued the patent. The obligation resting upon the homesteader had been fulfilled, and therefore no act, or failure to act, on the part of another, could deprive the community of what it had earned. This exact situation does not appear in any of the other cases noticed.

The case of Crochet v. McCamant, 116 La. 1, 40 So. 474, which was decided before the McCune Case, appears to be in direct opposition to the principle as enunciated in that case, and applied in CUNNINGHAM v. KRUTZ. In that case the court held that the acquisition of land by the homesteader, under the Federal homestead act, dated from the entry, and that the accomplishment of the mere conditions of occupation and making of final proof had a retroactive effect to the date of entry; and, consequently, the homestead became the joint property of the husband and wife at the time of the entry, even though the proofs were made and the certificate and patent issued after the dissolution of the community by the death of the wife. It appears from a reading of the opinion that the death of the wife occurred after the expiration of the five years, and this fact may distinguish this case from CUNNINGHAM v. KRUTZ; but in the opinion little weight appears to be attached to this fact, the decision turning mainly upon the fact that, immediately upon the entry, the homesteader had a conditional ownership of the land, and the accomplishment of the conditions under which he held it retroacted to the date of the entry, and consequently the land was acquired during, and fell into, the community.

40 L. ed. 231, 16 Sup. Ct. Rep. 54; Guaranty Sav. Bank v. Bladow, 170 U. S. 456, 44 L. ed. 543, 20 Sup. Ct. Rep. 425; Wagstaff v. Collins, 38 C. C. A. 19, 97 Fed. 3; Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401; McCune v. Essig, *supra*.

Until the expiration of the five years of residence and cultivation required, neither the homestead entry man, nor his wife, has any interest capable of disposal by will, or that descends to heirs.

Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Chapman v. Price, 32 Kan. 446, 4 Pac. 807; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Demars v. Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705; Tennessee Coal, Iron & R. Co. v. Tutwiler, 108 Ala. 483, 18 So. 668; McCune v. Essig, *supra*; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50.

He relinquished his homestead entry, and made, instead thereof, "a new and original entry," which gave him "a new title to the land."

United States v. Howard, 37 Fed. 666; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Zabriskie, Land Laws, U. S. 149; 14 Copp, Land Owner, p. 153.

Mr. H. E. Foster, for respondents:

Where the equitable title was vested in the community, and the legal title was not obtained until after the death of one of the spouses, the legal title would be vested in the community.

Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; Forker v. Henry, 21 Wash. 235, 57 Pac. 811; Barbet v. Langlois, 5 La. Ann. 212; Gardner v. Burkhardt, 4 Tex. Civ. App. 590, 23 S. W. 709.

Hadley, J., delivered the opinion of the court:

This is an action for the partition of real estate. The plaintiffs allege that they are seised in fee simple of the undivided half interest in the land, and that the defendants Harry Krutz and Mary E. Foster are tenants in common with plaintiffs in the ownership of the land. The defendants Harry Krutz and wife, by their answer, deny that the plaintiffs have any interest whatever in the land, either as tenants in common with the defendants, or otherwise. They also deny that the defendant Mary E. Foster has any interest in the land, except that she holds a mortgage thereon for \$500. It is affirmatively alleged in the answer that in December, 1887, one Carlson made entry upon a certain quarter section of

land, which includes the land in question, the entry being made under the homestead laws of the United States; that he continued to reside thereon until April, 1890, when he commuted the homestead entry, made final proof, paid cash for the land at the government price, received his final receipt therefor, and that, in due course thereafter, a patent was issued to him by the United States; that in July, 1890, said Carlson borrowed of one Thomas S. Krutz the sum of \$750, gave his note therefor, and to secure the same executed a mortgage upon said land, which was duly recorded. Allegations are made showing the due foreclosure of the mortgage by the assignee thereof against that part of the land here involved, a conveyance of the land under the foreclosure by the sheriff, and subsequent conveyances in direct line to the defendant Harry Krutz; that the defendant Hattie Krutz was, at the date of the conveyance to Harry Krutz, and still is, the wife of Harry Krutz; and that said land became, by said conveyance, the community property of the said two defendants. They ask that plaintiffs' complaint shall be dismissed. The answer of Mary E. Foster denies that the plaintiffs have any interest in the lands, and asks that their complaint be dismissed. The reply avers that the entry was made about December 21, 1887, and that from that time Carlson and wife were in possession of and resided upon the land; that in 1890 the wife of Carlson died testate, leaving a last will, which was duly admitted to probate; that said wife left three children as devisees under her will; that one of the children, an infant, has since died intestate and without issue; that, on the death of the wife and the probating of her will, the said children, her devisees, became the sole owners in fee simple of an undivided half interest in said land, and continued to hold the same until March, 1904, when, by deed, the two surviving children, together with their father, the surviving husband, conveyed said undivided half interest to one Shea; that thereafter said Shea and his wife conveyed to the plaintiffs. The cause was tried by the court, and resulted in a judgment for the plaintiffs, declaring that they are the owners in fee simple of an undivided half interest in the land, and awarding partition thereof. The defendants have appealed.

From the foregoing it will be seen upon what the respective claims of title are based. The respondents contend that the deceased, Mrs. Carlson, had a devisable community interest in the land, and that they are the owners, by successive conveyances, of the interest so devised. Upon the other

hand, appellants urge that, when the patent issued to the surviving husband, it conveyed to him the entire title as his separate property, and that through the foreclosure of a mortgage given by the patentee and successive conveyances thereunder the appellants Krutz and wife are the holders of the entire title. The trial court refused to receive and consider the offered evidence of appellants as to the giving and foreclosure of the mortgage, and as to the subsequent conveyances by which Krutz and wife claim title. It was the theory of the court that the land was the community property of Carlson and his deceased wife, and that, by the will of the latter, the undivided half passed to her children, through whom and their grantees it has come to respondents. Upon this theory, the court treated appellants' offered evidence as immaterial and incompetent. Respondents, however, conceded in their brief that, if the patent conveyed separate, and not community, property, they have no interest in the land. The entry was made as a homestead entry, and within less than three years thereafter the wife died. The husband did not continue to reside upon the land the required time to perfect the homestead, but commuted his homestead rights after the death of his wife, and made final proof and cash payment, in pursuance of which, in due course, a patent was issued to him. It therefore becomes necessary to determine whether the land was the separate property of Carlson, or whether it became the property of the community; and it is proper that we shall first refer to our own decisions bearing upon the question as to who obtains title from the United States through a homestead patent.

In *Kromer v. Friday*, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229, Kromer made a homestead entry, and an Indian woman lived with him as his wife. The required time of residence expired, and final proof was made. After the making of final proof, a marriage ceremony was performed between Kromer and the woman, and soon afterwards a patent was issued to Kromer. It was held that the land became the community property of the two. The holding was, however, apparently based upon the theory that the fact that the two had been living together as man and wife, and that a marriage ceremony was subsequently performed, was not conclusive evidence that there was no previous marriage between them, and that the land therefore became community property, notwithstanding that final proof was made before the ceremony was performed. In *Bolton v. La Camas Water Power Co.* 10 Wash. 246, 38 7 L.R.A. (N.S.)

Pac. 1043, it was held that, where the required time of residence upon a homestead had expired, and the wife afterwards died, but before final proof and issuance of patent to the husband, the community acquired only an equitable estate; the husband taking the full legal title, and, upon his conveyance to a grantee ignorant of the equities of the wife's heirs, both the legal and equitable titles passed. In *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, it was held that, where a woman had settled upon and improved a homestead before her marriage, and final proof was made and patent issued to her after marriage, the land became her separate property under our statute which defines as separate property of the wife all her property and pecuniary rights held by her at the time of her marriage. At the time of her marriage she had resided upon the land about four years, and, although she was not then entitled to the legal title, the court seems to have considered that, on account of her previous settlement and improvements, such equities attached as entitled her to the ultimate title as her separate property; the further fact appearing in that case that, as between the husband and wife, the land was deemed to be the wife's separate property. In *Ahern v. Ahern*, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023, the husband and wife had resided upon the homestead more than six years, when the wife died. Final proof was made after her death, and the patent was issued to the husband. It was held that the land became community property. In *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50, it was held that, where a settler upon unsurveyed public lands died, leaving no widow, and without heirs who were citizens of the United States, the land was again open to settlement, since the heirs could not succeed by right of inheritance, but by virtue only of a preference right given them by the laws of the United States if they had been duly qualified citizens. In *James v. James*, 35 Wash. 655, 77 Pac. 1082, the homesteader and his wife settled upon land, and three years afterwards the wife died. The husband completed the required residence and obtained a patent. It was said in that case that one who had been legally adopted by the husband and wife as a son was the lawful heir of the deceased wife, and had an interest in the land.

It is possible that some of the expressions in the above cases may be said to support respondents' contention here, and perhaps the conclusions upon the facts in some of them justify the contention that the decisions are decisive of this case in favor of

respondents. Be that as it may, we shall now refer to recent Federal decisions. In *McCune v. Essig*, 118 Fed. 273, the following facts existed: McCune settled upon land in this state as a homestead, and made entry thereon. Within a year he died intestate; his only surviving heirs being his widow and a daughter, who continued to reside upon the land the required time for the widow to complete the homestead rights. Mrs. McCune, having become Mrs. Donahue by remarriage, then made final proof, and a patent was issued to her. About a year after the issuance of the patent she conveyed the land to the defendants in the case cited. Thereafter the daughter instituted the suit to procure a decree establishing that she was the owner of an undivided half of the land. Her contention was that, when the land was conveyed by the patent to her mother, it became the property of the community, composed of her father and mother; that she, as the surviving heir of the father, succeeded to his interest; and that the interest was not conveyed by the mother's deed to the defendants in the action. The suit was begun in the superior court of this state for Lincoln county, and was removed to the United States circuit court. That court retained the cause on the ground that the question in the case was one which must be resolved by the laws of the United States, and decided that the widow, upon the issuance of the patent to her, took the entire title as her separate property, and that there was no community interest to descend to the daughter. This ruling was affirmed by the United States circuit court of appeals, ninth circuit. *McCune v. Essig*, 59 C. C. A. 429, 122 Fed. 588. The same case, on appeal to the Supreme Court of the United States, was in all particulars affirmed by a recent decision, rendered November 29, 1905, the opinion being written by Mr. Justice McKenna, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78. From a copy of that opinion, which has been placed before us, we here quote: "The actions of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground, to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488-4491 of the statutes of Washington provide that property and pecuniary rights owned by either husband or wife before

marriage, or that acquired afterwards by gifts, bequests, devise, or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger, Anno. Codes & Statutes. Relying on these provisions, the argument of appellant is, and we give it in the words of her counsel: 'When William McCune entered this land, he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. *United States v. Turner*, 54 Fed. 228. The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent.' But this is begging the question. What interest arose in McCune by his entry, who could upon his death fulfil the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. *Bernier v. Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244. The motion to remand was rightly overruled." After quoting the Federal statutes relating to the conditions of homestead entries and settlement (§§ 2291, 2292, U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 1390, 1394), the opinion further says: "It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die, his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who, in turn, shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the state. The law of the state is not competent to do this. As was observed by Circuit Judge Gilbert: 'The law of the state of Washington governs the de-

scient of land lying within the state, but the question here is whether there had been any descent of land.' And, against application of the state law, the learned judge cited *Wilcox v. Jackson*, 13 Pet. 498, 517, 10 L. ed. 264, 273, and *Bernier v. Bernier*, supra. In the former it was said that, whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to state legislation. In *Bernier v. Bernier* it was said that the object of §§ 2291 and 2292 was 'to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entry man's estate.' See *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829. And hence it was decided that Mrs. Donahue took the title, free from any interest or right in the appellant under the laws of the state. Against the effect of the patent conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted 'that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent.' But it is contended that, a beneficial interest having been created by the state law in McCune when the title passed out of the United States by the patent, it 'instantly dropped back in time to the inception or initiation of the equitable right of William McCune; and that the laws of the state intercepted and prevented the widow from having a complete title without first complying with the probate laws of the state. This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which § 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions of the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling."

There is no necessity for further reviewing the arguments of our own or of the Federal decisions. The above decision is final and conclusive that the question as to what title passed to Carlson must be resolved by the laws of the United States. Without regard to the community laws of this state, it follows from the decision that, when one makes a homestead entry and dies before completing the full residence period neces-

sary under the homestead law, and leaving a widow who completes the period of residence, makes proof, and procures a patent, the land becomes the absolute separate property of such widow. In so far as our own previous decisions may be in conflict with the above, when applied to a similar state of facts, they must now be treated as overruled. The facts in the case at bar are very similar to those in *McCune v. Essig*. In the other case the husband died and the widow completed the homestead title; while in this one, the wife died within the third year of residence, and the husband commuted the homestead rights and made final proof, paying cash, and procuring patent to himself. If Carlson's title had been perfected as a homestead title, we should see no difference in principle by which to distinguish it from the *McCune* Case. Our views upon this point were expressed in the case of *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, as follows: "True the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entry man, and that the entry man only acquires an undivided one-half interest on the death of the wife, under identical circumstances. The manifest object of our community-property system is to place the husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other." The additional fact in this case, that Carlson commuted the homestead entry and paid cash for the land, strengthens appellants' position. By the consent and concurrence of the United States, he relinquished the homestead entry, and availed himself of the benefits of the law granting pre-emption rights. The title conveyed to him was based upon a new consideration passing from him to the United States, a consideration entirely different from the conditions which inhered in the homestead entry. We see no escape from the conclusion that Carlson took the title as his sole and separate property. It follows that respondents have no title in the lands in question and no cause of action.

The judgment is reversed, and the cause remanded, with instructions to enter judgment dismissing the action.

Mount, Ch. J., and Rudkin, Fullerton, Crow, Root, and Dunbar, JJ., concur.

WASHINGTON SUPREME COURT.

LULU L. SHERIDAN, by Guardian, Respt.,
v.
MODERN WOODMEN OF AMERICA, Appt.

(— Wash. —, 87 Pac. 127.)

Benefit certificate—insanity of holder—promise of notice.

1. A single act of the clerk of a local camp of a mutual benefit society in attempting to contract notwithstanding a provision of the laws of the order that no act on his part shall have the effect of creating a liability on the part of the society, or of waiving any right belonging to it; which act consists of promising the representatives of an insane member to notify them of assessments,—will not bind the society so as to prevent its claiming a forfeiture of the certificate for nonpayment of dues, notice of which is regularly mailed to the member, although no notice is given to the representatives according to the promise.

Same—excuse for nonpayment.

2. Insanity of a member of a mutual benefit society is no excuse for noncompliance with his contract as to payment of dues.

Same—irregular forfeiture—acquiescence.

3. Failure for more than two years to make an attempt to secure relief from what is alleged to be an irregular forfeiture of a mutual benefit certificate, or to tender dues and assessments thereon, will be regarded as an acquiescence in the forfeiture.

(October 27, 1906.)

APPPEAL by defendant from a judgment of the Superior Court for Snohomish County in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual-benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Emery, Rourke, & Denney and Ben D. Smith for appellant.

Messrs. Bostwick & Mulvihill, for respondent:

The clerk of the local camp is the agent of the head camp, notwithstanding the by-laws provide to the contrary.

Andre v. Modern Woodmen, 102 Mo. App. 377, 76 S. W. 710; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Buchanan v. Supreme Conclave, I. O. of H. 178 Pa. 465, 34 L.R.A. 436, 56 Am. St. Rep. 774, 35 Atl. 873.

Notice of the insanity of the member, given to the clerk, is notice to the defendant company, whether communicated to it and received by it or not.

Note.—The general question as to waiver by officers of subordinate lodge of forfeiture for nonpayment of assessments is treated in a case note in 4 L.R.A.(N.S.) 421. 7 L.R.A.(N.S.)

Foster v. Pioneer Mut. Ins. Asso. 37 Wash. 288, 79 Pac. 798; Masterman v. Home Mut. Ins. Co. 5 Wash. 524, 34 Am. St. Rep. 877, 32 Pac. 458; Hart v. Niagara F. Ins. Co. 9 Wash. 620, 27 L.R.A. 86, 38 Pac. 213; Nixon v. Travelers' Ins. Co. 25 Wash. 254, 65 Pac. 195.

The law does not favor forfeitures, and, if possible, will construe all contracts of insurance to uphold, rather than forfeit, the policy.

Logsdon v. Supreme Lodge, F. U. 34 Wash. 666, 76 Pac. 292; Carpenter v. Continental Mut. Life Asso. 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 450.

When the offer to pay the assessments was made in advance, good faith required that the ones making it have an opportunity to preserve their rights, not against the voluntary act of the member, but as against the neglect caused by his inability to act.

Foresters of America v. Hollis, 70 Kan. 71, 78 Pac. 160; Niblack, Ben. Soc. 2d ed. § 272; Lavin v. Grand Lodge, A. O. U. W. 104 Mo. App. 1, 78 S. W. 325.

Crow, J., delivered the opinion of the court:

Action by the plaintiff, Lulu L. Sheridan, by Tillie Hewitt, her guardian, upon a benefit certificate issued by the defendant to one Hiram D. Sheridan, now deceased. The certificate, which was issued April 19, 1900, named as beneficiary the plaintiff, Lulu L. Sheridan, minor daughter of Hiram D. Sheridan and Tillie Hewitt. At the date of the certificate Lulu's father and mother had been divorced, and her mother had subsequently married. The plaintiff contends that, during the month of December, 1901, while Hiram D. Sheridan was in good standing, he became insane; that in March, 1902, he was committed to an asylum, where he remained until his death in June, 1904; that in December, 1901, on discovering such insanity, Tillie Hewitt, the plaintiff's mother, gave notice thereof by letter to the clerk of the defendant's local camp at Libby, Montana, advising him that, if Mr. Sheridan failed to pay his assessments, she wished to be notified, so that she might pay for the benefit of her daughter; that, in response, the clerk wrote Mrs. Hewitt that Mr. Sheridan's assessments were then paid in advance; that, when further assessments became due, he would notify her; and that he regretted to learn of the insanity of Mr. Sheridan; that the clerk afterwards failed to notify Mrs. Hewitt of assessment No. 1 for January, 1902; that Sheridan was suspended for its nonpayment; that, by reason of the failure of the clerk to notify Mrs. Hewitt, such suspension was void; that no subsequent notice was given Mrs. Hewitt;

and that the certificate, therefore, remained in full force at the date of Sheridan's death. The defendant claims that due notice of assessment No. 1 for January, 1902, was given to the assured by the clerk of the head camp in the manner provided by the contract; that he failed to pay the same and became *ipso facto* suspended on February 2, 1902; that he was never reinstated; that no notice was given the defendant of the insanity of the insured prior to his suspension; that insanity is no excuse for nonpayment of assessments; and that the alleged notice of insanity and the clerk's alleged promise to inform Mrs. Hewitt of nonpayment conferred no rights upon the plaintiff, nor did they impose any duty upon the defendant. Prior to the commencement of this action, the plaintiff tendered to the defendant all dues and assessments which had matured between January 1, 1902, and January 1, 1904, amounting to \$27.30. This tender was refused, the defendant denying liability on the certificate. On trial the jury found a verdict in favor of the plaintiff for \$1,972.70, and from the judgment entered thereon, this appeal has been taken.

The appellant, with other assignments of error, contends that the trial court erred (1) in denying its motion for a nonsuit, and (2) in denying its motion for a directed verdict. The pleadings and evidence show that the appellant is a fraternal mutual benefit association, organized under the laws of Illinois, with its head camp at Rock Island, and with numerous local camps throughout Illinois and other states; that it is organized on the lodge plan, having a ritualistic form of work, and also certain fraternal, social, and indemnity features. Hiram D. Sheridan was a member of the local camp at Libby, Montana. By the terms of his certificate, the appellant agreed, in case of his death, to pay to the respondent as beneficiary the sum of \$2,000, subject to certain conditions therein stated; one of which was that, if assessments against the assured should not be paid to the clerk of the local camp on or before the first of the month following the date of notice of the same, then the certificate should be null and void. The by-laws provided that every beneficial member who, after notice, should fail to pay any assessment on or before the first of the following month, or who should fail to pay dues in advance on or before the 1st day of April, July, October, or January, should *ipso facto* become suspended; that during such suspension his benefit certificate should be absolutely null and void; that a suspended member might be reinstated within sixty days upon payment of all arrearages, together with all fines, dues, and assessments maturing subsequent to de-

fault, provided that he was then in good health and furnished the clerk of the local camp a written warranty to such effect signed by himself; that a beneficiary member in suspension for more than sixty days but less than six months, if in good health, might be reinstated upon furnishing a certificate of good health from the camp physician after medical examination duly approved by the head physician, and upon payment of all arrearages; that no officer of any local camp was authorized or permitted to waive any of the provisions of the laws of the society relating to the contract for the payment of benefits; that no officer of any local camp should have the right or power to waive any of the provisions of the by-laws of the society; that the clerk of the local camp was declared to be the agent of such camp, and not the agent of the head camp; that no act or omission on his part should have the effect of creating a liability on the part of the society or of waiving any right or immunity belonging to it, and that he should not collect or receive assessments or dues from a beneficiary member who has been suspended, except upon reinstatement in the manner above mentioned. All by-laws of the society were, by the express terms of the certificate, made a part thereof. No payment of any assessments or dues maturing after December 1, 1901, was made by Sheridan or any other person at any time prior to his death in June, 1904, nor were any tendered except on the one occasion hereinafter mentioned. The respondent's witnesses testified that, in December, 1901, Mrs. Hewitt wrote a letter to the clerk of the local camp, advising him of the insanity of Sheridan, and requesting him to notify her so that she might pay the assessments in the event of the failure of Sheridan to do so; that the clerk, answering this letter, stated the assessments were then paid in advance, and that he would keep her notified; that, by reason of the failure of the clerk to give her any further notice, she failed to pay the assessment levied in January, 1902, not knowing that it had been levied; that in February, 1902, the clerk by letter advised her of the suspension of Sheridan for nonpayment of the January assessment, and sent her a blank certificate of health to be signed by him as a condition precedent to his reinstatement; that in response to this letter, she, on March 8, 1902, wrote the clerk in part as follows: "I have been away a little while and was not here when Lulu, my daughter, got your letter or would have seen to it at once as Sheridan was here then, but he is not here now and the last time I saw him, about three weeks ago, he was well and walking down the street, but as he has left town I cannot get him to

sign the paper, but will inclose \$3.60 to pay the dues to May 1st, and, if it is not all right, you can return the money order to me. . . . The reason I wish to keep up these dues is, he is a very reckless man now in some ways, and as I wrote you a year ago that I would keep up these dues if you would inform me when he failed to pay. . . . Now, . . . I hope you will look on my letter with some favor and make this all right; that is, if his insurance still runs to Lulu, his daughter." The original of the last-mentioned letter was produced at the trial, but none of the others mentioned by respondent's witnesses could be found. No further attempt of payment of either assessments or dues was made by the respondent or her mother, nor is it claimed that any further correspondence took place. The \$3.60 remitted by Mrs. Hewitt was returned by the clerk, he refusing to receive the same without the health certificate. The clerk denies receiving any letter from Mrs. Hewitt in December, 1901, and also denies that he wrote her the letter which she says she received from him during the same month, in which he promised to notify her of the assessments when levied. As the jury found a verdict in favor of the respondent, they necessarily believed the statements of her witnesses, and we must accept the same as true.

The contention of the respondent is that the appellant had no right to suspend Sheridan for nonpayment of dues or assessments, he being to appellant's knowledge insane and unfit for business; that appellant's agent, the clerk of the local camp, failed to notify the respondent of the levy of assessments as agreed, and that, by reason of such failure, the attempted suspension was void. It is not disputed but that notice of the January, 1902, assessment was given to Sheridan by the head clerk, in the manner required by the by-laws, and the appellant now insists that nonpayment after such notice *ipso facto* worked a forfeiture of the certificate; and that, even though the clerk of the local camp did agree to notify the respondent's mother of the assessments when levied, such agreement was not binding upon the appellant by reason of the restrictions upon his authority contained in its by-laws. We think these contentions should be sustained upon the authority of *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369, and cases therein cited. In the *Tevis* Case, the United States circuit court of appeals construed and passed upon the legal effect of the identical by-laws now before us, and we fully indorse and adopt its reasoning as controlling in this case; this being the sole instance in which it is shown that the clerk, in his course of dealing with members or

beneficiaries, violated any by-law of the society, and it not appearing that his action was the result of any customary course of procedure adopted by him towards members or beneficiaries. A single act of transgression cannot arise to the dignity of a custom so as to be impliedly ratified by the appellant. Had it been pleaded and shown that the clerk habitually violated appellant's by-laws in this or kindred matters, a different rule might possibly be applied in determining the relative rights of the parties; but that question is not now before us, as no showing of any such state of facts has been made.

The appellant further contends that the insanity of the assured is no excuse for nonpayment under the contract; and, in support of such contention cites with others the following authorities, which we think are in point: *Pitts v. Hartford Life & Annuity Ins. Co.* 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Carpenter v. Centennial Mut. Life Asso.* 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456. In following these cases we are not unmindful of the case of *Buchanan v. Supreme Conclave, I. O. of H.* 178 Pa. 465, 34 L.R.A. 436, 56 Am. St. Rep. 774, 35 Atl. 873, cited by respondent and which we regard as being against the weight of authority. The respondent most vigorously contends that, as she was misled by the act of the clerk of the local camp, the appellant had no right to forfeit the certificate, and that it should be estopped from pleading such forfeiture. Were we to concede that the clerk had power to bind the appellant when he agreed to notify respondent's mother of assessments as levied, and should we also hold that the beneficiary was entitled by reason of the insanity of the insured, of which appellant was advised, still we think no recovery can be permitted herein as the respondent and her mother, who was acting in her behalf, must be held by their subsequent conduct, covering a period of more than two years, to have acquiesced in such alleged irregular forfeiture of the certificate. At all times after March 8, 1902, they failed to make any further tender of dues or assessments, nor did they take any steps to secure relief from such suspension and forfeiture.

In *Lavin v. Grand Lodge, A. O. U. W.* 104 Mo. App. 1, 78 S. W. 325, cited by respondent, it was contended that the wife of the beneficiary had twice tendered payment of assessments which were due, but that the clerk of the local lodge had declined to accept the same for the reason that, as he alleged, the tender was insufficient in amount. No further payments were made or tendered

during the life of the assured, who died some six months later. On trial judgment was entered in favor of the beneficiary, which the appellate court reversed, ordering a new trial. Upon investigation we find that on the second trial the beneficiary again recovered judgment, and that the case again came to the court of appeals, being reported in 112 Mo. App. at page 1, 86 S. W. 600. On this last hearing the appellate court enters into a very elaborate and able discussion of the rights and duties of an assured when a certificate issued by a fraternal society has been forfeited without just cause, and announces the doctrine that it is essential for the preservation of the rights of the beneficiary under the certificate that, notwithstanding such forfeiture, the assured or his representative should offer to fully perform the contract upon his part. The court, reviewing numerous authorities, points out a clear distinction between the principles applicable to old-line life insurance companies which carry on business for profit, and those which are applicable to fraternal societies. Under appellant's by-laws and the terms of the certificate, Sheridan was required to pay quarterly dues in advance, without notice of the same. There is no showing that either he or any other person ever offered to make such payments within the two years and a half the assured lived after January, 1902. Yet the respondent and her mother, who had the certificate in her possession, must have known that nonpayment of these dues would *ipso facto* forfeit the rights of the assured, without regard to the assessments. There is no showing that, after the tender made in March, 1902, was returned by the clerk, the assured, the respondent, or her mother ever attempted to take any steps, either in the order or in any court of justice, to compel a reinstatement of the policy, or to have the alleged forfeiture declared to be void. The appellant contends that, under the by-laws of the society, the respondent should have appealed from the action of the clerk, and that, having failed to do so, she is now estopped from claiming under the certificate.

Respondent, however, calls attention to the fact that the by-laws, by their express terms, give the right of appeal to members only. This is true. Yet were we to hold that the respondent, by reason of her father's insanity, was, prior to his death, entitled to any vested right in the certificate, as against the appellant, she certainly should have taken some action to protect herself from the loss which would necessarily result from the forfeiture alleged to be void, and should have done so without unreasonable delay. Accepting her theory

of this case, we are unable to escape the conclusion that a duty was imposed upon her to at least direct the attention of the local camp to the action of its clerk, so that it might be afforded an opportunity for correcting his mistake in refusing the tender, either by taking action itself, or by causing the head camp to act. If the respondent and her representatives could be permitted to remain quiet and allow the suspension of Sheridan and the forfeiture of the certificate to continue unquestioned for the period of more than two years, without even tendering any payment of dues which necessarily matured, and could then successfully prosecute this claim against appellant, there is no reason why they could not have continued such inactivity for a period of ten years or even longer. Such a construction of the certificate would be absurd, to say nothing of its being unjust. We think the respondent acquiesced in the decision and action of the clerk, that she is now bound thereby, and is not entitled to recover.

The motion for a directed verdict in favor of the appellant should have been granted, and the trial court erred in denying the same. It is ordered that the judgment of the Superior Court be reversed, and that the cause be remanded, with instructions to dismiss the action.

Mount, Root, Fullerton, Hadley, Dunbar, and Rudkin, JJ., concur.

MARYLAND COURT OF APPEALS.

KLINGEL'S PHARMACY, Appt.,

v.

SHARPE & DOHME et al.

(— Md. —, 64 Atl. 1029.)

Monopoly—combination to effect—injury by—right of action.

Injury caused to a retail merchant because of inability to purchase goods on account of a combination among other retail and wholesale merchants for the purpose of maintaining maximum prices for the goods dealt in by them, to be made effectual by refusal to deal with persons who will not agree to maintain prices, and by threats to boycott wholesalers who deal with them, gives a right of action.

(November 2, 1906.)

Case Note.—Combination of dealers as giving right of action, where no statutory provision therefor exists, to merchant who cannot obtain goods because of such combination: ——— Abundant authority supports the propositions on which the line of argu-

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in defendants' favor in an action brought to recover damages for injuries alleged to have been caused to plaintiff by defendants' wrongful acts. Reversed.

The facts are stated in the opinion.

Messrs. John Prentiss Poe and N. Irvin Gressitt, for appellant:

The declaration presents a good cause of action.

Smith v. Nippert, 76 Wis. 88, 20 Am. St. Rep. 26, 44 N. W. 846; Delz v. Winfree, 80 Tex. 400 26 Am. St. Rep. 755, 16 S. W. 111.

Where the conduct of third parties is coerced by improper influences, such as threats of bodily harm or business boy-

cotting, the party injured by the malicious use of such influences will be entitled to damages.

My Maryland Lodge No. 186 v. Adt. 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 70 Am. St. Rep. 330, 57 N. E. 1011; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Curren v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 188, 8 Am.

ment followed in KLINGEL'S PHARMACY v. SHARPE & DOHME is based.

The courts have found occasion to hold that an absolute or conditional refusal to sell goods is not in itself unlawful. *Wills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 88 S. W. 265. See also *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454, which holds that the refusal of a manufacturer to sell, except at exorbitant prices, to a dealer who will not agree to refrain from handling the goods of competitors, is not actionable, although the dealer's business is injured thereby; *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606, which holds that the manufacturers of medicines made under trade secrets may withhold them entirely from sale, may sell them on such terms as they please, may withhold them from one person while selling them to others, and may fix the price at which the medicines may be resold.

And, though a number may agree to do what one may lawfully do, without becoming liable to a person injured thereby (see *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301, which holds that an action for damages cannot be maintained against members of an undertakers' association for refusal to furnish materials or render services at a funeral, for one who has refused or failed to pay for such services previously rendered by some member of the association), yet the same act, when done in pursuance of an unlawful purpose for which the combination has been effected, will become actionable, since it then falls within that part of the well-known definition which describes an unlawful conspiracy as a combination to accomplish an unlawful purpose by lawful means. The essential inquiry, then, is whether the object of the combination is an unlawful one.

The legality of combinations in pursuance of which restrictions have been attached to the sale of goods is the subject of discussion in the cases following.

In *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553, an action for damages for injuries to plaintiff's business and to enjoin

further injury by combining to prevent plaintiff from purchasing goods, it was held that a combination of mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or, upon his refusal so to do, to prevent those of whom its members are purchasing customers from selling goods to him, is, upon general legal principles, contrary to public policy, and void.

Murray v. McGarigle, 69 Wis. 483, 34 N. W. 522, holds that an action is maintainable by a dealer who is unable to obtain coal to carry out his contracts because of his refusal to comply with the rules of an association of coal dealers formed for the purpose of monopolizing the trade of the city.

In *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, it was held that a petition charging that defendants not only refused to supply plaintiff, who was a butcher, with animals or meat for the purposes of his business, but also conspired with others not to do so, whereby plaintiff suffered damage, states a cause of action.

In *Hawarden v. Youghiogheny & L. Coal Co.* 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472, it was held that a retail coal dealer, who had been unable to obtain coal because of a combination between wholesalers and favored retailers to monopolize the business, enhance prices, and drive retailers, not members of the combination, out of business, may maintain an action against the conspirators for the damages caused thereby; and this although the court recognized the right of several persons to combine, in the absence of any statute to the contrary, for the purpose of increasing their business and making greater gains by any legitimate means, even though, as an incidental result of the combination, others are driven out of business.

So, also, an action lies where the refusal to sell is dictated by a combination which is declared unlawful by statute. See *Ertz v. Produce Exch. Co.* 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743, where the constitution and by-laws of the defendant corporation regulated the credit to be allowed its members, discriminated in the prices to be paid for produce against

Rep. 159; John D. Park & Sons Co. v. National Wholesale Druggists' Assn. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Walker v. Cronin, 107 Mass. 555; Van Horn v. Van Horn, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485; W. W.

Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Loder v. Jayne, 142 Fed. 1010; Ertz v. Produce Exchange, 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; Bohn Mfg. Co. v. Hollis, (Bohn Mfg. Co. v. Northwestern

persons not members, controlled the delivery of goods, and provided a penalty by fine and suspension for offending and defaulting members; Straus v. American Publishers' Assn. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107, in which the refusal to sell was due to an agreement entered into between publishers of and dealers in books, whereby they agreed not to sell books of any kind to dealers who should be suspected of selling copyrighted books at less than the net price fixed by the publishers, or who should supply books to dealers who were suspected of making such sales.

A case which it is interesting to compare with KLINGEL'S PHARMACY v. SHARFE & DOHME because of the different conclusions reached upon a state of facts which, as stated in the complaint to which demurrer was taken, is essentially similar, is that of John D. Park & Sons Co. v. National Wholesale Druggists' Assn. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136, in which it was held, by a divided court, that a merchant of large means, who is in position, by reason of large orders, to obtain more advantageous prices from manufacturers than others, so that he can undersell them in the market, has no cause of complaint if they combine, and, by representation and persuasion, induce the manufacturers to refuse to sell to him unless he will agree to maintain prices to consumers. The judge writing the opinion, however, seems to have understood that the combination in question would not prevent the purchase of goods by the plaintiff at the so-called "long" price. The decision seems to be based upon the theory that the plan adopted, of granting rebates to dealers who would agree to maintain prices, did not operate to restrict trade, but was, in effect, the creating of an agency on the part of the proprietors by which any druggist might receive the goods and dispose of them as an agent of the principal, receiving the commissions agreed upon therefor. The court further said that the members of the wholesale druggists' association clearly had a right to work for their own interest, and a right to devise and adopt a plan for the conduct of the business in which they could make a commission or a profit, so long as they did not unlawfully interfere with the rights of others; and that they might lawfully petition the manufacturers to adopt the plan devised by them, and might support their petition with all of the arguments and persuasions that they could bring to bear, so long as they did not resort to threats or intimidation. And it was further held that there was no boycott of the 7 L.R.A. (N.S.)

plaintiff, since it could obtain goods at the long price, and might at any time avail itself of the rebate provision by agreeing to maintain the selling price.

As bearing upon the general question of the right to recover damages for interference with business by a combination which imposes restrictions as to the persons with whom its members may do business, reference may be made to the cases of Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, which holds that an action will lie on behalf of a quarry owner against members of a voluntary association of dealers in stone, of which he is not a member, who enforce a by-law of the association imposing a fine upon members who deal with those who are not members, so that members who desire to deal with nonmembers are coerced from doing so, to the ruin of the business of the quarry owner; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607, in which it was held that an action for damages for conspiracy was maintainable by a partnership engaged in the business of polishing granite, which was unable to obtain business because of a resolution of the granite manufacturers' association not to do business with persons not members of the association, which was rendered effective by a by-law imposing a fine upon any member who should violate it; and Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003, in which it was held that a by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge of it is reputed to patronize nonunion members, or to any person whose family, for the occasion, patronize a nonunion livery, is unlawful as against public policy, and that therefore damages may be recovered by one from whose service a hearse and carriages at a funeral were withdrawn in pursuance of such by-law.

By the Federal anti-trust act, and also by some of the state anti-trust laws, express provision is made for the recovery of damages by any person suffering injury on account of the combinations thereby declared unlawful. What combinations come under the ban of such statutes is not within the scope of this note. A discussion of the question may be found in an exhaustive note in 64 L.R.A. 689, on Illegal trusts under modern anti-trust laws; and see also the case of Jayne v. Loder, herewith reported, and decisions collected in the case note there-to appended.

Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119.

Messrs. Gans & Haman, George A. Solter, and Charles Markell, Jr., for appellees:

A "conspiracy" not to sell to the plaintiff is not actionable.

Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; 8 Cyc. Law & Proc. pp. 646, 647; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; My Maryland Lodge No. 186 v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721.

To become actionable, facts must be alleged which show that the damage done was not merely incidental to lawful competition, but was done by the defendants without legal justification.

Mogul S. S. Co. v. McGregor [1892] A. C. 25; Macauley v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

The allegations of "boycotting," "blacklisting," "threats," and the like, are all mere conclusions of law.

Leppert v. Flags, 101 Md. 71, 60 Atl. 450.

Mr. Vernon Cook also for appellees.

McSherry, Ch. J., delivered the opinion of the court:

The question now before us is merely one of pleading, and involves only the sufficiency of the averments of the declaration. To the declaration the defendants demurred, and the superior court of Baltimore city sustained the demurrer and entered judgment for the defendants for costs, and from that judgment this appeal was taken.

In order to determine whether the ruling of the superior court was correct, it will be necessary to set forth with some fullness the allegations of the declaration; and the objections which have been urged against its legal sufficiency will then be stated and considered. The declaration avers that Klingel's Pharmacy, of Baltimore city, the plaintiff, is a duly licensed, incorporated retail vendor of drugs and druggists' supplies; that it was and still is able, ready, and willing to pay cash for all kinds of drugs and druggists' supplies needed by it and suitable for the proper conducting of its said business; that the defendants the Calvert Drug Company and Sharpe & Dohme 7 L.R.A. (N.S.)

are corporations which have been for some time and still are engaged in the business of selling drugs and druggists' supplies; that the other defendant the Baltimore Retail Drug Association is a corporation formed and organized for the purpose, among other things, of unlawfully maintaining among dealers in drugs and druggists' supplies the maximum rate schedule of prices and of preventing, in restraint of trade, all vendors of drugs and druggists' supplies, who are unwilling to acquiesce in and submit to the prices so fixed by it, from buying at any price the drugs and druggists' supplies needed and desired by them in their business, by the unlawful coercion of threats that any and all vendors of drugs and druggists' supplies who shall sell for less than the schedule prices shall be themselves blacklisted, and all sales of drugs and druggists' supplies be refused them; that all the members of said retail drug association are bound by an agreement not to sell such supplies to any person or corporation who will not agree to maintain its maximum schedule of prices; that the plaintiff has steadily refused to become a member of said Baltimore Retail Drug Association, or to unite with it, and with its members, and with the other named defendants, in said combination and conspiracy to coerce the dealers in drugs and druggists' supplies to maintain said established prices by refusing to sell to them and by threats that, unless they shall so maintain the same, they shall be boycotted and placed on the blacklist, and be disabled from buying any drugs and druggists' supplies whatever; that, though the plaintiff has repeatedly applied to the Calvert Drug Company and to Sharpe & Dohme, and to sundry other druggists, to sell to it drugs and druggists' supplies, tendering itself ready, able, and willing to pay cash, yet the said defendants and said other druggists have refused to sell it drugs or druggists' supplies at any price whatsoever, because of said unlawful conspiracy and combination, coupled with the threat that for any violation of such unlawful combination and conspiracy the parties violating it should themselves be blacklisted and all sales be refused to them; that the avowed object of the conspiracy was and is to maintain in restraint of trade a maximum price of drugs and druggists' supplies, and to compel the plaintiff to become a member of said combination and to agree to charge all its customers such maximum price or to be driven out of business; that the retail drug association is wholly composed in its membership of such vendors, and that the entire power of the association and of its members is unlawfully exerted to coerce, by blacklisting and by potent and effective

threats of boycotting, the illegal purposes and acts aforesaid; that the wrongful refusal of the Calvert Drug Company, and of Sharpe & Dohme, and of other parties, to sell to the plaintiff, was and is the direct result exclusively of said unlawful combination and conspiracy and of the wrongful actings and doings of said retail drug association in carrying out the unlawful object and purpose of said conspiracy; that the action of the defendants is not an action taken by them in the bona fide exercise of their supposed right to sell or to refuse to sell to whomsoever they please, nor in the bona fide exercise of their supposed right to advise other vendors as to selling or not selling their drugs and druggists' supplies, but, on the contrary, that, by the said combination and conspiracy, the defendants did wrongfully and maliciously intend to injure and destroy the plaintiff's business, which they have succeeded in doing; and that such injury to the business of the plaintiff is the direct result of said illegal, malicious, and wrongful conspiracy, and of the acts done in furtherance thereof.

Here, then, it is distinctly charged that there is an unlawful conspiracy to exact and to maintain a maximum schedule of prices for drugs and druggists' supplies in restraint of trade; and it is with equal directness alleged that, because the plaintiff will not enter into that combination and conspiracy, no drugs or supplies have been or will be sold to it by the defendants, and that no other dealer in those articles is or will be allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action of the defendants was not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they pleased, but was taken with a malicious intent to injure and destroy the business of the plaintiff, whereby the plaintiff has been wholly deprived of the ability to purchase supplies, and has as a result been prevented from pursuing its lawful avocation. By sustaining the demurrer, the superior court held that these facts, if true, did not constitute a valid cause of action. We are not apprised by the record as to the ground upon which the trial judge based his decision. But the reasons assigned in the brief of the appellees to sustain that ruling are, first, because (a) an agreement or conspiracy not to sell to the plaintiff is not actionable, and because (b) no facts are alleged that amount to unlawful coercion by the defendants to the damage of the plaintiff; secondly, because the declaration is bad for misjoinder. These grounds are not tenable, as we shall see in a moment. They have been assumed, obviously, in con-

sequence of a misinterpretation of the averments of the *narr*.

In the last analysis it will be seen that there are three salient facts averred in the declaration: First. A combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies is asserted to exist between the defendants and others in restraint of trade. That combination, if it does exist, and we are bound to assume that it does when dealing with the issue raised by the demurrer, is a criminal conspiracy at the common law, and is punishable by fine and imprisonment after indictment and conviction. It is the offense of forestalling the market, and is defined to be every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise. *Roscoe, Ev. 437; 3 Inst. 196; 3 Bacon, Abr. 261; 1 Russell, Crimes & Misdemeanors, 169.* As it creates a monopoly it was held to be unlawful at the common law as being in restraint of trade and against public policy. *Mitchell v. Reynolds, 1 P. Wms. 181.* The English statutes on this subject, which were merely declaratory of the common law, were repealed by 7 & 8 Vict. chap. 24. In the United States, while we hear little now about forestalling, engrossing, or regrating, we hear much of "corners" and "trusts" which are, in many instances, the old offenses under new names, since they are frequently attempts by a combination or conspiracy of persons to monopolize an article of trade or commerce and so to enhance its price. Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. *Addyston Pipe & Steel Co. v. United States, 175 U. S. 244, 44 L. ed. 141, 20 Sup. Ct. Rep. 96.* Though this was said by the Supreme Court in a case which arose under the anti-trust act of Congress of July 2, 1890, it equally applies to combinations and conspiracies of the character described in the declaration set forth in the record now before us. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the

purposes of the latter, whether of extortion or mischief; and the same proposition in one form of expression or another is laid down in all the criminal law. Bishop, *Crim. Law*, § 172; Desty, *Crim. Law*, § 2; 3 Chitty, *Crim. Law*, § 1138; Archbold, *Crim. Pr. & Pl.* 1830. A "corner," when accomplished by confederation to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *People v. Melvin*, 2 Wheeler, C. C. 262; *People v. North River Sugar Ref. Co.* 2 L.R.A. 33, and notes (54 Hun, 355, 3 N. Y. Supp. 401). In *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485, it was ruled that an action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage. The cases of *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, and *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411, decide nothing at variance with the principles just stated. They hold that an act which does not constitute a cause of action when done by one person does not become actionable merely because it has been done by conspirators; that an unlawful combination to do an act, which, if done, would injure another, does not of itself and without more furnish a ground for a civil suit; and finally, as a corollary to the previous proposition, that, though a conspiracy to do an injury exists, a plaintiff cannot recover against the conspirators unless some act has been done in furtherance of the conspiracy which has resulted in damage to him. "The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie." *Kimball v. Harman*, *supra*. Having described a combination which, at the common law, is a criminal conspiracy, the declaration proceeds to set forth the acts done in execution of the unlawful conspiracy, and to aver that they were maliciously done, and then to allege the injury resulting therefrom.

The second salient fact averred in the *narr.* consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold: First, a refusal by the defendants to sell to the plaintiff,—an act they would have the legal right to do if, when done, it were not done in the execution of and to carry into effect a criminal conspiracy in restraint of trade; and, secondly, coercion and intimidation practised by the defendants upon other vendors of like commodities, by means of threats to blacklist and to boycott such vendors, if they sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from sell-

ing those articles to the plaintiff, unless it joined the association.

"It is a part of every man's civil rights," said Judge Cooley, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley, *Torts*, 278. Again: "The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a [legal] right to do another can have no right to complain of." *Id.* 688. It was upon this principle that the decision in *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119, was placed. In that case a large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard; and they provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact to all the members of the association, and it was held that no action would lie, and that there was no ground for an injunction. There was nothing unlawful in this. Each member of the association had the legal right to refuse to sell the lumber which he owned, if he saw fit to refuse, and the collective refusal of all the members was equally lawful. So, too, the defendants in this case had a perfect legal right to refuse to sell to the plaintiff any drugs and druggists' supplies owned by them, and it would have been wholly immaterial whether that refusal was the result of whim, caprice, prejudice, or malice, if the bare refusal to sell had been the head and front of their offending. But the refusal to sell was not the exercise of a legal right, if that refusal were a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares, and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. While an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of by only one, yet the same act may be unlawful when it is a means of

accomplishing an unlawful end. An act performed in furthering an unlawful enterprise cannot be a lawful act, though the same act would be free from censure if done with some other view. If it be conceded that a person has the lawful right to do a thing irrespective of his motive for doing it, the proposition that an act lawful in itself is not converted by a bad motive into an unlawful act is a mere abstract truism. But if the meaning of the proposition is that when a person or an aggregation of persons, if influenced by one kind of motive, has a lawful right to do a thing, the act is still lawful when done with any motive; or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances,—then the proposition is neither logically nor legally accurate. In so far as a right is absolutely and unqualifiedly lawful, it is lawful whatever may be the motive of the actor; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and the motive combined. *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. The intent or knowledge with which an act is done may make a lawful act unlawful. It is no offense to receive stolen goods; it is an offense to receive them knowing them to be stolen. The act of receiving the goods is identically the same in each instance. In the one case it is lawful, in the other the same act is unlawful because the *scienter* makes it so. To utter forged paper is no offense, but to utter it knowing it to be forged is criminal. It is the same act in each instance, but it is lawful or unlawful according to the absence or presence of a guilty knowledge. Hence it is fallacious to say that an act which is lawful can never become unlawful, and equally fallacious to say that, though it is lawful for a person to refuse to sell to another, it is also lawful for the same person in combination with others to likewise refuse to sell when such refusal forms part of a scheme to raise and maintain the price of commodities in restraint of trade, and is not the bona fide exercise of their right to refuse to sell.

The declaration goes a step farther and charges that the defendants coerced other vendors of drugs and druggists' supplies to abstain from selling those articles to the plaintiff, and that they did this by means of threats of blacklisting and boycotting such vendors if they should sell to the plaintiff while it was not a member of that combination.

tion; by reason of which threats those vendors were intimidated and were deterred from selling to the plaintiff. The plain meaning of all this is: The defendants notified the plaintiff that, unless it entered into the union or combination, and charged the same prices which other members thereof were required to charge, the defendants would, by threats of coercion, by blacklisting, and by boycotting other dealers, deprive the plaintiff of the ability to carry on its lawful business. Is such an interference with the legal right of an individual to conduct a lawful business in a lawful way tolerated by the law? And can it be permitted to flourish unscathed because no open deeds of violence or breaches of the peace have been committed? It would be a reproach to the law if such were the case. A boycott means the confederation, generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. 8 Cyc. Law & Proc. p. 639. The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment. *My Maryland Lodge No. 168 v. Adt*, 100 Md. 248, 68 L.R.A. 752, 59 Atl. 721. While an owner of property has the legal right to refuse to sell it to another, and while, as in the case of *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.*) *supra*, several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages, and in fact may refuse to work unless such better wages are obtained, still "the law does not permit either an employer or employee to use force, violence, threats of force, or threats of violence, intimidation, or coercion, to secure these ends (*My Maryland Lodge No. 168 v. Adt, supra*); nor does it permit vendors to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their own method of conducting a lawful business in a lawful way. In *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327, it was held that a conspiracy by a number of persons that they will, by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union, would be restrained.

The case at bar involves no right of labor; but the principles which have upheld the ju-

jurisdiction of courts to intervene to prevent injury and loss that would result to both employer and employee, if a threatened strike or boycott were not prevented, are broad enough to include the situation presented by the declaration now before us. In the case of *Plant v. Woods*, supra, it was held that members of a labor union were entitled to an injunction restraining the members of another union, from which they had withdrawn, from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. In the course of the judgment it was said: "It is true, they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. . . . Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this." If these facts warrant a court of equity in restraining anticipated injury, why do they not furnish a sufficient ground to enable a court of law to award damages for the injury which they have actually caused? The coercive threats of blacklisting and boycotting have been as efficacious in restraining the minds of the persons upon whom they operated according to the averments of the *narr.* as would have been the consummated boycott itself; and the result to the plaintiff's business has been just as disastrous as though the persons who have been deterred or terrorized by these threats from selling to it had been in fact blacklisted by the defendants. The threat to boycott produced the consequences intended by the defendants as completely as an actual boycott would have done; and it is no answer for them to say that no other overt act, or no act involving a breach of the peace, was done to make effective their unlawful combination. The threatened boycott was successful. It deterred persons from selling to the plaintiff, and as a direct result ruined the plaintiff's business. These

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are the allegations of the *narr.*, and, if proved to be true, they show an injury to the plaintiff as the direct consequence of the lawless acts of an unlawful confederation, and entitle the plaintiff to recover.

The threat to injure the business of the persons who might sell to the plaintiff was just as efficacious in preventing them from doing the thing they were warned not to do, and therefore just as potent in causing damage to the plaintiff, as an actual boycott would have been. A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent. *Anderson's Law Dict.* That such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action, has repeatedly been decided. The principle is stated by Mr. Addison in these words: "Injuries to property, indirectly brought about by menaces, false representation, or fraud, create as valid a cause of action as any direct injury from force or trespass. Thus, if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done." *Addison, Torts*, 20. The threats were overt acts in the scheme of the conspiracy, and were as effective in accomplishing the result intended to be attained as would have been an agency or instrument of physical force had it been resorted to.

The damages alleged to have followed the acts and conduct of the defendants are charged to be the direct and necessary results of those acts and that conduct. Every element, therefore, which is required to make out a valid cause of action is distinctly set forth in the *narr.*, and the demurrer should have been overruled, unless there has been a misjoinder of defendants. It is insisted that the retail drug association should not have been made a party, but the answer to this objection is found in the *narr.* itself, since by appropriate averments it charges that defendant with a complicity in and as being the medium to execute the various illegal acts which go to make up the cause of action.

Of course, what has been said must be understood as applying to the case as made by the pleadings. We know nothing of or concerning the facts which a trial of the issues may elicit. For the error committed in sustaining the demurrer, the judgment will be reversed, with costs.

Judgment reversed, with costs above and below, and new trial awarded.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

EBEN C. JAYNE et al., Pliffs. in Err.,
v.

C. G. A. LODER.

(— C. C. A. —, 149 Fed. 21.)

Verdict— incompetent evidence—remittitur.

1. A verdict for damages founded in part on incompetent evidence cannot be corrected by the court's requiring a remittitur of the amount, made up of the items to which the incompetent evidence related.

Monopoly—refusal to supply goods.

2. The owner of a proprietary medicine may lawfully fix the price and name, the terms and conditions, at and upon which alone he will supply his product to the trade, refusing to deal with those who refuse to comply with such conditions.

Trust—restraint of trade—maintenance of price.

3. That each proprietor and wholesaler of patent medicines is permitted to determine for himself to what retailers he will refuse to sell does not prevent an undertaking on the part of associations of pro-

prietors, wholesalers, and retailers to prevent rate cutting from being within the Sherman anti-trust act, if they bind themselves by an agreement not to sell to aggressive cutters of prices, and the agreement is enforced by the retailers notifying wholesalers who are aggressive cutters, and putting upon the list of aggressive cutters all wholesalers who do not desist from selling to persons on the list so furnished; the result of which is greatly to increase the cost of proprietary medicines to consumers throughout the country.

Conspiracy—unauthorized acts—liability.

4. Persons agreeing to a plan to maintain the prices of proprietary medicines by refusing to sell to aggressive cutters are not, unless they expressly agree thereto, responsible for the acts of a retailers' association which is a party to the agreement, in putting in force coercive measures against aggressive cutters by requesting wholesalers of general druggists' supplies to desist from selling to aggressive cutters, and reporting their replies to the organized retailers; the effective working of which would drive the aggressive cutters out of business.

Case Note.—Combination of dealers as giving right of action for damages under Federal anti-trust law to merchants thereby restricted in, or prevented from, obtaining goods:—By § 7 of the Federal anti-trust act of 1890 (26 Stat. at L. 210, chap. 647, U. S. Comp. Stat. 1901, p. 3202), it is provided that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy; and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Since the right of action of any dealer who is restricted in, or prevented from, obtaining goods, must depend upon whether the contract or combination of which complaint is made comes within the scope of the act, the main question presented in the class of cases under discussion is the same as in cases of criminal prosecutions under the act, which may be found in an exhaustive note in 64 L.R.A. 689, on Illegal trusts under modern anti-trust laws.

In *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, Affirming 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27, it was held that damages were recoverable by a dealer who, by reason of an association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fireplace fixtures, in which the dealers agreed not to purchase from manufacturers not members of the association, and not to sell unset tile to

nonmembers for less than list prices, which were more than 50 per cent higher than prices to members; while the manufacturers agreed not to sell their products or wares to nonmembers at any price under penalty of forfeiture of membership,—was unable to procure tiles except from the local dealers and at the excessive price charged nonmembers of the association.

In *Ellis v. Inman, P. & Co.* 65 C. C. A. 488, 131 Fed. 182, it was held that a cause of action under the statute was stated by a complaint filed by a builder in an action for damages under the Federal anti-trust act, alleging that in his business he had occasion to purchase rough lumber from mills located in a neighboring state, and was unable to obtain finished lumber from the defendants, who comprised all the manufacturers and dealers in the city in which he was doing business, because of an agreement among themselves that they would not sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, unless such consumer would pay the defendants the difference between the price he paid for lumber so bought from others and the price charged by defendants therefor, and should promise thereafter to buy all his lumber from them.

And in *Mines v. Scribner*, 147 Fed. 927, it was held that a dealer who could not buy books because of a rule adopted by a publishers' association controlling 90 per cent of the book business of the country, that they would not sell any books to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices, had a cause of action for damages to his business, occasioned thereby.

Same—evidence.

5. In an action against members of a combination in restraint of trade having for its object the driving out of business of aggressive cutters of prices, evidence is not admissible of other measures adopted by only part of the members of the former combination, which are separate and distinct from it, unless they are shown to have been agreed to by all the defendants.

(December 3, 1906.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover damages for injuries alleged to have been inflicted upon him by a combination in restraint of trade. Reversed.

The facts are stated in the opinion.

Argued before Dallas and Gray, Circuit Judges, and Archbald, District Judge.

Mr. W. Horace Hepburn, for plaintiff in error, H. K. Mulford Company:

The tripartite agreement was lawful.

John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

Where an association is formed, whose objects and purposes are legal and laudable, and its powers are afterwards abused by those who have the control and management of it, only those who misuse it or give consent thereto are liable.

Com. v. Hunt, 4 Met. 120, 38 Am. Dec. 346.

No manufacturer is under any duty or obligation to sell his product to third persons; and if, acting under his own uncontrolled volition, he refuses arbitrarily or capriciously to sell, or even because he believes he will thereby secure the good will of his customers, he incurs no liability to third persons thus refused.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 460; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 233, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119.

Messrs. Irving P. Wanger and John G. Johnson also for plaintiffs in error.

Mr. Henry J. Scott, for defendant in error:

The mere fact that the subject-matter of an agreement or contract in restraint of trade was articles prepared under secret processes, recipes, and formulas, which were sold under trade names or marks, does not protect the combination from the provisions of the anti-trust act.

Bobbs-Merrill Co. v. Straus. 139 Fed. 155. 7 L.R.A. (N.S.)

The facts show a combination in violation of the Sherman anti-trust act.

United States v. Coal Dealers' Asso. 85 Fed. 252.

Archbald, District Judge, delivered the opinion of the court:

This case was an involved and tedious one, and the reluctance of counsel to retry it is not to be wondered at. The suggestion at bar, however, that there should be no reversal unless it could be without a venire, was not put in shape to be acted upon; and, as material error has been assigned which cannot be passed by, notwithstanding the painstaking care with which the case was considered and the correctness with which, in the main, it was disposed of, it must nevertheless go back and be tried over.

The error which lies on the surface is the attempt of the court, by a reduction of the verdict, to eliminate items of damage with regard to which there was admittedly no sufficient evidence. The damages claimed by the plaintiff were \$34,416.72, made up as follows: Compensation for extra time and labor, covering a period of four years, \$20,000; 8 per cent increased cost on \$96,000 worth of proprietary medicines purchased, \$7,680; extra clerk hire for four years, \$4,000; interest for four years on \$10,000 increased capital required, \$2,700; loss of profits on sales in June and July, 1904, \$36.72. The jury gave a verdict somewhat less than this, for \$20,738, which the court, on a rule for a new trial, still further reduced to \$10,880.52, to which extent alone it was figured there was evidence to sustain it. Loder v. Jayne (C. C.) 142 Fed. 1010. It is not necessary to follow the steps by which this result was reached, or the reasoning by which it was sought to be justified. It is sufficient to note that the evidence with regard to the first and fourth items of claim was held to be insufficient, and that the item of clerk hire was found to be substantiated to the amount of but \$3,164. Putting this and the remaining two items together, the verdict was allowed to stand for the aggregate; all above that being required to be released.

The error which was so committed is manifest. The admission of incompetent evidence could not be cured in any such way. The verdict rendered is based on the whole of it, good and bad, and there is no means of knowing by what items the jury were influenced, or how far the items which are now allowed were accepted by them, or entered into their calculations. As it stands, the verdict is judge made; the only virtue in it being that it is within the a-

mount assessed by the jury. But that coincidence does not help it, the amount so found being the result of evidence improperly submitted for their consideration, the only remedy for which was to grant a new trial. *Jacoby v. Johnson*, 56 C.C.A. 637, 120 Fed. 487. See also *Watt v. Watt* [1905] A. C. 115.

More important, however, is the question which is raised, whether the defendants are in any respect liable. The action is for damages, under the act of Congress of July, 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), commonly known as the "Sherman anti-trust law," the defendants being charged with having entered into an unlawful combination injurious to the plaintiff, within its terms. The sections which obtain are given below.* The drug trade is the one affected; the plaintiff being a retail dealer doing business in Philadelphia, and the defendants variously engaged as wholesale or retail druggists or manufacturers of patent medicines and pharmaceutical supplies. The plaintiff is the subject of trade animosity because he does not maintain the price of medicines as the defendants think he ought to, and as they have agreed among themselves that they shall be. He is what is known as an "aggressive cutter," against whom and others similarly actuated the acts complained of are directed.

That which is charged to be a combination in violation of the act consists primarily in what is known as the "tripartite plan," so called because of its being entered into by the three affiliated associations in the drug trade,—the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists,—of one or the other of which the defendants are members. The purpose was to maintain the retail prices of patent or proprietary medicines by combined action, which was recognized as neces-

sary to accomplish it. These medicines, being compounded according to secret formulas by those who originate them, are made popular by extensive advertising, and are supposed to be retailed to the consumer at uniform prices, fixed by the proprietors and named on the package. In some parts of the country this is carried out, but in others, and particularly in the large cities, where competition is keen, there has for a long time been a cutting of prices by the retailer, which has reacted on the jobber or wholesaler, as well as the proprietary, demoralizing all branches of the trade. This condition was the subject of extended discussion and animadversion for a number of years at various meetings of the several associations involved; different means for remedying it being proposed. The plan finally formulated was adopted upon an overture from the retailers at the annual meeting of the wholesalers at Chicago in September, 1900, in which the proprietors as associate members participated. It seems to have had its inception in a resolution passed at the preceding annual meeting of the wholesalers, in conformity to which the chairman of the proprietary committee and the chairman of the executive committee of the retailers sent out, in March, 1900, a confidential circular, in the joint names of the two associations, to various patent medicine proprietors, urging them for the future to confine their best price sales to a uniform list of jobbers to be selected as wholesale agents. A number of prominent proprietors, who had already agreed to the proposed policy, was given; and, in order to make it effective, it was urged that each should send out to his wholesale distributing agents a printed price list, giving the regular rebates on goods when ordered in certain quantities, to be restricted, however, to those who did not divide quantities with others, or quote or sell these preparations, either directly or

*"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or

with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

indirectly, or permit them to be disposed of in any way, at less than the prices stated. Favorable responses were received to these circulars; but, at the suggestion of members of the retail trade, as well as in pursuance of views expressed by a large percentage of the jobbers, it was decided that the selection of the list of wholesale agents, to whom alone best price sales should be made, should be subject to certain conditions: (1) That jobbers, through their salesmen, should refrain from running down proprietary goods, and should sell whatever was called for by the customer without reference to any particular article happening to pay a higher profit; (2) that they ask no further discounts than already allowed; (3) that each jobber discontinue his so-called nonsecret department (referring to substitute preparations offered in place of proprietary medicines called for); and (4) that they refrain from selling proprietary preparations at any price, either directly or indirectly, to aggressive cutters or brokers; an aggressive cutter being defined as a dealer who was so designated by 75 per cent of the local trade at any given place. The plan so recommended was adopted, not only, as already stated, by the National Wholesalers' Association, but by the proprietors and retailers as well, and became the so-called "tripartite agreement" in suit. To be successful, it required the adherence and concerted action of the members of each association, and this was secured by direct appeal and individual assent. As the result of it, the proprietors sold only, thereafter, at uniform and fixed prices, to those wholesalers and jobbers who agreed to maintain prices and not sell to aggressive cutters and brokers; the recognized list of such jobbers being furnished to the proprietors by the chairman of the proprietary committee of the wholesalers, and the list of aggressive cutters, as reported by local associations of retailers, whose organizers investigated the matter, being made up and sent out to jobbers and proprietors by the secretary of the national retailers. If a wholesaler failed to regard this list, and sold to an aggressive cutter, he was promptly reported, and his name added to it. A pink slip was also sent out to all retail druggists who were members of the retailers' association, calling attention to the fact, and insinuating that such individual action be taken by each, protective of his own interest, as might seem advisable; a cessation of dealing being plainly intimated. And this was followed, in case of a correction of his ways by the wholesaler and his reinstatement, by a yellow slip, announcing that he was entitled

to the same favorable consideration as before.

Notwithstanding, however, the seemingly drastic character of these provisions, the aggressive cutter having still a certain margin on which to trade if not thrive, at the annual convention of the National Retailers' Association at Cleveland in 1902, it was resolved "that . . . the secretary be instructed to request all manufacturers of chemicals, pharmaceuticals, plasters, dressing, and like products, handled by the drug trade, to desist from selling to aggressive cutters, or suppliers of cutters, when solicited to do so by the respective local associations; and that the retail druggists shall be made acquainted with the responses to such requests, in such manner as the executive committee may deem best."

This is the so-called "resolution C," to be referred to more fully by that name as we proceed. Under the date of November 6 following, the national secretary accordingly addressed a circular letter to each of the manufacturers indicated, propounding the question whether, when specifically requested by local associations of retail druggists throughout the country affiliated with the National Retail Association, they would refuse all sales to those parties whom the various manufacturers of proprietaries had designated as aggressive cutters. To this appeal a large majority of the manufacturers made favorable reply; but, others having failed to do so, a second circular was issued, May 1, 1903, again calling attention to the matter, and notifying the parties addressed that there would be published in the official paper of the national association, called "Notes," a list of those who acquiesced and those who did not, requesting definite answer, as before. "It is believed," as it is significantly said in closing, "that a little reflection will convince you of the desirability of co-operating with the secretary of the National Association of Retail Druggists in the discharge of the important duty that has been laid upon him." The second circular brought in a large number not secured by the first; the names of several of the defendants being found in the published list. The resolution under which this action was taken did not suggest the specific use which was expected to be made of the information conveyed by the publication, but several who had given in their adherence to the plan having fallen by the way, an honor roll was proposed later on, which should contain the names of those wholesale druggists and jobbers who refused, in the words of the committee, "to have any business dealings whatever with

unfair price demoralizers;" to be made up according as favorable response was made to the circular, and to be published the same as the other in the N. A. R. D. "Notes." In this connection, in the issue of January 22, 1904, the following assurance was given, anticipating, somewhat, the argument of counsel here: "There is no Federal or state law that can possibly be construed in such a way as to compel any jobber to sell goods he has bought and paid for to any person or persons he does not want to. This is a free country, . . . where freedom of trade within its borders is guaranteed by constitutional provisions; and each wholesaler has an unalienable right to frame for himself a selling policy, in accord with his own ideas of what is best for his individual interest and the trade at large, and then to adopt and put this policy into effect."

There were other and further suggestions, from time to time, for concerted action against price cutters, in line with what has been so referred to,—such as requiring salesmen to have cards of identification and regularity; providing for the advancing and making uniform the prices for prescriptions; having proprietors refuse to patronize newspapers where cut prices were advertised; and doing away with the necessity for a special request from local retail associations, in order to have wholesalers refuse to sell to aggressive cutters,—all, except, perhaps, the last, emanating from and being advocated by the National Retailers' Association. But it is not necessary to follow the matter further. Sufficient has been given to show the character of the combination in restraint of trade which is charged, and the only question is as to the law which is to be applied. It is contended, on the one hand, that no unlawful combination is made out, the manufacturers of proprietary goods having the right to decide, each for himself, as was done, to whom and upon what terms and conditions he would sell, or whether he would sell at all; it making no difference, provided his policy in this regard was individual, whether it coincided with a similar policy, adopted by others of the same class or not, nor that the action so taken was to that extent concerted. The tripartite agreement, to which alone the proprietors subscribed, was not, according to this, unlawful; and as to anything after that to which they did not agree, or which they did not recognize or subscribe to, such as the so-called "resolution C," with its honor roll and white list, got up by the secretary of the retailers on his own motion, under it, they are not answerable; and these were therefore improperly admitted in evidence against them. 7 L.R.A. (N.S.)

It is argued, on the other hand, that the combination and conspiracy for which action is brought is not to be limited to the tripartite agreement, or the sale of proprietary medicines to which it related, which was, however, unquestionably, an unlawful restraint of trade, within the meaning of the act. But that it is to be taken as extending to everything which was done concertedly to carry out the pervading idea, to which the defendants individually and collectively subscribed, which was to cripple and drive out of business, by coercive measures, such cutters of prices as 75 per cent of the local trade at any given place declared obnoxious. This, it is claimed, was the real conspiracy, of which the various steps taken were merely manifestations or overt acts, including "resolution C," the "roll-of-honor list," etc.; all of which were therefore admissible against the defendants generally.

Both contentions are right to a certain extent; neither can be sustained in its entirety. Undoubtedly the originator and compounder of a proprietary medicine may shape his own policy, and sell or withhold from selling, as he pleases, according to supposed self-interest or whim; fixing the prices and naming the terms and conditions at and upon which alone he will do so, refusing to those who will not comply. And, so far as this is confined to his own goods, and pursued by independent and individual action, it cannot be challenged. It is quite a different matter, however, when two or more combine and agree that neither will sell to anyone who cuts the prices of any of the others. This concerted policy, by which it is sought not only to maintain by each the price of his own medicines, which alone he is interested in or has the right to control, but also the prices on those of all who are thus banded together, is manifestly a direct interference with and restraint upon the freedom of trade, which in commerce between the states it was the object of the act of Congress to preserve. As in every conspiracy, it is the joining together of a number that counts, and that the individual has to fear. It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor to-day will likely cut his medicines to-morrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind. If that was all there was to the present case, it would be easily disposed of. But, unfortunately for the defendants, it is not. The policy

adopted and pursued with respect to aggressive cutters and those who sold to them was not that of the proprietors only, acting independently, each with regard to his own, according to what seemed to him good. The arrangement was tripartite, in which all the affiliated associations of the drug trade were involved,—proprietors, wholesale distributing agents or jobbers, and retailers, the latter, if anything, dominating it,—evolved after extended agitation, discussion, and conference, to which the members were individually and collectively bound, disciplinary and coercive measures being provided against any who proved recalcitrant. Let a patent-medicine man or wholesaler disregard its terms, and he was quickly given to understand that, if he catered to the aggressive cutter, he could not expect the custom of the organized retailer, between whom it did not usually take him long to decide. He became, if he persisted, an unfair trader, to be treated accordingly, until he repented and was reinstated, after acknowledging the error of his ways, and agreeing to transgress no more. Against this discipline, and with this rod held over them, it is needless to say that there were few who went astray, and still fewer who held out. There was, perhaps, a murmur here and there, a question raised as to whether they might not overstep the law, and a recognition that they were close to the line; but it was met by assurances such as that quoted above, or by suggestions of escape by individual action, which can hardly be expected to deceive. Nor did, indeed, the individual proprietor control his own prices, nor determine to whom his goods should go. This was done for him in the cities by the local associations of retail druggists, into whose hands he thus committed himself. The prices which should there prevail were of their naming, and aggressive cutters were those who did not maintain them, who were ferreted out, and reported by the retailers' agents. All this and more was part and parcel of the tripartite plan, to which the proprietary, as well as the wholesaler, bound himself when he entered into it.

If co-operation and concerted action such as this does not make out a combination and conspiracy in restraint of trade, it is difficult to see what would be effective to do so. The combination is clear, and has been demonstrated; so, also, is the restraint of trade. That, indeed, was the avowed purpose of it, which was not simply to put the aggressive cutter out of business, but to maintain prices to the consumer, by this means, as they would not be maintained if left to themselves. It seems incredible, except

as the trade in patent medicines is known to be immense, but it is confidently asserted, by those having the right to speak, that the cost to the country of the tripartite agreement amounted to \$90,000,000 in six years. The general public have thus, as usual, been made to foot the bill. That this constitutes in law, as in fact, an unlawful combination in restraint of trade, within the meaning of the act, there can be no doubt. Whatever may be decided elsewhere, the question is set at rest by *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, and *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 396, which control. In the former there was a combination among certain manufacturers of cast-iron pipe, controlling two thirds of the business in states of the South and West, by which they agreed to advance the prices to the consumer by abolishing competition between themselves, parceling out the territory, and fixing the prices at which sales should be made therein, going through the form of bidding against each other at times as a blind; the prices and the successful bidder in each case being prearranged. It was sought to defend this action, because the restraint was only partial, not extending to the whole United States; also, that the monopoly secured was not complete, being tempered by fear of competition from others not in the arrangement, and affecting only a modicum of the price; and again, that the prices fixed were reasonable, and within those which were being continually and unrestrainedly made, simply doing away with ruinous competition, to which the parties had a right. But these and other arguments were put aside, and the case declared to be one prohibited by the act. "It is the effect of the combination," says the court, "in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded." So in *Montague v. Lowry*, by an agreement between eastern manufacturers of tiles and certain dealers in San Francisco and vicinity, an association was formed whose by-laws provided that no manufacturer should sell to any dealer not a member, nor should any dealer sell to the same except at certain list prices, which were 50 per cent higher than those at which sales were made to other members; membership also being confined to those who carried an average stock of not less than \$3,000 and who were acceptable. The plaintiffs were dealers in San Francisco, where they had built up a business, but were not

members of the association, and were not eligible; and after its formation they found themselves unable to buy to advantage, being restricted to dealing with San Francisco parties, to whom they were compelled to pay the extra prices listed. On a suit against the association for damages under the act, a verdict for the plaintiff was sustained; the case being held to be clear. It is useless, in the face of these authorities, to urge upon us the decision in *John D. Park & Sons Co. v. National Druggists' Asso.* 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 87 N. E. 136, where a different conclusion has apparently been reached. It is to be noted, however, with regard to that case, that the agreement there, as viewed by the majority of the court, was merely to sell to all wholesale distributing agents at uniform rebate prices, so that the small dealer, with limited capital, was put on a par with the large ones, whose capital was more ample, thus tending to fairness and equality, on which stress is laid. There was, however, the further provision (to say nothing of other restrictions) that until a wholesaler agreed to the plan he could not buy of any member of the association whatever, in view of which three of the judges dissented; the case being still further weakened as an authority by the failure of the majority to altogether agree in their reasoning. At the best, therefore, it is near the line, and in no event can it be taken, contrary to the cases cited, as giving the law here.

So far, then, as the present case was kept within the limits indicated by these observations, it was correctly disposed of, and is to be sustained; but outside of them not. Unfortunately, it did not stop with the tripartite agreement and the action taken under it, but went on to resolution C, with its honor roll and white list. It is urged that these were merely further steps in the general combination and conspiracy, to get rid of the aggressive cutter, on which all were determined, and for which, therefore, by whomsoever taken, all were bound. But this fails to note several things. Speaking broadly, no doubt there was a general purpose, or conspiracy, if you will, to drive the plaintiff and others like him out of business, to which, in entering into the tripartite agreement, the parties committed themselves. At the same time, however, there was a selection of methods. Not only was a general policy declared for, but a definite line of action under it, adopted after extended consideration and conference, which could not be varied from at will. In accepting the tripartite plan, they did not necessarily agree to anything and every-

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thing which might be done in its name, and particularly not to resolution C, which was recognized as a new and decidedly advanced step, expected to work a radical change. As already stated, this project emanated from the National Retail Druggists' Association, in annual convention assembled at Cleveland in 1902. But even among the retailers there were those who doubted the propriety, as well as the legality, of it; as witness the remarks of the president, at the annual meeting just before that, at which, having been proposed, it was promptly voted down. Nor was it ever adopted by the proprietors or the wholesalers as a body; the only assent given to it being individual, and by no means by all. This was secured by direct appeal, and the circulars sent out were addressed to "manufacturers and dealers in non-tripartite goods;" showing that a different class was intended to be reached.

No connection, except the most general one, is thus established between the tripartite agreement and resolution C, and they are not to be taken as one and the same plan. They may not differ much in principle, but they do decidedly in results; pressure being put upon the aggressive cutter as it had not been by any means before. By the one, he was merely deprived of patent medicines, as to which, right or wrong, the proprietor might feel that he had a certain freedom to sell or withhold, the same as is argued here; but by the other, he was cut off from the most ordinary druggists' supplies, even toothbrushes and sponges being denied. A retailer cannot do much, it is true, without proprietary goods on his shelves; but without drugs and pharmaceuticals he cannot put up a single prescription, and might as well go out of business; and that, indeed, was what resolution C was designed to bring about. This was an excursion into a new field, and to whatever else short of that the proprietor or wholesaler was committed, he might not care to go that far. He was at least entitled to have it distinctly presented for his acceptance before being bound, and his assent is not to be implied simply because he had agreed to what had gone before. He did not put himself indiscriminately and to all lengths into the hands of his associates. The trade recognized that this was the case, and that there were classes among the wholesalers, as shown by the publication called "Notes," of May 21, 1904, where those operating under the tripartite agreement are set apart from those operating under resolution C. This may not be conclusive, but it is significant, and confirms, as it corresponds, with our own views.

As distinguished by parties, also, the

combination was new. No doubt there were many who had agreed to the tripartite plan, who also agreed to resolution C. But there were some who did not, who are defendants here, as well as some who agreed to the resolution alone. They divide on these lines, and cannot be brought together as one, so far as anything has been shown; and neither, as the result, can a joint action be maintained. As the case stands, however, all are made liable without distinction, for all that has been done, both under the tripartite agreement, as well as resolution C; both being put in evidence against them all. It may be that a person who joins a conspiracy at an advanced stage of it makes himself party to what has been done in pursuance of it before. 3 Greenl. Ev. Lewis's ed. § 93; 8 Cyc. Law & Proc. p. 658. But this must be with knowledge, and in promotion of the common cause. And even though, upon this basis, those wholesalers who, with knowledge of the existing purpose to drive aggressive cutters out of business, lent themselves to this design, by denying him their goods as called for by resolution C, could be held for the damages resulting from the whole scheme, still, as already pointed out, there is too wide a divergence between the original tripartite plan and this later extreme development of it to make those who merely agreed to the one committed irretrievably and without question to both.

Upon the whole case, therefore, we reach the conclusion that resolution C was inadmissible to charge those who had not assented to it, and should not have been received in evidence, nor anything done under it. The wrong which was committed by its adoption and enforcement was separate and distinct from that which resulted from entering into and carrying out the tripartite plan, as were also the damages experienced therefrom. The plaintiff in this respect pressed his case too far. He had a good one against some of the defendants under the tripartite agreement, and another against others under resolution C, and against some, no doubt, upon both, but not against all; and there was the mistake. A joint tort being charged, not only had it to be proved as laid (Howard v. Union Traction Co. 195 Pa. 391, 45 Atl. 1076; Wiest v. Electric Traction Co. [Wiest v. Philadelphia] 200 Pa. 149, 58 L.R.A. 666, 49 Atl. 891; Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589), but the defendants had all to be liable for all that was resolved upon or done. This, in the view we take of it, was not the case, and the judgment must therefore also be reversed upon this ground.

This reversal is general, and applies to all 7 L.R.A. (N.S.)

the defendants, which renders it unnecessary to consider the special argument which was made for some. It will be for the trial judge, when the case comes up again, to determine, in the light of what has been said, how far they and others can be held.

Judgment reversed, and a new trial awarded.

OREGON SUPREME COURT.

J. WOLFARD et al., Appts.,

v.

A. W. FISHER, Exr., etc., of H. F. Fisher,
Deceased, Resp't.

(—Or. —, 84 Pac. 850.)

Railroad in street—consent—estoppel.

1. After the maintenance of a railroad switch in a public street for twenty years under the express consent of the abutting owners, neither those who gave the consent, nor their successors in title, are entitled to injunctive relief against the alleged nuisance.

On Rehearing.

Same—private use—nuisance.

2. That a railroad was constructed in a public street partly for the accommodation of a certain mill owner does not make it private, so as to constitute a public nuisance, if it is open to all persons generally for shipping purposes.

(April 3, 1906.)

Case Note.—Remedy of abutting owner as affected by his consent to the construction of railroad or street railway in street or highway:—The cases are substantially agreed that the express consent, whether evidenced by writing or shown by parol, by the owner of abutting property, to the construction of a railroad in a street or highway the fee of which is not owned by him, is irrevocable,—at least after it has been acted upon; and, if in terms unconditional and unqualified, precludes him or his privies, including subsequent grantees with notice, from maintaining either an action at law for damages, or a suit in equity for an injunction based upon the location of the road, or its construction and operation in a proper and reasonable manner.

The principle above stated is sustained by Pratt v. Des Moines Northwestern R. Co. 72 Iowa, 249, 33 N. W. 666, holding that an express consent, though by parol, by the owner of abutting property, having no title or interest in the street, is irrevocable after the road has been constructed in reliance thereon, and will preclude an action for damages—either by the owner who gave the consent, or by one who purchased the property after the construction of the road—which would otherwise lie against the railroad company under the provision of the

A PPEAL by plaintiffs from a decree of the Circuit Court for Marion County in favor of defendant in a suit to enjoin the maintenance of a railroad switch track in a public street. Affirmed.

The facts are stated in the opinion.

Mr. L. H. McMahan for appellants.

Messrs. L. J. Adams, W. E. Yates, and George G. Bingham, for respondent:

A railroad track upon a street, properly constructed, is not a nuisance.

1 High, Inj. § 602; *Randale v. Pacific R. Co.* 65 Mo. 325; *Danville, H. & W. R. Co. v. Com.* 73 Pa. 29; *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624; *Harris v. Thompson*, 9 Barb. 350.

It is not a public nuisance, and the de-

fendant can be called to account only by the sovereign authority.

Miller v. Long Island R. Co. Fed. Cas. No. 9,580a; *Williams v. New York C. R. Co.* 18 Barb. 222; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252.

Long acquiescence in the use of the street for a railway, and permitting the railroad company and defendant to spend large sums of money, should now prevent plaintiffs from making complaint.

Midland R. Co. v. Smith, 113 Ind. 233, 15 N. E. 256.

Bean, Ch. J., delivered the opinion of the court:

This suit was brought in 1904, by the owners of property abutting on Water

Iowa Code declaring that a railway track shall not be laid on any street until the damages of the abutting lot owners are ascertained.

The principle was applied with the same result in *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. R. Co.* 79 Iowa, 613, 44 N. W. 900. In this as in the preceding case, the action was brought by one who purchased the property after the road was constructed, was based upon the Code provision already referred to, and the consent was given by parol. It also expressly appeared that the abutting owners had no title to the street; and, in view of that fact, and of the further fact that another track nearer to the plaintiff's property than the one in question had been constructed before the enactment of the Code provision, and at a time when an abutting owner was not entitled to compensation, it was held that the right to damages on account of the track in question was effectively waived so as to prevent recovery by the plaintiff, notwithstanding that the consent was given by one only of the two tenants in common by whom the title was held at that time.

In *Burkam v. Ohio & M. R. Co.* 122 Ind. 344, 23 N. E. 799 (an action by an abutting owner for the abatement of a nuisance by the removal of a railroad track from the street), the supreme court, in sustaining the ruling of the trial court in admitting evidence tending to prove that plaintiff consented to the occupancy of the street and assisted in making the fill upon which the track was laid, declared generally that an abutting owner who expressly consents to the occupancy of a street cannot afterward ask a court to enjoin the use of the street, or award him damages. While the court does not expressly limit this principle to cases where the abutting owner does not own the fee, that seems to have been the fact in that case; and the same is true of the case of *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138, in which a similar principle was declared, although it was not applied for the reason that the court held that no consent had been shown.

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In *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404, it was held that the consent of an abutting owner to the location of a railroad in the street deprives him of the right to claim damages incident to that location, or to a change of the grade of the street, made by the company under the authority of a valid ordinance in order to make it correspond with the grade of the road. The consent in this case was inferred from the conduct of the plaintiff. The opinion does not show whether or not he owned the fee of the street.

Distinction based on ownership of fee of street.

In *Pratt v. Des Moines Northwestern R. Co.* supra, the court said that the contention of counsel for plaintiff that a permanent interest in real estate cannot be acquired by a parol license would be conceded for the purposes of the case; but avoided any practical effect from that concession by the statement that the abutting owner in that case did not own the street or any interest therein. The distinction thus intimated between an abutting owner who owns the fee of the street and one who does not, as bearing upon the effect of a consent not amounting to a grant, is expressly recognized by the New York cases, or at least by some of them. Thus, the court of appeals, in *White v. Manhattan R. Co.* 139 N. Y. 19, 34 N. E. 887, for the evident purpose of explaining the emphasis laid upon the fact that the proof in that case showed that all the rights that the abutting owners had in the street were in the nature of easements of light, air, and access, said: "It has been the law in this state for a number of years that an easement to do some act of a permanent nature on the land of another can be created only by a deed or conveyance in writing operating as a grant, and that a consent in writing on the part of the landowner is no more valid than if it were by parol." The court then points out that a consent, not in the form of a grant, by the owner of the fee, may be revoked even after it has been acted upon

street in the city of Silverton, and by persons engaged in business along such street, to enjoin and restrain the defendant from maintaining and operating on the street a switch or branch railroad from his flouring mill and warehouse connected therewith to the main line of the Oregon & California Railroad Company, a distance of about a quarter of a mile. This switch or branch road was built in 1881 by the Oregonian Railway Company, the grantor of the Oregon & California Railroad Company, under an agreement with the then owner of the flouring mill by which the latter was to obtain the right of way, furnish the ties, and pay the railway company \$1,000 in cash; and it has been used and operated ever

since. For a short time after it was built, horses were used in moving cars over the road; but this was found to be impracticable, and, for more than twenty years prior to the commencement of this suit, cars have been moved by the engines of the railroad company. What is now Water street was a county road at the time the switch or side track in controversy was built. All the property owners, except two, along that portion occupied by the track, joined in a petition addressed either to the railway company, asking it to build the road, or to the county court, praying that a right of way along the county road be granted for that purpose.

by the other party. It is clearly implied that this principle would have been held applicable if the abutting owners in this case had owned the fee of the street. The court, however, proceeds to show that the principle does not apply to a consent given by an abutting owner who does not own the fee, and holds specifically that the written consent of such an owner to the construction of an elevated railroad along the street, though given to meet the requirement of the constitutional provision forbidding the construction of a railroad in the street without the consent of property owners, and though not in the form of a grant which would be necessary in order to encumber the fee with a permanent easement, amounts to an abandonment and extinguishment of the special easements of the abutting owner in the street so far as is necessary for the construction and operation of the road; and that such consent, if absolute and unconditional in terms, is, after it has been acted upon, irrevocable, and precludes any claim for damages consequent upon the erection and operation of the road in a proper and reasonable manner.

In *Paige v. Schenectady R. Co.* 178 N. Y. 102, 70 N. E. 213, it is held that valid consents in writing, under seal, to the construction and operation of a railroad in a street, given by abutting owners who own the fee in the street, in reliance upon which the road has been constructed, cannot be withdrawn at the will of the owners, where there was no contract with the company to that effect, no consent by the state or general public, or by the stockholders of the company, and no consideration therefor. This case does not conflict with the *White Case*, since the consents were, as the court said, valid "grants," under seal, of the right to build and operate the road over the street, including the premises of the plaintiffs.

The doctrine of the *White Case*, that the special easements in the street, of an abutting owner who does not own the fee, may be abandoned without a grant, was recognized in *Foote v. Metropolitan Elev. R. Co.* 147 N. Y. 367, 42 N. E. 181, though it was

not applied for the reason that the evidence was insufficient to show an abandonment.

In *Adee v. Nassau Electric R. Co.* 65 App. Div. 529, 72 N. Y. Supp. 992, the appellate division of the supreme court declared, in effect, that written consents, which seem to have been given in compliance with the requirements of the railroad law, were not revocable, although the title of the abutting owners extended to the center of the street; and it does not appear that the consents were technical grants. The decision, however, on this point was largely influenced by the court's opinion that the legislature regarded the consents as something more than mere licenses, as evidenced by the formalities required in their execution, and the provisions making them capable of being recorded, and declaring them competent evidence, in connection with the provision of the act of 1895, amending § 91 of the railroad law, preserving indefinitely the life of such consents as had been granted prior to the adoption of that statute. This decision was affirmed by the court of appeals (173 N. Y. 580, 65 N. E. 1113) without an opinion.

Even assuming that a consent is revocable so as to sustain action for damages at law, it does not necessarily follow that the abutting owner is entitled to relief by injunction.

Thus, in *Stephens v. New York, O. & W. R. Co.* 175 N. Y. 72, 67 N. E. 119, the court held that, even if the instrument in question by which the property owner consented to the location of the railroad in the street in front of his premises could be construed as a license revocable at law by the licensor, the fact of performance by the licensee under its authority in the expenditure of large sums of money in constructing its railroad plant would move a court of equity to protect the latter's right against revocation, though only to the extent of the acts which were warranted by the terms of the consent.

So, in *Herzog v. New York Elev. R. Co.* 76 Hun, 486, 27 N. Y. Supp. 1034, where it appeared that the city of New York, being the owner of certain premises and of the fee of the street upon which they abutted,

The evidence tends to show that this petition was presented to the county court, but there is no proof that any action was taken thereon. Two or three years after the road had been built some controversy arose about the matter, and the county court was requested to order its removal, but did not do so. In April, 1894, and after the incorporation of the city of Silverton, an ordinance was duly passed by the common council, granting to J. W. Cochran, who then owned the flouring mill, a ten-year franchise to

maintain and operate a railroad on Water street from his mill to the main line of the Oregon & California Railroad Company, and in March, 1904, such franchise was extended for an additional ten years. The plaintiffs' position is that the road was built and is maintained for the private use and benefit of the owner of the flouring mill, and not for public purposes, and is therefore a nuisance, and an unlawful use of the street. The defendant, however, contends and alleges that the railroad in controversy be-

gave its consent in writing to the construction of an elevated railroad in the street; and that, while the company was operating the road, the plaintiff acquired the title by mesne conveyances from the city,—the court, after holding, in effect, that the city's consent to the construction of the railroad extinguished its right as an abutting owner to compensation, suggested as an additional ground for its decision denying an injunction, that, the road having been built by and with the consent of the owners of the premises in question, it would be inequitable to permit a subsequent owner, buying the premises with knowledge of such consent, to enjoin the operation of the road in violation of its terms; and that, even if an action for damages might be sustained, a court of equity would not, under such circumstances, grant an injunction.

There seems to be an intimation in *Murdock v. Prospect Park & C. I. R. Co.* 73 N. Y. 579, that a parol consent by an owner whose title extended into the street, being revocable at the pleasure of the owner, even after money had been expended in reliance thereon, would not prevent a suit by the abutting owner to enjoin the operation of the road. The point, however, was not decided, as the decision below refusing the injunction was reversed upon the ground that no consent to the construction of the road had been established. The decision of the general term (10 Hun, 598) denying the injunction was upon the assumption that the road was constructed in reliance upon the consent of the property owner, and that it would be contrary to principles of equity to enjoin its operation. The decision, therefore, did not deny that the parol consent would be revocable at law.

Of course, the consent, even if it amounts to nothing but a revocable license, is a justification for acts done under it while unrevoked, and will protect the company from liability for the period prior to its revocation. *Miller v. Auburn & S. R. Co.* 6 Hill, 61.

The validity of the distinction based upon the ownership or nonownership by the abutting proprietor of the fee of the street depends upon the soundness or unsoundness of the general proposition stated in the *White Case*, as to the necessity of a grant in order to encumber a fee with a permanent easement. The discussion of that general

question is, of course, beyond the scope of this note. It is touched upon in the case note in 1 L.R.A.(N.S.) 359.

Right to withdraw consent before acted upon.

In *White v. Manhattan R. Co.* 139 N. Y. 19, 34 N. E. 887, the court suggested that perhaps the consenting party might withdraw his consent if he had given it without any valuable consideration, and if the other party had done nothing under it, so that its position could not be unfavorably affected by such withdrawal.

In *Adee v. Nassau Electric R. Co.* 65 App. Div. 529, 72 N. Y. Supp. 992, however, the court, alluding to this suggestion, said that it was made before the amendment to the railroad law in 1895, and could not be regarded as controlling in the case at bar, even if it were assumed that no valuable consideration passed.

Consent as affected by mode of construction or use.

The abutting owner's consent to the construction and operation of the road, of course, affords no protection—at least as against an action at law for damages—to the construction or operation of the road in an unusual or unreasonable manner not within the reasonable scope or intention of the consent.

Thus, in *White v. Manhattan R. Co.* supra, the court said that the written consent of the owner of abutting property to the construction of an elevated-railroad track in the street should have a reasonable construction; and the court would not hold that such a consent would authorize the building of a solid structure as high as the top of the building fronting on the street and completely covering the same from building to building, as that would not be regarded as within the contemplation of the parties to the consent. The court of appeals, however, for the reason that the court below denied all validity to the written consent, declined to pass upon the question whether the use actually made of the street was or was not unreasonable with reference to the consent.

The question, however, whether a particular mode of construction or use is rea-

longs to the Oregon & California Railroad Company, and is maintained and operated by its lessee, the Southern Pacific Company, for public purposes, and that both of these companies are necessary parties to this suit. It is, we think, unnecessary to consider or determine either of these questions at this time. The road was built originally by the consent and at the request of the property owners along that portion of the county road occupied by it, and since 1894 has been maintained and operated under a franchise

granted by the municipal authorities. It is used principally for the transportation of grain from the main line of the railroad company to the defendant's mill and of flour and other mill products from the mill to such main line; but there is evidence that the defendant owns and operates in connection with his mill a grain warehouse or elevator with a storage capacity of about 60,000 bushels, and that the road has been used for the transportation of hops, grain, building material, and the like for parties

sonable and within the contemplation of the parties does not fall within the scope of this note.

When implied consent shown.

Assuming that an affirmative consent by the property owner has been shown, it seems to be immaterial, so far as the rights of an abutting proprietor who does not own the fee of the street are concerned, whether the consent is written or parol; and, as already shown, in case of an abutting proprietor who does own the fee of the street, the vital distinction is between consents which amount to grants and those which, whether oral or in writing, do not amount to grants. Some of the cases, however, have passed upon the sufficiency of the evidence to establish a parol consent.

In *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404, a finding of consent was sustained by evidence authorizing the jury to find that the plaintiff, as a member of the city council, advocated and voted for the location of the road, supported it in a speech before the directors of the company, and, in a contest between different neighborhoods as to its location, urged its location in the street in question, and said that its location on that street would be worth \$1,000 to him.

In *Pratt v. Des Moines Northwestern R. Co.* 72 Iowa, 249, 33 N. W. 666, the court, while holding that evidence that the abutting owner expressly consented to the construction and operation of the road in the street was admissible, said that it might be that mere silence on his part would not amount to what may be termed a license to enter, or a waiver of damages.

The mere failure of the landowner to order a railroad company off his land, or to bring action against it as a trespasser until near the end of the statutory period of limitation, does not operate as a consent, so as to prevent him from maintaining an action. *Rusch v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 136, 11 N. W. 253.

In *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138, it was held that the fact, if it was a fact, that the abutting owner urged a member of the common council to vote for an ordinance allowing the company to locate its road in the street, was insufficient to show his consent, it not appearing that such mem-

ber's vote was necessary for the passage of the ordinance. The court said: "To create the estoppel, there must be some affirmative act by the person sought to be estopped, in reliance upon which the company has acted to its prejudice."

In *Foote v. Metropolitan Elev. R. Co.* 147 N. Y. 367, 42 N. E. 181, it was held that an intention by the abutting owner to abandon his easements in the street could not be inferred from the fact that he brought an action at law against an elevated street railway company to recover damages for the loss of rents and injury to the value of his premises occasioned by its trespass upon his property rights in the street, in connection with a provision, in an executory agreement with the parties to whom he afterwards conveyed the premises, reserving all claims which have arisen or are to accrue by reason of the road; and further, that the plaintiff, a remote grantee, could not be affected by the conduct of the original proprietor, after plaintiff had acquired the title, in discontinuing the action against the company and executing to it a release of all claims, in which he stated his intention to release all rights and easements in the street appurtenant to the premises which on a certain date (the date of his deed to the grantors of the plaintiff) were in the possession and occupation of the company.

In *Griffin v. Jacksonville, T. & K. W. R. Co.* 33 Fla. 606, 15 So. 338, it was held that the bringing of an action against the company for trespass to recover damages for the construction of the road in the street in front of the premises amounted to a consent to the use of the street in a proper manner and with due care, and precluded plaintiff from maintaining an action of ejectment.

Effect of acquiescence to defeat particular remedies.

As already shown, an affirmative consent, at least, by an abutting owner who does not own the fee of the street, is effectual not only to prevent him from maintaining a suit to enjoin the operation of the road, but also to preclude an action at law for damages. Even assuming that the evidence does not establish an affirmative consent which would preclude an action at law for damages, the courts may, and in a number

other than the mill company. Whether this is such a public use as would have authorized the construction and maintenance of the road in the street originally without the consent of the owners of the abutting property, is not necessary to consider. It was built by the express consent of and at the request of the property owners, and neither they nor their successors in interest are now entitled to injunctive relief against it. A property owner who has expressly consented to the use of his own property, or of the street in front thereof, for purposes such as shown, is not entitled, after the road has been constructed and operated

for twenty years, to an injunction against its further maintenance. 3 Elliott, Railways, §§ 949, 1096; 1 Lewis, Em. Dom. 2d ed. § 120; 2 Wood, Railways, p. 792; *Burkam v. Ohio & M. R. Co.* 122 Ind. 344, 23 N. E. 799. Injunctive relief will only be granted when application thereof is seasonably made. *Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256.

The decree of the court below will therefore be affirmed.

A petition for rehearing having been filed, Hailey, J., on November 21, 1906, handed down the following additional opinion:

of instances have, upon the ground of either public policy or laches, denied an injunction against the operation of the road where the abutting owner stood by and acquiesced in, or failed to object to, its construction. The following cases are to that effect: It is to be noted that they merely hold that the acquiescence in the construction of the road deprived the abutting owner of the right to an equitable relief by injunction, and they do not hold or imply that such acquiescence would extinguish the substantive right to damages, or prevent the maintenance of an action at law to secure the same. *Hinnershitz v. United Traction Co.* 206 Pa. 91, 55 Atl. 841; *Pater-son & P. Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *Tilton v. New Orleans City R. Co.* 35 La. Ann. 1062; *Hentz v. Long Island R. Co.* 13 Barb. 646.

In *Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co.* 115 Mo. 613, 22 S. W. 616, the court held that an objection is not, alone, sufficient to protect the abutting owner; but that he must take some steps to prevent the construction of the road.

In *Coombs v. Salt Lake & Ft. D. R. Co.* 9 Utah, 322, 34 Pac. 248, however, it was held that an abutting owner does not, by his mere silence and inaction, lose his right to an injunction restraining the operation of the road unless the damages are paid within a specified time. The fact will be noted that the injunction allowed in this case was conditioned upon the nonpayment of the damages; and, besides, it appeared that the remedy at law was inadequate, for the reason that the defendant was insolvent.

It has also been held, upon the ground of public policy, that the acquiescence of an abutting proprietor in the construction of a railroad in the street will preclude an action of ejectment by him, even if he owns the fee of the street, and would otherwise be in a position to maintain that kind of an action. *Reichart v. St. Louis & S. F. R. Co.* 51 Ark. 491, 5 L.R.A. 183, 11 S. W. 690; *Louisville, N. A. & C. R. Co. v. Solitwedde*, 116 Ind. 257, 9 Am. St. Rep. 852, 19 N. E. 111; *Taylor v. Chicago, M. & St. P. R. Co.* 63 Wis. 327, 24 N. W. 84. What

was said of the cases above cited denying an injunction under such circumstances is also true of these cases; the courts merely deny the remedy by ejectment for the reason that the allowance of such a remedy would be contrary to the interests of the public, and relegate the owner to an appropriate remedy at law which may be pursued without prejudice to the interests of the public.

In *Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164, however, it is declared that a property owner is not estopped from maintaining ejectment because he does not forbid the occupancy of the street by the railroad company. In this case, however, the discussion was principally upon the general question whether the ownership of the fee of the street will sustain an action of ejectment, and there was no mention of public policy as a ground for denying this particular form of relief.

In *Taylor v. Chicago, M. & St. P. R. Co.* supra, the court held, in effect, that, where the owner expressly or impliedly consents to the construction of a railroad in the street, he assumes to himself the process of ascertaining the compensation which would otherwise have devolved upon the railroad company; and that he thereby waives his common-law right of action to obtain his compensation, and is restricted to the proceedings prescribed by statute for that purpose. *Strickford v. Boston & M. R. Co.* 73 N. H. 81, 59 Atl. 367, is to the similar effect.

It will be observed that even the last two cases do not deny the substantive right of an abutting owner to damages merely because of his acquiescence, as distinguished from his affirmative consent, to the construction of the road, but merely restrict him to the statutory method of procuring such compensation; and, apart from such a restriction, acquiescence which might preclude equitable relief by injunction will not prevent recovery of damages by an action at law. Thus, *Maysville & B. S. R. Co. v. Ingram*, 16 Ky. L. Rep. 853, 30 S. W. 8, while recognizing the general rule that injunction will not issue against the construction of a railroad, holds that the fact that the owner takes no steps to prevent its construction does not preclude him from maintaining an action at law for damages.

On the rehearing in this case it was strenuously contended by the counsel for the plaintiff that the track in question is used for private purposes only, for the benefit of defendant, and, being so used on a public street, is a public nuisance *per se*. The evidence, however, shows that, while the track is used largely by the defendant for shipping in grain for his mill and shipping out his products, it has also been used by others, including at least two of the plaintiffs, for shipping other products, such as lumber, shingles, brick, sand, hops, and other freight, and is open to all persons for shipping purposes. Such being the case, it is clearly not a private track confined exclusively to the use of defendant or any limited number of persons, and, being available to the public generally for shipping purposes, its use is a public one. The number of shipments made by different individuals or firms over a track is not the criterion by which to judge whether or not it is a public track. The public or private character of a track or way depends upon the right of the public generally to its use, and not upon the extent of the exercise of that right. If such right is confined to a limited number only, it is a private use and a private track, although such persons may use it an equal or unequal number of times each, while, if it is available to all the public who desire to use it for shipping purposes, it is a public use, although some one or more of the public may use it more frequently than others. As stated in *Phillips v. Watson*, 63 Iowa, 33, 18 N. W. 659, "if all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small." 3 Elliott, Railroads, 3d ed. § 961; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 210, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; *Towns v. Klamath County*, 33 Or. 233, 53 Pac. 604.

The former opinion sufficiently covers the only other point in the case, and we adhere to that opinion. The decree of the lower court will therefore be affirmed.

ARKANSAS SUPREME COURT.

ST LOUIS SOUTHWESTERN RAILWAY
COMPANY, Appt.,
v.
JOHN REAGAN.

(— Ark. —, 96 S. W. 168.)

Railroad—injured employee—delay in transportation—damages.

Upon failure of a railroad company promptly to furnish an injured employee 7 L.R.A. (N.S.)

free transportation to its hospital, to which he is entitled under his contract, he cannot, in case he has in his possession the means of paying for the transportation, hold the company liable for pain and suffering due to delay in reaching the hospital.

(July 2, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Miller County in plaintiff's favor in an action brought to recover damages for pain and suffering alleged to have been caused to plaintiff by defendant's failure promptly to furnish him with transportation. Reversed.

Statement by Riddick, J.:

John Reagan was, in 1904, a section foreman in charge of section No. 50 on defendant's road. This section was located at and near Stephens, Ouachita county. On the 8th day of February, 1904, while riding on a hand car in the course of his duties, Reagan was injured by the explosion of a torpedo which had been placed on the track to warn passing trains. The injury was caused by a piece of tin from the torpedo striking the leg of plaintiff with such force that it penetrated the flesh, and lodged between the two bones of the leg. Reagan went to the local surgeon at Camden who gave him the following certificate:

"This is to certify that John Reagan is badly and must go to hospital at Tyler, Texas.

[Signed] G. W. Hudson,
Local Surgeon.

Case Note.—Right of servant to recover for master's delay in taking him to hospital:—Search has failed to find any case similar to *ST. LOUIS SOUTHWESTERN R. CO. v. REAGAN*, which passes on the right of a servant to hold his master liable for pain and suffering due to the latter's delay in carrying him to a hospital. The question arose in an analogous case as to the liability of a railroad company for its refusal to admit an injured employee to a hospital maintained by assessments withheld from the wages of the employees of the company, and the court said that, when the injured employee was refused admission to the hospital, he was bound to do all that he could to keep the consequent injury and damage as light as possible; and, to do so, he should have employed medical and surgical attention to effect a cure, or at least to arrest further injury; and for such service and attention, or the cost thereof, the railroad company would have been required to pay. *Illinois C. R. Co. v. Gheen*, 112 Ky. 695, 66 S. W. 639, Rehearing denied in 112 Ky. 704, 68 S. W. 1087.

On the subject of the duty of a master to furnish medical aid to a servant, see exhaustive note in 28 L.R.A. 546.

The word "hurt" or "injured" was evidently omitted from this certificate by mistake, but the meaning thereof is plain. Reagan boarded the train with this certificate, but the conductor informed him that he could not receive it in lieu of a pass, and that he must procure a pass or ticket from the proper person, or pay fare. Reagan then told the conductor he would go to Stephens, the next station, where he lived, and was allowed to do so. Reagan got off the train at Stephens, and sent a telegram to Davis, the roadmaster, asking him to furnish him a pass for transportation to Tyler. By a series of accidents this pass was not received until the 12th of February. After the pass was received Reagan went to the hospital at Tyler, Texas. But there was some delay in performing the operation to remove the piece of tin, and the tin was not taken out of his leg until about twenty-four hours after his arrival. When the operation was performed the leg had become badly swollen and poisoned by the tin, which was imbedded between the two bones of his leg. About a pint of clotted blood and pus was removed from the leg. The wound healed slowly, and Reagan was confined at the hospital about four weeks on account of the injury, and had not fully recovered from the effects of the injury at the time of the trial. He brought an action against the defendant company to recover damages caused by delay in furnishing transportation to the hospital at Tyler and by delay in operating after his arrival. The defendant filed an answer and on the trial the evidence showed that a certain amount was deducted by the company from the wages of its employees as a fund to maintain a hospital for injured employees of defendant. This and other facts proved tended to show that there was a contract between the defendant and its employees that if the employee was injured while in the service of the company it would furnish prompt transportation to its hospital and treatment there free of charge.

The court, among other instructions, gave the following instruction to the jury: "You are instructed that, if you believe from the evidence that the plaintiff was delayed in receiving transportation, which he had a right to expect from the facts in this case, if such facts are proved, that he is entitled to recover for whatever suffering and pain there may have been caused by reason of the delay in furnishing him transportation, notwithstanding he may have been able to pay his transportation;" and refused to give the following instruction asked by the defendant: "(1) The jury are instructed that, if they find from the evidence that the plaintiff was injured while in the service of

the defendant company, and was entitled, by virtue of an implied contract with defendant, to be transported free of charge to its hospital at Tyler, Texas, for treatment, and that defendant failed or neglected to promptly furnish transportation to plaintiff to go to the hospital, and by reason thereof, plaintiff's injury was increased; and you further find that the plaintiff had the means by which he could have paid his way and thereby reached the hospital promptly,—it was his duty to have done so, and thereby avoided increased injury; and, if you find he did have the means, and failed or neglected to use it, he cannot recover any sum as damages which resulted from the delay of defendant in furnishing him transportation to the hospital." There was a verdict and judgment in favor of plaintiff for the sum of \$2,000, and the defendant appealed.

Messrs. S. H. West and Gaughan & Siford for appellant.

Messrs. Scott & Head, for appellee:

The railroad company violated its duty toward the plaintiff, when, after being injured, it failed and neglected to send him to its hospital with reasonable promptness.

Gulf, C. & S. F. R. Co. v. Harney (Tex. Civ. App.) 54 S. W. 791.

This case is controlled by Hot Springs R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351.

Riddick, J., delivered the opinion of the court:

This is an appeal from a judgment for the sum of \$2,000, rendered against the defendant company for failure to furnish the plaintiff prompt transportation to its hospital and prompt treatment after his arrival. The presiding judge instructed the jury that, if there was an agreement by the company, in case of injury, to furnish the plaintiff transportation to its hospital, and if it failed to do so, that plaintiff was entitled to recover whatever suffering and pain there may have been caused to plaintiff by reason of the delay in furnishing him transportation, notwithstanding he may have been able to pay for such transportation. Now, tickets from Stephens, Arkansas, where plaintiff lived, to Tyler, Texas, where the hospital of defendant was located, cost but \$6, and the defendant company offered evidence to show that plaintiff had at all times an ample supply of money to have paid for this transportation had he desired to do so, and that when he arrived at the hospital he had over \$3,000 cash in his possession. Instead of paying his fare and compelling the company to restore the amount paid afterwards, he chose to wait for the pass. This delay, no

doubt, acted unfavorably upon his wound, and was the cause of considerable suffering on the part of plaintiff; but, as he had it in his power to have avoided this delay and injury by buying a ticket, we think it was his duty to have done so. Suppose the company had never furnished him a ticket, could he with \$3,000 in his pocket have been justified in refusing to spend \$6 for a ticket and in allowing his leg to mortify so that amputation would be necessary; and, if he did so, could he justly demand of the company compensation for the loss of a leg? It was the duty of plaintiff when the company failed to carry out its contract, to do what he reasonably could to avoid further injury to himself, and we are of the opinion that he cannot recover for pain and suffering caused by the delay under such circumstances, for he had it in his own power to have avoided such injury. *Hall v. Memphis & C. R. Co.* 15 Fed. 57; *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968.

The decision of this court in the case of *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351, does not conflict with our conclusion here, for that was a case of an unlawful ejection of a passenger at a point between stations. In such cases there is an element of tort; and the court said that the passenger could recover "for the time and trouble of having to walk back to the Hot Springs depot, and for such humiliation as he was made to undergo by being put off," but that he could not recover damages for mental anguish caused by the resulting delay in reaching his sick brother; and the judgment was reversed on account of an improper instruction on that point. But this case has none of the elements of tort, for plaintiff was not ejected from the train. He does not complain that the conductor, at the time he boarded the train at Camden, refused to carry him beyond Stephens, for he had neither pass nor ticket, and did not offer to pay fare. He got off at Stephens, and for the first time notified the defendant company that he needed a pass to go to Tyler. He claims only that the defendant was bound, under its contract, to furnish him transportation to the hospital when thus notified. We may concede that this contention was well taken, but it does not follow that plaintiff can recover for pain and suffering caused by delay in reaching the hospital. It must be remembered that the railway company was under no obligation to enter into a contract of the kind set up by this plaintiff. The law requires railway companies to carry passengers who present themselves at the proper time and place and tender the amount required for transportation of passengers. A breach of 7 L.R.A.(N.S.)

a contract of that kind by ejecting a passenger who has paid his fare is a violation of a duty which the company owes to the public, for which the passenger ejected may recover his damages in an action for tort. But in this case the law did not require the company to enter into a contract to carry its employees to a hospital when injured. In refusing to perform such a contract the company was guilty of no breach of duty to the public, nor of any tort. The damages must be assessed as in ordinary cases of breach of contract, and only those damages can be recovered as are the natural and proximate consequences of the defendant's breach of contract. *Louisville & N. R. Co. v. Spinks*, supra; 3 *Sutherland, Damages*, § 899.

When a party has the money with which to purchase a ticket, the natural and ordinary damages which would result from a breach of a contract to give him free transportation would be the price of the transportation agreed to be furnished. If plaintiff in this case had the money with which to have purchased a ticket, we see no reason why he should be allowed to recover damages for failing to furnish a ticket, beyond the price of a ticket. For if, having the money to buy a ticket, he voluntarily exposed himself to this additional pain and suffering rather than pay the price of a ticket, his suffering caused by the delay is as much due to his own inaction as to that of the defendant, and he ought not to be allowed to hold the defendant liable for pain and suffering that he could have avoided by such a slight expenditure on his part. We are therefore of the opinion that the court erred in refusing to allow evidence that plaintiff had money with which he could have bought a ticket to Tyler. He also, we think, erred not only in giving the instruction to which we have referred, but in refusing to give instruction No. 1, asked by the defendant, which stated the law substantially as set forth in this opinion.

Judgment reversed, and cause remanded for a new trial.

COLORADO SUPREME COURT.

SI ALLEN et al., Appts.,

v.

S. HARRISON WHITE et al.

(— Colo. —, 85 Pac. 695.)

Trust—enforcement—premature suit.

In case of a trust for the heirs of a certain person who shall be living at the

Case Note.—Right of one whose interest is merely contingent, to maintain suit to

death of another, prior to the latter's death, no action can be maintained to establish the trust against an assignee of the trustee, or to impound the rents and profits.

(April 2, 1906.)

APPEAL by plaintiffs from a judgment of the District Court for Pueblo County in defendants' favor in a suit to establish a trust. Affirmed.

The facts are stated in the opinion.

Messrs. J. Ed. Rizer and M. G. Saunders for appellants.

Messrs. Charles E. Gast and S. H. White, for appellees:

The deed creating the supposed trust can vest no legal title in the *cestuis* until the death of the mother, Mary H. Allen.

2 Perry, Tr. 4th ed. 920; Schaffer v. Wadsworth, 106 Mass. 19; Prentice v. Hall, 106 Mass. 597; Brandenburg v. Thorndike, 139 Mass. 102, 28 N. E. 575.

Goddard, J., delivered the opinion of the court:

On the 25th day of November, 1876, Stephen Wally executed a deed conveying lot No. 6, in block No. 58, in the town of South Pueblo, to Alfred Allen, trustee, for

establish or enforce a trust: — The reluctance of the courts to enforce a trust at the suit of one whose interest therein is purely contingent is further illustrated by the case of *McChord v. Caldwell*, 96 Ky. 617, 29 S. W. 440, in which it was held that, where a will provided that, in the event of the death of testator's grandson without descendant and intestate, the estate devised to him should pass in accordance with the directions of a sealed paper left in the hands of the testator's trustees, one who alleged that the sealed paper referred to bequeathed to him, upon the occurrence of the contingencies named, the whole of the estate devised to the grandson, had too remote and uncertain an interest, in the absence of any allegation of the death of the grandson without descendant and intestate, to give him the right to complain of the management of the estate and the settlements made by the executor.

And in *Association for Relief of Respectable Aged Indigent Females v. Beekman*, 21 Barb. 565, it was held that where a testator directed that, after satisfying a provision in his will for the establishment of a dispensary, any estate then remaining should go to his executors in trust to apply the same in such sums and at such time and times as, in their discretion, they should think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies, 7 L.R.A. (N.S.)

his heirs at the death of his wife Mary H. Allen. On the 30th day of July, A. D. 1884, Alfred Allen conveyed the property to Andrew Ruddy, and, through divers mesne conveyances, the appellee White, defendant below, became possessed of the property on the 20th day of March, 1900. On the 20th day of May, A. D. 1896, Alfred Allen died. Mary H. Allen, his wife, is still living. The appellants, who were all the living children of Alfred Allen, deceased, instituted this action for the purpose of obtaining an adjudication that the above property is impressed with a trust in favor of the children of the said Alfred Allen who may be living at the time of the death of the said Mary H. Allen, and that White holds the title to the property subject to this trust, for an accounting by the said White, and the appointment of a receiver to take possession and hold said property in trust for the children of Alfred Allen that may be living at the time of the death of said Mary H. Allen, and directing said receiver to hold and manage said property and hold the rents and proceeds thereof under the direction of the court. A demurrer was sustained to the complaint, on the ground that it failed to state facts sufficient to con-

the fact that a society which fell within the foregoing description might possibly be made a beneficiary of the trust did not entitle it to maintain a suit for its establishment and execution.

But in *Carson v. Kennerly*, 8 Rich. Eq. 259, it was held that a party entitled to a contingent remainder or interest might, under proper circumstances, be permitted to maintain an action for the preservation of the property in case his contingent rights should thereafter become vested; the criterion by which the court would determine the propriety of granting him relief being the reasonable probability that his claim would vest.

Upon the authority of the foregoing case, it was held in *Clarke v. Deveaux*, 1 S. C. N. S. 172, that *cestuis que trust* whose interests were future and contingent were entitled to maintain a bill in equity for the purpose of preserving the trust fund.

And in *Hunt v. Hunt*, 124 Mich. 502, 83 N. W. 371, it was held that, where property was devised in trust, the income to be paid to two persons equally as long as they lived, and, upon the death of either of them, to pay over one half of the trust estate to his heirs, devisees, or legatees, the prospective heirs of one of such persons were entitled to take proceedings to protect the trust fund, to compel the appointment of trustees, and to have them properly execute the trust, although such person was then living and had made a will devising the trust property to his wife.

stitute a cause of action, and the action was dismissed. From this judgment, this appeal is prosecuted.

It is apparent from the foregoing statement that, if the deed to Allen created a trust, it continues until the death of Mary H. Allen, and cannot be terminated until that event occurs (2 Perry, Tr. 4th ed. § 920; Schaffer v. Wadsworth, 106 Mass. 19; Prentice v. Hall, 106 Mass. 597); and that said trust will inure to the benefit of such of the *cestuis que trust* only as may be living at the time this contingency shall happen. It is clear that it cannot now be determined whether any of them will be living at that time. This furnishes a conclusive reason why we should not now determine the question as to the existence or nonexistence of the trust. It is also evident that in these circumstances the plaintiffs are not now entitled to receive the rents and profits of the property, or to have them impounded for their benefit.

The judgment dismissing the action will therefore be affirmed.

Affirmed.

Gabbert, Ch. J., and Bailey, J., concur.

COLORADO SUPREME COURT.

ZOUAVE E. MONCRIEFF, Admr., etc., of
John Moncrieff, Appt.,

v.

CHARLES WILLING HARE.

38 221
(— Colo. —, 87 Pac. 1032.)

Mortgage—rents and profits.

Notwithstanding the statute provides that a mortgage of real estate shall not be deemed a conveyance whatever its terms,

Case Note.—Power of equity, in jurisdiction where mortgage does not convey the title, to impound rents and profits of mortgaged property pending foreclosure: — In order to explain adequately the causes for the variance in the views taken in different jurisdictions as to the effect of statutes providing, expressly or in substance, that a mortgage shall not be deemed a conveyance so as to enable the mortgagee to recover possession of the property without foreclosure, on the appointing of a receiver for the mortgaged property, it is necessary to allude briefly to the different American theories of mortgages, and to the bases of equity jurisdiction to impound the rents and profits of mortgaged property.

According to a recognized authority (Pom. Eq. Jur. §§ 1186–1188), the English system, under which the mortgagee is regarded at law as the legal owner and in equity as having merely a lien, has not been wholly adopted in any of the United States, in 7 L.R.A. (N.S.)

so as to enable the owner of the mortgage to recover possession without a foreclosure, a court of equity may, pending foreclosure, impound the rents and profits to be applied in reduction of the debt,—especially, where the rents and profits were pledged in the mortgage to the payment of the debt, in consideration of the release by the mortgagee of other security.

(December 3, 1906.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in plaintiff's favor in a proceeding to compel specific performance of a contract to apply the rents and profits of mortgaged property in reduction of the debt. Modified.

The facts are stated in the opinion.

Messrs. Henry C. Charpiot and John A. Perry, for appellant:

An agreement in a mortgage by which the mortgagor agrees, in case of default, to give up possession of the mortgaged property pending foreclosure, or to give up the incidents of that possession, the rents, is against public policy, and therefore void.

Teal v. Walker, 111 U. S. 242–252, 28 L. ed. 415–419, 4 Sup. Ct. Rep. 420; Couper v. Shirley, 21 C. C. A. 288, 44 U. S. App. 586, 75 Fed. 170; Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74; Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836; Wagar v. Stone, 36 Mich. 364; Beecher v. Marquette & P. Rolling Mill Co. 40 Mich. 307; American Nat. Bank v. Northwestern Mut. L. Ins. Co. 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610.

The rents and profits of real estate have always been regarded as the necessary incidental accompaniment of use and occupation of the property.

Teal v. Walker, 111 U. S. 242, 28 L. ed.

which equitable principles have penetrated the legal theory either to the extent that the mortgagee is recognized as the holder of the legal title only so far as may be necessary to protect his interests, or, partly through the adoption of equitable doctrines by the courts and partly through the operation of statutes of the kind under consideration, with the result of destroying the legal theory *in toto*.

Originally, the practice of appointing a receiver to impound the rents and profits of mortgaged property seems to have grown out of the lack of a remedy at law on the part of persons having only equitable mortgages, who, in consequence, were not in a position to recover the possession of the mortgaged premises in an action at law. But, as equity would give effect to a mortgage only so far as to afford protection to the mortgagee, such mortgagee could not enforce his right to the rents and profits in equity, unless he could show that the

415, 4 Sup. Ct. Rep. 420; Hughes v. Edwards, 9 Wheat. 500, 6 L. ed. 145; Gilman v. Illinois & M. Teleg. Co. 91 U. S. 603, 23 L. ed. 405; 4 Kent, Com. 157.

The law does not permit the recovery of the legal incident, independent of the principal thing, from which it emanates.

Teal v. Walker; Hazeltine v. Granger; Couper v. Shirley; Wagar v. Stone; Beecher v. Marquette & P. Rolling Mill Co.; and American Nat. Bank v. Northwestern Mut. L. Ins. Co.,—supra.

The legislature, in securing to the mortgagor the possession of mortgaged premises, with its incidents, placed the same beyond even the mortgagee's own contracts.

Teal v. Walker; Hazeltine v. Granger;

property itself was inadequate security. Out of this enforcement, on equitable grounds, of a right incident to the mortgage itself, seems to have sprung the doctrine of so-called equitable lien on the rents and profits of mortgaged property, which courts of equity enforce by impounding them for the benefit of the owner of the mortgage when it appears that the property itself is inadequate to pay the debt and the mortgagor is insolvent, which doctrine is a part of the hybrid theory above alluded to as prevalent in some jurisdictions, that the mortgagee is to be regarded as owner so far as is necessary to keep him secure.

The difficulty of basing an equitable lien against property of an insolvent debtor on the mere inadequacy of security held by the creditor, which is what the rule that a mortgagee, regarded simply as a lienor, may have rents and profits sequestered for his benefit under such circumstances amounts to, has occurred to some of the courts.

Thus, in *Lowell v. Doe*, 44 Minn. 141, 46 N. W. 297, in discussing the effect of the statute declaring that "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of real property without a foreclosure," the court intimated that whether a receiver should be appointed *pendente lite* from the mere fact of the insolvency of the debtor and the insufficiency of the security,—at least if that is not becoming depreciated by reason of the culpable acts or neglect of the mortgagor,—might, perhaps, be doubted; and in *Marshall & I. Bank v. Cady*, 76 Minn. 112, 78 N. W. 978, it was expressly held that, since a receiver could not be appointed on the ground that, under the mortgage, the rents and profits enter into and become a part of the security, for the payment of the debt, the only ground upon which an appointment may be made is the equitable one that it is necessary to prevent waste, and protect and preserve the premises themselves. The court said: "The fact that the premises are inadequate security, or

and Beecher v. Marquette & P. Rolling Mill Co.,—supra.

Mr. James H. Pershing, for appellee:

Rent is a mortgageable interest in real estate.

Jones, Mortg. § 136; First Nat. Bank v. Illinois Steel Co. 72 Ill. App. 640; Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Shotwell v. Smith, 3 Edw. Ch. 588; Jones, Mortg. § 1516.

The mortgage of the rents was not against public policy.

First Nat. Bank v. Illinois Steel Co. supra; Davis v. Dale, 150 Ill. 239, 37 N. E. 215; Sacramento & P. R. Co. v. Superior Court, 55 Cal. 453; Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414; McLane v. Placer-ville & S. Valley R. Co. 66 Cal. 606, 6 Pac.

that the mortgagor is insolvent, or both combined, is, of itself alone, no ground for the appointment of a receiver, although it might be a very material consideration in passing upon the propriety or necessity of appointing a receiver for the purpose of preserving the premises. To hold otherwise would be to defeat the provisions of the statute which gives the right of possession to the mortgagor, to deprive him of those substantial rights which it was the evident intent he should have, and to allow the mortgagee to do indirectly what he cannot do directly. . . . It must be conceded that, under similar statutes, the decisions of the courts on this question seem to be somewhat conflicting. Doubtless, some of them have been influenced by preconceived ideas derived from the common law, while others, which hold that a receiver of the rents and profits may still be appointed, have failed fully to appreciate the limitations upon the right resulting from the change in the law of mortgages."

In *Post v. Dorr*, 4 Edw. Ct. 412, the court said: "Notwithstanding the right of entry of a mortgagee has been abolished by our Revised Statutes, and there is no longer any existing analogy between putting a receiver into possession of mortgaged premises and any legal right or remedy which a mortgagee now enjoys or may resort to, yet the court of chancery has persevered in its ancient practice (doubtless borrowed from the practice of the chancery in England, and where a different state of things exists in regard to the legal rights and remedies of a mortgagee) of appointing a receiver over a mortgagor and his tenants, after default made in payment of the principal debt and a well-grounded apprehension of a deficiency of the security. This has been the practice so long, and it is so firmly established by order of the chancellor,—and even, I believe, in cases without reference to the point whether, by the terms of the mortgage, the rents and profits were expressly pledged or not as a part of the security,—that I am not at liberty to depart from it or to doubt the authority of the court in

748; *Bank of Ogdensburgh v. Arnold*, 5 Paige, 41; *Shotwell v. Smith*, *supra*; *Hollenbeck v. Donnell*, 94 N. Y. 342; *MacKellar v. Rogers*, 20 Jones & S. 360; *Bryson v. James*, 23 Jones & S. 374.

Where rents are specifically made a part of the security, the courts will enforce such provisions.

Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836; *Michigan Trust Co. v. Lansing Lumber Co.* 103 Mich. 402, 61 N. W. 668; *Byers v. Byers*, 65 Mich. 598, 32 N. W. 831; *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54; *Reading v. Waterman*, 46 Mich. 107, 8 N. W. 691; *Roberts v. Sutherland*, 4 Or. 219.

Equity has power to preserve rents and profits for the satisfaction of the debt.

High, Receivers, § 643; *Jones, Mortg.* §

1516; *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911; *Dubois v. Bowles*, 30 Colo. 44, 69 Pac. 1067; *Pasco v. Gamble*, 15 Fla. 562; *Callaman v. Shaw*, 19 Iowa, 183; *Douglass v. Cline*, 12 Bush, 608; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Davidson v. Allis*, Fed. Cas. No. 3,600; *Phillips v. Eiland*, 52 Miss. 721; *Hyman v. Kelly*, 1 Nev. 179; *Bank of Ogdensburgh v. Arnold*, 5 Paige, 39; *Smith v. Tiffany*, 13 Hun, 671; *Boyce v. Boyce*, 6 Rich. Eq. 302; *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124; *Frisbie v. Bateman*, 24 N. J. Eq. 28; *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 30 L. ed. 905, 7 Sup. Ct. Rep. 841; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 36 C. C. A. 236, 94 Fed. 269; *Bryson v. James*, *supra*; *St. Louis*

this particular. At the same time, I confess myself unable to discover the analogy or the principle under our laws in relation to the nature and true character of a mortgage, which authorizes such an interference with the legal rights of a mortgagor, unless, indeed, he has, by the express terms of his contract, pledged the rents and profits, as well as the corpus of the estate, as security for the debt."

And in later decisions the courts of New York have based the appointment of a receiver pending foreclosure upon other grounds. See *Hollenbeck v. Donnell*, *infra*.

And in *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936, it was held that where, by statutory provisions, a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of a debt, in the absence of a stipulation in the mortgage that the mortgagee shall have a lien upon the rents and profits as well as upon the land, the mortgagee has no higher or better claim to the rents and profits than an unsecured creditor of the mortgagor, though the latter is insolvent and the mortgaged premises insufficient to satisfy the mortgage debt. The court attributes the conflict of authority upon this point to a failure to keep in mind the marked distinction between the nature and effect of a mortgage at common law and under statutes like the one in question.

Even where the effect of such statutes was not an element of the case, some courts seem to have found it impossible to recognize the right of a mortgagee to have the rents and profits of the mortgaged property impounded for his benefit as being purely equitable in character.

Thus, in *Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArth. 220 (Reversed on this point in 121 U. S. 105, 30 L. ed. 905, 7 Sup. Ct. Rep. 841), it was said: "It will be observed that the mortgage or deed of trust, as it is called, did not mortgage or create any lien upon the rents and profits of this property: and, while it is averred in the bill 7 L.R.A. (N.S.)

that the property mortgaged is an inadequate security for the amount of money loaned to the mortgagor, and that he is insolvent, that affords no grounds whatever for seizing upon the rents and profits before foreclosure or sale of the mortgaged premises. Indeed, the grocer or merchant who supplied the necessities of life for Grant and family has a much higher equity on the rents and profits than the mortgagee. The latter loaned Grant money and took security for the repayment of it, but the former sold him goods on his personal credit. What justice or equity is there in allowing a mortgagee to claim any rights in reference to something not mortgaged to him over and above the rights of any other contract creditor? No well-adjudicated case can be found, I think, that allows the appointment of a receiver of rents and profits, when these rents and profits were not mortgaged, except, perhaps, in the state of New York, in which these decisions depend mainly upon the statute laws of that state; and these decisions may be laid out of the question so far as this case is concerned."

In New Jersey it is denied that the mere inadequacy in value of the mortgaged premises and insolvency of the mortgagor are a sufficient foundation for the appointment of a receiver, although it is admitted that one may be appointed where waste is being committed and the property has depreciated in value through the fault or negligence of the mortgagor or tenant in possession, or where there is any act on the part of the mortgagor or such tenant which shows fraud on his part, or makes him chargeable with bad faith in misappropriating the rents and profits for other purposes than that of keeping down the interest on the encumbrances. *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Frisbie v. Bateman*, 24 N. J. Eq. 28; *Horne v. Dey*, 61 N. J. Eq. 554, 49 Atl. 154.

It certainly seems that the more consistent explanation lies in viewing the impounding of the rents and profits under such circumstances as a recognition in equity of right which is legal in character, even though it is the inadequacy of the principal

Nat. Bank v. Field, 156 Mo. 306, 56 S. W. 1095.

Campbell, J., delivered the opinion of the court:

This special proceeding, in the nature of a suit for specific performance, was begun in the county court of Arapahoe county to compel an administrator of an estate, who had received his letters from that tribunal, to conform to the terms of a real-estate mortgage given to secure the payment of estate indebtedness which he refused to observe, though at his request the court had specifically directed him to execute it. The county court granted the full relief asked by the appellee, and the administrator took the case by appeal to the district court, where

the decree of the county court was affirmed, with modifications hereinafter adverted to. From the judgment of the district court, the administrator has brought the case here.

Upon this appeal there are no disputed questions of fact, and but a single legal question is involved. To show the equities, which are clearly with the mortgagee, who is appellee here, the facts are fully stated.

John Moncrieff, whose estate is now being administered by Zouave E. Moncrieff, in his lifetime borrowed \$33,000, and gave his note therefor, which afterwards became the property of appellee, Hare. To secure its payment, John Moncrieff gave a mortgage upon a number of lots in the city of Denver. The note did not mature until after John's death, and while his estate was in

security which evokes the action of the equity court. The significance of whether this right is essentially legal or equitable in nature lies in its bearing upon decisions as to the effect of statutes stripping the mortgagee of his legal estate upon the right to have a receiver appointed.

But there is another basis for the appointment of a receiver which presents no such difficulty,—the preservation of the security against waste by the mortgagor. The right to have a receiver appointed under these circumstances, being purely equitable in character, is generally regarded as unaffected by the statutes in question.

It should also be noted that the effect of these statutes, so far as they bear upon the right to have a receiver of rents and profits appointed, is frequently modified by other statutes directly governing the appointment of receivers.

An examination of the cases with reference to the holding of *MONCRIEFF v. HARE* that statutes stripping the mortgagee of his legal estate do not affect his right to ask, or the jurisdiction of equity to decree, the appointment of a receiver to impound rents and profits for his benefit under such circumstances as were formerly a ground for invoking such action, shows that the effect of many of the decisions on this question has been frequently misunderstood.

In *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490, a case commonly regarded as holding that a statute forbidding the mortgagee from recovering the mortgaged estate, and confining his remedy to a foreclosure, operates to prevent the appointment of a receiver, the ground on which the appointment was sought seems to have been that the mortgagee was entitled to rents and profits pending foreclosure as an incident to his mortgage; and it does not appear that the property itself was alleged to be insufficient. The effect of this decision, therefore, is not so sweeping as is commonly claimed for it.

In the case of *American Nat. Bank v. Northwestern Mut. L. Ins. Co.* 32 C. A. 275, 60 U. S. App. 693, 89 Fed. 610, it was held that the Colorado statute pro-

viding that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale, does not operate to preclude the appointment of a receiver of rents and profits pending foreclosure, for the purpose of applying them to the payment of taxes, insurance, and for repairs on the property which the mortgagor had covenanted to keep up. The criticism made in *MONCRIEFF v. HARE*, that so much of the opinion therein as intimates that a receiver could not be appointed pending foreclosure, solely for the purpose of sequestering rents and profits to be applied to the satisfaction of the mortgage debt, is contrary to the rule announced by the Supreme Court of the United States, does not seem to be well founded, as the decisions of that court on the question, with the exception of the *obiter dictum* in *Kountze v. Omaha Hotel Co.*, discussed *infra*, have not been made with reference to statutes of the kind under discussion, altering the effect of mortgages.

In *Pasco v. Gamble*, 15 Fla. 562, it was held that a statute providing that a mortgage is a specific lien upon property, and that the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding and outbidding all competitors in market, does not operate to prevent the appointment of a receiver where the land is inadequate security for the debt and the mortgagor is insolvent. The court said: "We are now satisfied that his [the mortgagee's] right to possession was not the basis of this equity. He had no right in equity to possession as against the mortgagor, unless there were equities affecting the conscience of the mortgagor, by which his possession could be controlled for the benefit of the charge and encumbrance, and equity gave her aid when these circumstances existed, and when at law the mortgagee could not get possession, or his right there was obstructed or not available. The equity results from the fact that a mortgage is a charge upon the land; that the land is in-

process of administration, against which the debt was established as a claim of the fourth class. Default was made in payment. Hare foreclosed the mortgage or deed of trust in the district court, and at the foreclosure sale bid in the property for \$20,000, and credited the same upon the note, leaving a balance due of over \$15,000, for which a deficiency judgment was rendered. It seems that the foreclosure and sale were brought about with an understanding between the mortgagee, Hare, the administrator, and the heirs of John Moncrieff for a readjustment of the indebtedness, upon the following plan: Hare agreed to, and did, extend the maturity of the entire indebtedness for three years, and, for a consideration of \$20,000, reconveyed to the heirs the prop-

erty purchased at the foreclosure sale. To secure the payment of the debt, a mortgage on the reconveyed property was given by the heirs, and Hare put into possession, with power to receive the rents and profits, out of which he was to pay taxes, insurance, repairs, and interest on the mortgage debt. As additional security, two other lots, being a part of the unencumbered estate of John Moncrieff, were covered by a second mortgage, in which the heirs and the administrator joined. As these lots belonged to the estate, application was made to the county court for leave to encumber it, and authority and direction were given to the administrator to mortgage both the property and its rents and profits. In pursuance thereof, the instrument contained the following

adequate security for the debt; that the mortgagor is insolvent, or resides out of the state; that both the mortgagor and the purchaser at the execution sale have paid no attention to arrears of interest due upon the mortgage debt, or to pay taxes then due and unpaid. This rule we deduce from the uniform action of courts of equity in analogous cases, where, as against the legal right of possession, equity will sequester and apply the rents and profits to a charge or encumbrance. The right to appropriate the rents and profits which equity gives the mortgagee, where a receiver is appointed at this instance, does not result from any specific pledge of such rents contained in the mortgage. Equity makes the mortgage, as between mortgagor and mortgagee, a charge upon the rents and profits whenever the mortgagor is insolvent and the security is inadequate; and especially is it the duty of the purchaser in possession to keep down the interest." The effect of this decision, however, is considerably weakened by the fact that one of the grounds on which the appointment was based was the purely equitable one of the preservation of the estate, it appearing that the owner of the property had failed to pay the taxes.

Merritt v. Gibson, 129 Ind. 155, 15 L.R.A. 277, 27 N. E. 136, discussed in the opinion in *MONCRIEFF v. HARE*, hinged on the effect to be given to a statute authorizing the appointment of a receiver to protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person entitled thereto the rents and profits thereof, in connection with another statute providing that the owner of real estate sold under execution shall be entitled to the possession of the same for one year from the date of such sale; the court going on to state, however, that the appointment of a receiver might be justified aside from the statute, by well-settled principles of equity, a conclusion dissented from by two judges, it being said by Elliott, J., in the dissenting opinion, that the mere fact that the mortgaged property is not of value sufficient to satisfy the judgment does

not authorize the appointment of a receiver. The case, therefore, lends little real support to the proposition that equity may, in the absence of a statute authorizing the appointment of a receiver, impound the rents and profits of mortgaged property pending foreclosure for the benefit of a mortgagee without right of possession.

In *American Invest. Co. v. Farrar*, 87 Iowa, 437, 54 N. W. 361, it was held that, where it was provided by statute that, in the absence of stipulations to the contrary, the mortgagor of real property should retain the legal title and right of possession thereto, a receiver could not be appointed pending foreclosure for the purpose of appropriating the rents and revenues of the mortgaged premises for the benefit of the mortgagee, whose mortgage did not, in terms, give to him the right of possession before sale and the termination of the right of redemption, nor pledge the rents and profits, even though it appeared that the mortgagor was insolvent and the security insufficient; the court saying: "To take possession of property so mortgaged, or to appropriate the revenue which is derived therefrom for the benefit of the mortgagee, even though done by means of a receiver, would be to violate rights which are created and protected by statute for the benefit of the mortgagor, and those who claim through him, and cannot be authorized."

In *Wagar v. Stone*, 36 Mich. 364, it was held that, where it was provided by statute that the mortgagor should be entitled to the possession during the proceedings taken to foreclose the mortgage, and until a sale should have been made and the title of the purchaser become absolute; and that, until the title should have become absolute upon a foreclosure of the mortgage, an action of ejectment could not be maintained by the mortgagee, his assigns, or representatives, to recover possession of the mortgaged premises,—rents and profits collected by a receiver appointed pending foreclosure could not be applied to a deficiency remaining after application of the proceeds of the foreclosure sale to the mortgage debt; the court taking the view that the legislature,

clause, which gives rise to this controversy: "It is further covenanted and agreed that, after applying the rents and profits from the property aforesaid to the payment of the insurance premiums, taxes, assessments, necessary repairs, and necessary incidental expenses, that he will pay over the net balance of said rents to the said Charles Willing Hare, or to his duly authorized agent, to be applied upon the interest upon the notes secured by the mortgage ratably." The mortgagee was not placed in possession of this property, because the same was already in *custodia legis*, and the administrator, being the representative of the estate, was deemed a proper person to collect and apply the rents in accordance with the terms of the mortgage just quoted. Until about

the time of the maturity of the debt, the administrator collected the rents and profits and applied them as the mortgage prescribed, and as the county court, in authorizing its execution, directed. Thereafter he refused to comply with these terms as to rents and profits, and, the indebtedness being due and unpaid, the mortgagee began foreclosure proceedings in the district court in the year 1901, and in a separate proceeding (which is the one now under consideration) applied to the county court for an order to compel the administrator to observe the covenants of the mortgage, and apply the rents and profits to the payment of the taxes and insurance then in arrears, and the balance, if any, in reducing the interest, and to continue so to do pending foreclosure.

in depriving the mortgagee of the means of enforcing possession, intended also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title.

And in *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058, it was held, upon the authority of the foregoing case, that a mortgagee is not entitled to have the rents and profits pending foreclosure impounded, although it was alleged that the mortgagor's grantee did not intend to devote the rents and profits to the payment of the encumbrances.

In *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 3 L.R.A. 90, 37 Fed. 286, it was held that the right of the mortgagor to the rents and profits *pendente lite* is a substantial one under the Michigan statute above stated, which must be recognized by the courts of the United States in administering the rights of parties to a mortgage, and that, therefore, a receiver would not be appointed to take the rents and profits to apply on the mortgage prior to the completion of foreclosure, although the security was inadequate; it being stated, however, that there is nothing in *Wagar v. Stone* which controverts the power and duty of the court to appoint a receiver in foreclosure cases, where the property is being destroyed or wasted by the mortgagor, for the protection of the security.

In *Belding v. Meloche*, 113 Mich. 223, 71 N. W. 592, however, it was held that the statute does not apply to equitable mortgages, and that, therefore, a receiver appointed pending the foreclosure of a land contract providing that, on default of the purchaser, the vendor may re-enter without notice, might be required to apply rents and profits received by him to a deficiency remaining after sale.

In *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297, relied upon in *MONCRIEFF v. HARE* as supporting the doctrine that rents and profits may be impounded pending foreclosure for the benefit of a mortgagee, even where he is divested by statute of all legal rights, it was held that a statute declaring that "a mortgage of real property is not to be

deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," was clearly intended to abrogate the common-law doctrine that a mortgage created an estate upon condition in the mortgagee, which, upon default in the performance of the condition, became absolute, entitling the mortgagee to recover possession; but that such statute could not be fairly construed as abrogating, also, the power of courts of equity to afford to mortgagees such remedies for the protection of their equitable rights as, upon equitable grounds, those courts had always been accustomed to afford, and the granting of which did not rest upon the doctrine of the legal title or right of possession being in the mortgagee. That this case cannot be regarded as authority for the proposition that the rents and profits pending foreclosure may be impounded for the benefit of the mortgagee where the security is insufficient and the mortgagor insolvent, is apparent from the fact that the propriety of appointing a receiver on such grounds was expressly doubted, and that the appointment of a receiver was put upon the ground of the nonpayment of taxes, the probable cancellation of the insurance, and the cessation of the use of the property for hotel purposes, resulting in a permanent impairment of the value of the mortgaged property.

And in *Marshall & I. Bank v. Cady*, 76 Minn. 112, 78 N. W. 978, hereinbefore quoted, and *National F. Ins. Co. v. Broadbent*, 77 Minn. 175, 79 N. W. 676, it was held that, while a receiver may be appointed to collect rents and profits to protect and preserve the mortgage security and to protect the mortgaged property from waste, such is the only purpose for which a receivership can be exercised, or for which the rents and profits can be used.

But in *Davidson v. Allis*, Fed. Cas. No. 3,600, it was held that the Minnesota statute above quoted did not restrict the power of a court of chancery to take charge of the rents and income and enforce the equitable right of the mortgagee to the rents, grow-

proceedings, and until possession of the property was delivered to the purchaser at the foreclosure sale. As a part of the readjustment plan, Hare, particularly in view of the new pledge of rents and profits, released securities he held on other property of the estate, relieved the Moncrieff heirs from personal liability upon the debt, and relinquished his claim against the estate. When this proceeding was begun, it is conceded that the mortgaged premises were and are insufficient security for the payment of the debt, and that they constitute the only asset available to apply on the debt, as all the mortgagors are insolvent. The legal question, therefore, is whether, under the facts disclosed by this record, the rents and profits belonged to the mortgagors until the

period for redemption has expired, or whether they may be applied upon the interest on the mortgage debt. Counsel do not object to the form of the proceeding, apparently agreeing that, if this is a case where a court of equity, in which foreclosure proceedings are pending, might appoint a receiver to sequester the rents and profits to be applied in accordance with the rights of the parties, to be ascertained upon final hearing, that the same relief may be granted herein if the equities are with the mortgagee.

It is the contention of the administrator that, under § 261 of our Code of Civil Procedure, reading, "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the

ing out of the fact of the insolvency of the mortgagor and the inadequate security.

In *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911, it appears that the mortgage in question was affected by a Nebraska statute declaring that, "in the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession." It should be noted that what was said therein as to the power of courts of equity to take charge of mortgaged property by means of a receiver, quoted in the *MONCRIEFF CASE*, was purely *obiter*, the question before the court being the measure of damages to be recovered on an appeal bond in a foreclosure suit, and the effect of the statute referred to upon the power of the court to impound the rents and profits for the purpose of satisfying any deficiency is nowhere discussed.

In *Hyman v. Kelly*, 1 Nev. 179, it was held that a statute providing that a mortgage of real property shall not be deemed a conveyance, so as to enable the owner of a mortgage to recover possession of the real property without foreclosure and sale, simply operated to restrict the remedies available to the mortgagee, and did not curtail the power of equity courts to appoint a receiver pending foreclosure. It appears, however, that, in addition to the inadequacy of the property, and the insolvency of the mortgagors, the property was being wasted and destroyed; and further, that the rents and profits had been expressly pledged for the payment of interest and the making of repairs.

In New York it is held that, notwithstanding the right of entry of a mortgagee has been abolished, equity may appoint a receiver pending foreclosure, where there are grounds to apprehend a deficiency of the security. See *Post v. Dorr*, 4 Edw. Ch. 412.

And in *Syracuse City Bank v. Tallman*, 31 Barb. 201, it was held that, though a mortgage is simply a lien for the security of the mortgage debt, courts of equity, adhering to the ancient practice, will, after default in an action for foreclosure and sale, anticipate the final judgment of the court by the appointment of a receiver, and, in 7 L.R.A. (N.S.)

effect, put the mortgagee in possession, and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage, where it appears that the mortgaged premises are an inadequate security for the debt, and that the mortgagor, or other person liable for the mortgage debt, is insolvent. The court said: "This relief, it will be readily seen from the conditions necessary to its enjoyment, does not grow directly out of the relations of the parties or the stipulations contained in the mortgage, but out of equitable considerations alone."

In *Hollenbeck v. Donnell*, 94 N. Y. 342, it was held that the right of a mortgagee to a receivership of the rents and profits of the mortgaged premises does not rest upon his legal right to the possession of the premises, and consequently to the rents thereof, but upon the ground that, when default has been made in the condition of a mortgage, the mortgagee at once becomes entitled to a foreclosure of the mortgage and a sale of the mortgaged premises; and that, since this process requires time, on general principles of equity the court may make the decree, when obtained, relate back to the time of the commencement of the action, and, where necessary for the security of the mortgage debt, may appoint a receiver of the rents and profits accruing in the meantime, thus anticipating the decree and sale; and that, therefore, the right of the mortgagee to have the rents and profits impounded pending foreclosure was unaffected by a statute providing that no action of ejectment should thereafter be maintained by a mortgagee for the possession of the mortgaged premises.

In *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936, it was held that, where the effect of the statute is such that a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of the debt, the mortgagee cannot, in the absence of a stipulation in the mortgage that he shall have a

real property without foreclosure and sale," the rents of mortgaged property cannot be applied to the reduction of the mortgage debt, in consequence of any agreement in the mortgage itself, until the mortgagee has obtained actual possession, or has acquired the right to possession under a foreclosure and sale after the period of redemption has expired. The mortgagee contends that, while this provision of the Code makes the mortgage merely a security for the debt, and the mortgagee acquires no legal title, nevertheless, where his mortgage security is inadequate, especially where there is a specific pledge of rents as part of the security, and the mortgagor is insolvent, a court of equity may, upon default and after foreclosure suit has been brought, appoint a receiver to col-

lect the rents and profits, and have the same applied upon the mortgage debt when final decree is made; in other words, the mortgagee says that this section was not intended to take away from courts of equity their power in such cases to apply rents and profits of the mortgaged estate towards the reduction of the mortgage debt.

It is familiar learning that at common law a mortgage vests the legal title in the mortgagee, and upon condition broken the mortgagee might re-enter or bring ejectment. Our statute, however, has taken from the instrument its common-law character, and deprived the mortgagee of all possession, or right of possession, either before or after condition broken; and before this right exists the mortgagee must foreclose

lien upon the rents and profits as well as upon the land before or pending proceedings for foreclosure, subject the rents and profits of the mortgaged premises to the payment of his debt, though the security be inadequate, since he then has no higher or better claim to them than an unsecured creditor of the mortgagor.

In *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124, it was held that, although, by the laws of the state, a mortgagor has a legal right to the possession of the mortgaged property until after foreclosure and sale, notwithstanding the condition of the mortgage has not been performed; and although all legal actions for the recovery of possession of the mortgaged premises have been taken from the mortgagee by express statute,—the power of a court of equity to appoint a receiver of the rents and profits in an action to foreclose the mortgage is unaffected. It appeared in the case that there was some doubt about the adequacy of the principal security to satisfy the debt, and that the premises had been sold for taxes and the certificates of sale transferred to strangers, so that a proper case for the protection of the security by a court of equity was shown independent of any supposed equitable lien arising out of the inadequacy of the mortgaged premises. The court, however, bases its decision on what it conceives to be the general current of authority, and also says that the want of legal remedy to enable the mortgagee to recover possession of the mortgaged premises before foreclosure is an additional reason why equity should aid him.

The correctness of this decision is reaffirmed in *Sales v. Lusk*, 60 Wis. 490, 19 N. W. 362; and the power of equity to appoint a receiver to take possession of the mortgaged premises, to the end that the rents and profits may be applied to the payment of any deficiency that may remain after foreclosure and sale, is recognized in *Gaynor v. Blewett*, 82 Wis. 313, 33 Am. St. Rep. 47, 62 N. W. 313.

As hereinbefore stated, the question under discussion is affected by the existence of statutes relating to the appointment of re-

ceivers, the relation of which to statutes governing the effect of mortgages is considered in the cases following:

Thus, in *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45, the power of equity to appoint a receiver to take and hold the rents and profits of mortgaged premises to secure the debt, where it is averred that the security is insufficient, based upon a statutory provision to that effect, was recognized, although by the laws of California the remedy of a mortgagee is confined to a foreclosure. See *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490.

In *Douglass v. Cline*, 12 Bush, 608, and *Newport & C. Bridge Co. v. Douglass*, 12 Bush, 673, a statute providing for the appointment of a receiver, where it appears that the mortgaged property is in danger of loss or injury, or is, perhaps, insufficient to discharge the mortgage debt, was held to authorize the appointment of a receiver, notwithstanding the mortgagee had been stripped of his legal rights by a statute providing that actions at law for possession may, upon motion of the mortgagor, be transferred to the equity side of the docket.

And in *Nebraska*, although it is provided by statute that, in the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession, the power of a court of equity to proceed under a statute authorizing the appointment of a receiver in an action to foreclose a mortgage, when the mortgaged property is probably insufficient to discharge the mortgage debt, is regarded as unaffected. *Jacobs v. Gibson*, 9 Neb. 380, 2 N. W. 893; *Philadelphia Mortg. & T. Co. v. Goos*, 47 Neb. 804, 66 N. W. 843.

In *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591, it was held that the provision of the Civil Code that a mortgage does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage, is to be taken, under the rule of construction enacted by the legislature, that, if the provisions of any Code conflict with or contravene the provisions of any other Code, the provisions of each Code must prevail as to all questions arising thereunder out of the same

his mortgage, and sell the mortgaged property. This court, in *Pueblo & A. Valley R. Co. v. Beshoar*, 8 Colo. 32, 5 Pac. 639, has so construed our statute in harmony with rulings in other jurisdictions where similar statutes are in force, and has said that, in the absence of a special contract to the contrary, the equitable doctrine has thereby been made universal that a mortgage creates merely a lien. The language of this court that such was the doctrine, in the absence of a special contract to the contrary, indicates that the mortgagor and mortgagee may, by special contract, work a change in the rule. To the same effect is *Fogarty v. Sawyer*, 17 Cal. 589, where, in speaking for the court, Chief Justice Field says the statute does not prevent the owner from mak-

ing an independent contract for the possession or from authorizing a sale of the premises (the mortgagee consenting thereto) to pay off the debt; and this right to dispose both of the possession and estate follows, necessarily, from the ownership of the property, and no valid objection can be urged against incorporating the contract and power in the same instrument with the mortgage.

Such a contract as we find in the mortgage in this case concerning rents and profits is just as much independent of this mortgage proper as was the contract in the *Fogarty* Case creating a power of sale independent of that mortgage. But, in disposing of this case, we shall not rest our judgment upon the power of the parties, by

subject-matter, as modified by the provision of the Code of Civil Procedure for the appointment of a receiver in foreclosure actions, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or probably insufficient to discharge the mortgage debt.

In *Rogers v. Southern Pine Lumber Co.* 21 Tex. Civ. App. 48, 51 S. W. 26, and *De Barrera v. Frost*, 33 Tex. Civ. App. 580, 77 S. W. 637, the appointment of a receiver, under a statute expressly providing that a receiver may be appointed in an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, when it appears that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt, seems to have been regarded as unaffected by a statute providing that a mortgagee is not entitled to possession, nor to rents of the property.

But in *Hardin v. Hardin*, supra, it is held that a statute authorizing the appointment of a receiver *pendente lite* on the application of a party establishing an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured, or impaired, does not warrant the appointment of a receiver in an action to foreclose a mortgage which does not operate as a conveyance of any estate, but simply as a lien, and which contains no provision subjecting the rents and profits of the mortgaged premises to the lien.

And in *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715, it was held that a statute providing that a mortgage of realty shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale according to law, repealed by implication an earlier statute authorizing the appointment of a receiver in an action for foreclosure, when the mortgaged property is insufficient to discharge the debt, to secure the application of the rents and profits accruing before sale can be had.

In connection with the question as to the 7 L.R.A. (N.S.)

effect of a statute authorizing the appointment of a receiver, compare *Merritt v. Gibson*, 129 Ind. 155, 15 L.R.A. 277, 27 N. E. 136.

While it is not purposed to discuss in this note the effect of a stipulation in the mortgage for the appointment of a receiver where statutes of the kind hereinbefore stated exist, reference may be made in passing to a few decisions upon this phase of the question.

In *Scott v. Hotchkiss*, supra, it was intimated, and in *Baker v. Varney*, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100, it was expressly held, that no stipulation in a mortgage can confer jurisdiction upon a court to appoint a receiver in a case where no authority is conferred by law.

In *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74, it was held that the Michigan statute forbidding ejectment by a mortgagee before foreclosure absolute renders a stipulation in a mortgage for the appointment of a receiver for the benefit of the mortgagee invalid. The court said: "The statute does not say that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common-law form contains words whereby, if applied as they read, possession would belong to the mortgagee, and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture, and not to allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction for the protection of mortgagors against agreements which, as literally drawn and as theretofore expounded, were deemed dangerous and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than the previous words of grant, and is really narrowed. It was no doubt intended to go further and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to ap-

independent contract, to take the case out of the operation of the statute, but, giving to the statute all that the mortgagor here claims for it, we shall see, from a review of the authorities, that the prevailing rule established by the authorities, as well as the correct principle, is that in a case like ours the mortgagee is entitled to rents and profits.

The mortgagor relies chiefly upon the following cases: *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74; *Couper v. Shirley*, 21 C. C. A. 288, 44 U. S. App. 586, 75 Fed. 168; *Wagar v. Stone*, 36 Mich. 364; *Beecher v. Marquette & P. Rolling Mill Co.* 40 Mich. 307; *American Nat. Bank v. Northwestern Mut. L. Ins. Co.* 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610.

Teal v. Walker was an action at law brought by Walker, mortgagee, as against Teal, one of the mortgagors, to recover damages which the mortgagee claimed he had sustained by the refusal of Teal to surrender possession of the mortgaged property; and the court held that, inasmuch as the plaintiff mortgagee took no effectual steps to regain possession of the mortgaged premises, he was not entitled to the rents and profits thereof while they were occupied by the mortgagor, who was the owner of the equity of redemption. In that case, which arose in Oregon, the court, in construing a statute in the same words as ours, said that a mortgage is not a conveyance, and a mortgagee is not entitled to possession until after the foreclosure and sale; and therefore his claim to the rents is without support. It will be observed that no equitable principle was invoked in this case, the naked question being the relative rights of mortgagor and mortgagee to rents and profits of the mortgaged property while they were in

possession of the mortgagor, and before the mortgagee, by suit or otherwise, sought to obtain possession. The court, in its opinion, refers to *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911, in which it was also said that, under a similar statute, the land mortgaged is in the nature of a pledge, and the rents and profits are not pledged, and that they belong to the one in possession, whether he be the mortgagor or a third person claiming under him; and the conclusion in the *Kountze Case* was that, as the plaintiff was not entitled to possession he had no right to the rents and profits. In that case, however, which was equitable in its character for the foreclosure of a mortgage, the court expressly recognized the equitable doctrine that rents and profits might be applied to the satisfaction of a debt, and said: "There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits, for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party, in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property."

In *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 116, 30 L. ed. 905, 909, 7 Sup. Ct. Rep. 841, it was declared that a court

point receivers, which we held, in *Wagar v. Stone*, 36 Mich. 364, had been abolished. Any such attempt to create a forfeiture is contrary to equity, and equity will not enforce it. The same principle which makes all original agreements void which destroy the equity of redemption in advance must cover a partial as well as complete destruction."

So also in *Couper v. Shirley*, 21 C. C. A. 288, 44 U. S. App. 586, 75 Fed. 168, it was held that the Oregon statute providing that a mortgage of real property shall not be deemed a conveyance, etc., is evidence of a public policy which is contravened by a provision in the mortgage for the appointment of a receiver for rents and profits pending foreclosure.

This decision was followed in *Norfor v. Busby*, supra.
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But in *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936, the right of a mortgagee to have a receiver appointed, where there is a stipulation in the mortgage that he shall have a lien upon the rents and profits as well as upon the land, was recognized, although it was provided by law that a mortgage of real estate is not a conveyance of any estate whatever.

In Iowa, though it is provided by statute that the mortgagor shall retain the legal title and right of possession, it has been held that a stipulation in a mortgage for the appointment of a receiver in case of foreclosure, to receive the rents and profits during the period of redemption, to be applied on the mortgage debt, is not against public policy. *Hubbell v. Avenue Invest. Co.* 97 Iowa, 135, 66 N. W. 85.

of equity has the power before sale in a foreclosure suit to appoint a receiver of the property involved in litigation, and thus deprive the mortgagor of its use and of its rents and profits, even where the trust deed or mortgage did not embrace the rents and profits of the property as a part of the security. *Kountze v. Omaha Hotel Co.* was cited to the point.

In *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334, the court said that, while a mortgage of real estate is now pretty generally, in this country, considered as mere security for the debt, creating only a lien, and leaving title in the mortgagor, yet everywhere it is considered as passing title in the land, so far as may be necessary for the protection of the mortgagee, and to give him the full benefit of his security; and, even against the mortgagor in possession, the mortgagee may obtain an injunction or damages for such cutting of timber as tends to impair the value of the mortgage security.

In *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86, the court remarked that, if the mortgage there under consideration had conveyed the earnings and rentals of the property, and those had constituted a part of the estate conveyed as security for the bonds, there would be some reason for saying that the mortgagee would be entitled to recover these earnings and rentals before it demanded possession of the road, which was the mortgaged property. But the court concluded that the better doctrine, as established by its previous decisions, was that, even where a mortgage covered rents and profits, and the mortgagor was in default, and for such default the mortgage provided that the trustee or mortgagee should take possession of the road, until regular demand was made for the payment of the encumbrance by the defendants, the mortgagor was not obliged to account therefor. The court concluded, citing *Kountze v. Omaha Hotel Co.*, that the substance of the rulings of the various cases is that, until the mortgagee asserts his rights under the mortgage to the possession of the road by filing a bill of foreclosure, or by demanding possession of some third party who is in possession, he has no right to its earnings and profits; thereby clearly indicating that in a proper case, where equitable rights are asserted by the mortgagee, he may, upon filing a bill for foreclosure and before decree and sale, have the rents and profits sequestered to wait final determination of the case.

In *McGahan v. National Bank*, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. Rep. 347, the court, speaking by Chief Justice Fuller, 7 L.R.A. (N.S.)

said that, as between mortgagor and mortgagee (and that is the case in hand), whether the mortgage be regarded as passing the legal estate, or as giving merely a lien for the debt, the right of the mortgagee to be protected from the impairment of his security is alike recognized,—citing *Jones on Mortgages*, § 684. And the learned chief justice added that it may be conceded that the mortgagee is not entitled to rents and profits unless a lien thereon is reserved in the mortgage; and, referring to *Teal v. Walker*, said that where a mortgagee may have the right to take possession upon condition broken, if he does not exercise the right he cannot claim rents; again indicating that, if the mortgagee had availed himself of his equitable right to preserve or impound the rents, relief could be given.

In *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250, Mr. Justice Harlan said that it was competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee while the mortgagor remains in possession, and that when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by the receiver, or until in proper form he demands and is refused possession; and he refers to *Kountze v. Omaha Hotel Co.* supra, as authority for the proposition that courts of equity, where the debtor is insolvent and the mortgaged property an insufficient security for the debt, may appoint a receiver to take charge of the property, not only to preserve the corpus, but the rents and profits, to the satisfaction of the debt.

The mortgagor lays much stress upon *American Nat. Bank v. Northwestern Mut. L. Ins. Co.* 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610, as enunciating the doctrine that, under a statute like ours, a mortgagee cannot maintain a right to have rents and profits applied to the satisfaction of his mortgage debt, because the rents belong to the mortgagor, and the mortgage is not a lien thereon; nor will the appointment of a receiver for the purpose of collecting the rents create an equitable lien in favor of the mortgagee. If such was the announcement in that case, it was *obiter*; the court expressly saying that the record in the case before it did not show that any part of the rents collected by the receiver was used in payment of the original mortgage debt, but, on the contrary, the money paid to him as rental was expended in repairing

the mortgaged premises, in keeping up insurance, and in paying taxes. For such purposes, it was said that a receiver might be appointed; but whether he could be appointed for the purpose of sequestering rents and profits to be applied to the satisfaction of the mortgage debt was not in that case, and was expressly eliminated. But, if it was there decided, the case would not be authority, for it is contrary to the rule announced by the Supreme Court of the United States in the cases to which we have already adverted.

In an early case in California (*Guy v. Ide*, supra) it was said that, as their statute, of which ours is a copy, forbids a mortgagee from recovering the mortgaged estate, the same reason does not there exist as under the English rule for appointing a receiver to collect the rents and profits pending the litigation. The authority of this case seems somewhat shaken by subsequent decisions of the same court, though possibly subsequent statutes may account for the change. But in *Fogarty v. Sawyer*, 17 Cal. 589, it was said that the language of the statute, of which ours is a copy, was intended merely to control the terms of grant, bargain, and sale generally employed in mortgages, and was not intended to prohibit separate stipulations between the parties for possession.

In *Sacramento & P. R. Co. v. Superior Court*, 55 Cal. 453, in a proceeding which, like the one under consideration, was in the nature of a suit to enforce specific performance of the terms and conditions of a mortgage, it was held that a receiver might be appointed by the court to collect the income and profits of the mortgaged property, even though the mortgagee had not filed a bill for foreclosure. This was where the mortgage, as here, specifically pledged the income and profits of the railroad company as part of the security for the mortgage debt.

In *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414, the mortgage of land included the rents, issues, and profits thereof. In proceedings for foreclosure a receiver was appointed, and at the sale thereunder the sum bid was insufficient to satisfy the mortgage debt. Held, that the mortgage was a lien upon the crops growing upon the mortgaged premises, and the proceeds of its sale by the receiver should be applied to the payment of the deficiency. This would seem to be against the doctrine announced in *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490.

In *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484, the court quotes with approval *Jones on Mortgages*, that upon a bill in equity to obtain foreclosure and sale the mortgagee, in proper cases, may apply for the appoint-

ment of a receiver to take possession of the earnings of the mortgaged property. The same principle is recognized in *Freeman v. Campbell*, 109 Cal. 360, 42 Pac. 35.

In *Merritt v. Gibson*, 129 Ind. 155, 15 L.R.A. 277, 27 N. E. 136, it was held, where lands are sold at a mortgage sale, and the mortgage creditor is the purchaser, if he shows that the mortgaged lands are inadequate to secure the debt, and the debtor is insolvent, and that the lands are in actual occupancy of tenants who are to pay rent therefor, a court of equity may appoint a receiver to collect rents and profits accruing from such lands, and hold them till the expiration of the year allowed for redemption, subject to the order of the court, to be paid to the debtor if he redeems, or to the mortgage creditor if no redemption is made. The Indiana statute gave to the mortgagor not only possession and right of possession before and after default, but also the right to redeem during an additional year after foreclosure sale. The opinion, though not unanimous, contains an exhaustive examination of the doctrine under consideration.

The earlier Michigan cases, above referred to, apparently bear out the mortgagor's contention. In *Preston v. Young*, 46 Mich. 103, 41 Am. Rep. 148, 8 N. W. 706, it was said that, where a mortgagor intentionally or deliberately puts his mortgagee in possession, the possession of the latter is rightful. This would seem to be not entirely in consonance with the earlier doctrine. In *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54, it was ruled that, though, by statute, the mortgagee of lands is not entitled to possession until after foreclosure, this was a provision for the benefit of the mortgagor, and he is not obliged to insist upon it; and if, in mortgaging his lands, he gives a deed which in form is absolute, he thereby conveys the right to possession, and consents to the mortgagee taking possession. This is a departure from the rule theretofore announced, that the statute absolutely forbade the mortgagor from making a contract giving the right of possession to the mortgagee before foreclosure and sale.

In *Byers v. Byers*, 65 Mich. 598, 32 N. W. 831, which indicates a relaxing of the strict doctrine, it was said that defendant, merely as mortgagee, could not, under the statute, demand or enforce possession; but, if the mortgagor chose to put him in, the tenancy is at least good as a tenancy at will.

In *Michigan Trust Co. v. Lansing Lumber Co.* 103 Mich. 392, 61 N. W. 668, it was said that it had never been the policy of the Michigan laws to divest the mortgagor of possession until foreclosure and the expiration of the period of redemption; and, while

the court was of opinion that it was within the power of the parties to stipulate that such possession might precede foreclosure, and in such case a court of equity may enforce specifically such an engagement, yet such power should be exercised with a full recognition of the settled policy of the state, and should not be exercised except in a case where the right is clearly given by the engagement of the parties. If the mortgagor, by special contract, may stipulate away his statutory right to retain possession until after foreclosure and sale occur and redemption is lost, it would seem a logical deduction that the right to rents and profits, which are but an incident of the right to possession, might, in like manner, be yielded up to the mortgagee.

In *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836, an assignment of rents of mortgaged property to be received by the mortgagee and applied upon the mortgage was considered valid.

In *Hyman v. Kelly*, 1 Nev. 179, under a statute exactly the same as that of California, the court refused to follow *Guy v. Ide*, and held that it did not deprive the mortgagee of any portion of the relief which is usually granted in foreclosure suits, where the sale of the property is sought; and that where, as in the case in hand, there was an allegation that the property mortgaged was insufficient to pay the mortgage debt, and the mortgagor was insolvent; and if, in addition, it appears that there was a specific pledge of the rents and profits to keep down the interest, and they were being diverted,—the case made was one for the appointment of a receiver, and the ultimate application of the rents and profits to the satisfaction of the mortgage debt. The case is an instructive one in support of the conclusion which we have reached.

In *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124, the conclusion was that, under the laws of that state, the mortgagor of lands holds the legal title until foreclosure and sale; yet in a proper case, when necessary to protect the mortgagee's interests, equity will appoint a receiver of the rents and profits of the real estate mortgaged. The court comments upon the earlier Michigan and California cases, and declines to follow them; saying that it finds no courts in the country, which deny the power except in those states.

In New York which has a similar provision to ours with reference to the lien of a mortgage, it has invariably been held that a court of equity has the power to appoint a receiver of rents and profits of mortgaged premises when they are an insufficient security, and there is no other adequate remedy. *Hollenbeck v. Donnell*, 94 N. Y. 342; 7 L.R.A.(N.S.)

MacKellar v. Rogers, 20 Jones & S. 360; *Bryson v. James*, 23 Jones & S. 374.

In Oregon, whose statute is exactly like ours, the supreme court, in *Roberts v. Sutherlin*, 4 Or. 219, held that a mortgagor might place his mortgagee in possession of the mortgaged premises, if he chose to do so, which in no wise would conflict with the rule that a mortgage is simply a security for a debt, and vests in the mortgagee no legal title in the mortgaged premises.

In *Couper v. Shirley*, 21 C. C. A. 288, 44 U. S. App. 586, 75 Fed. 168, in a foreclosure suit, Hawley, Justice, observed that, under the provisions of the Oregon statute, the parties to a real-estate mortgage have no power to bind the courts, independent of any equitable condition which might be shown to exist, by any stipulation contained in the mortgage for the appointment of a trustee or receiver to take charge of the rents and profits pending foreclosure. This observation implies that, if equitable conditions such as are present in this case were shown to exist, a receiver might be appointed, though not because the parties had stipulated for it. The case went off solely upon the proposition that the stipulation of the parties could not bind the court; and it was expressly said that the appointment of a receiver was not sought upon any of the established general principles of equity, which, when alleged to exist, would authorize a court of equity to appoint a receiver.

In *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297, the true ground upon which the appointment of a receiver to collect rents of mortgaged property for application to the reduction of the mortgage debt is stated. The court said that the exercise of this power is not based upon the ground that the legal title has passed from mortgagor to mortgagee, but upon the equitable rights of the mortgagee to have his security preserved, so that it should be adequate for the satisfaction of the mortgage debt; the court observing that this power, in fact, was exercised in favor of those who had no legal title. In Minnesota, as here, the statute expressly declared that a mortgage of real property shall not be deemed a conveyance so as to enable the mortgagee to recover possession without a foreclosure. The Minnesota court, as did the supreme court of Wisconsin, declined to follow the Michigan and California cases, and referred with approval to the New York cases and to *Pasco v. Gamble*, 15 Fla. 562. The opinion in the latter case is a full and able discussion of the principles involved in the pending case.

Phillips v. Elland, 52 Miss. 721, also is authority for the appointment of a receiver of rents and profits *pendente lite* in a bill for a foreclosure, where the showing is that

the mortgaged property is insufficient security, and the mortgagor is insolvent.

Cases from other states are to the same effect, though their statutes are different from ours. In chapter 33, §§ 1516 et seq. 5th ed. Mr. Jones in his valuable work on *Mortgages*, vol. 2, says that the prevailing rule in those states in which the legal title is regarded as being in the mortgagor until foreclosure is that a receiver will be appointed upon the application of the mortgagee, upon default, without reference to his legal rights, whenever sufficient equitable ground for this relief is shown, which is, in general, that the premises are an inadequate security for the debt, and the mortgagor, or other person who is liable for the debt, is unable to make good the deficiency. Additional equitable grounds are stated by the learned author, and in a note to § 1516 the author says that the practice of appointing a receiver is chiefly confined to those states where, as in Colorado, the mortgagee's right of entry upon default is taken away.

We think the prevailing rule, as stated by Jones, is the one that should be followed in this jurisdiction. In the case in hand the equities are peculiarly strong in favor of the mortgagee. In consideration of obtaining, as additional security for the mortgage debt, the rents and profits of the encumbered premises, the mortgagee released other security which he theretofore held, he relieved the heirs of any personal liability for the debt, and relinquished his adjudicated claim against the estate. The independent stipulation or agreement in the mortgage, by which the rents and profits were specifically pledged, was inserted at the request of the administrator himself, who applied for and obtained an order of the county court, to whose mandates he was amenable, for permission to mortgage the rents and profits, upon the faith of which order and agreement the mortgagee made the foregoing relinquishment of additional securities.

With the decree made by the district court both parties are dissatisfied, but we think it should be affirmed, with the modification hereinafter made. The authorities which we have followed agree that, so long as the mortgagee does not take some effectual step to regain possession, and while the mortgagor is in actual possession, the latter, and not the former, is entitled to the rents and profits. Applying that doctrine to the present case, it would seem to follow that the mortgagee's right to the rents and profits should be limited to those accruing after the filing of the suit to foreclose the mortgage, which was the first attempt by

the mortgagee to gain possession and prove his rights.

The judgment of the District Court should be affirmed, with the modification that the mortgagee's right to the rents and profits should begin on the date of the filing of the suit to foreclose the mortgage, instead of May 12, 1902, the date of the foreclosure decree, and it is so ordered. Modified and affirmed.

Gabbert, Ch. J., and Steele, J., concur.

LOUISIANA SUPREME COURT.

NEW ORLEANS BASEBALL & AMUSEMENT COMPANY, LIMITED,

CITY OF NEW ORLEANS.

(118 La. —, 42 So. 784.)

Injunction—void ordinance.

1. Where property rights will be destroyed or greatly impaired, interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.

Same—discrimination.

2. Where the facts alleged show injury to property rights resulting from the enactment of an ordinance excluding the erection or operation of baseball parks within certain limits, and that the ordinance was personal, arbitrary, and discriminatory in its character, and the power of the city council to enact any such ordinance as a police regulation is questionable, a proper case is disclosed for the interference of a court of equity by the process of injunction.

(January 7, 1907.)

APPLICATION by defendant for a writ of prohibition against the enforcement of an injunction restraining interference with plaintiff's use of its property as a baseball ground. Dismissed.

The facts are stated in the opinion.

Messrs. Samuel L. Gilmore and John P. Sullivan, for relator:

It appearing that the effect of the injunction was to prohibit the enforcement of an ordinance in the nature of a police regulation, the question of the legality or constitutionality of such ordinance should be left

Headnotes by LAND, J.

Note.—The question, when equity will enjoin proceedings of a criminal or quasi-criminal character, for the purpose of protecting property rights, is treated in a case note in 2 L.R.A. (N.S.) 631, on the general question of equitable interference with criminal prosecutions.

to the court in which the attempt is made to enforce it, and equity has no jurisdiction.

Boin v. Jennings, 107 La. 410, 31 So. 806; *New Orleans v. Becker*, 31 La. Ann. 644; *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575; *Darcantel v. People's Slaughter-House & Refrigerating Co.* 44 La. Ann. 645, 11 So. 239; *State ex rel. New Orleans v. Theard*, 48 La. Ann. 1449, 21 So. 28; *Lacourt v. Gaster*, 49 La. Ann. 488, 21 So. 646; *State v. Crozier*, 50 La. Ann. 247, 23 So. 288; *Levy v. Shreveport*, 27 La. Ann. 620; 1 High, Inj. 4th ed. ¶ 68, p. 86; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Moses v. Mobile*, 52 Ala. 198; *Taylor v. Pine Bluff*, 34 Ark. 603; *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill. 397, 36 N. E. 85; *Golden v. Guthrie*, 3 Okla. 128, 41 Pac. 350; *Phillips v. Stone Mountain*, 61 Ga. 386; *Moultrie v. Patterson*, 109 Ga. 370, 34 S. E. 600; *Bainbridge v. Reynolds*, 111 Ga. 758, 36 S. E. 935; *Paulk v. Sycamore*, 104 Ga. 24, 41 L.R.A. 772, 69 Am. St. Rep. 128, 30 S. E. 417; *Davis v. American Soc.* 75 N. Y. 362.

Messrs. J. C. Henriques and Charles Rosen, for respondent:

Equity has jurisdiction to restrain the executive department of a municipal corporation from obstructing or interfering with plaintiff in its property rights through the instrumentality of a city ordinance.

L'Hote v. New Orleans, 51 La. Ann. 96, 44 L.R.A. 90, 24 So. 608; High, Inj. ¶ 68; *Dobbins v. Los Angeles*, 195 U. S. 241, 49 L. ed. 177, 25 Sup. Ct. Rep. 18; *McFarlain v. Jennings*, 106 La. 545, 31 So. 62; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 126; *Mobile v. Louisville & N. R. Co.* 84 Ala. 125, 5 Am. St. Rep. 342, 4 So. 106; 1 Dill. Mun. Corp. ¶ 420, p. 486; *Baltimore v. Radecke*, 49 Md. 231, 33 Am. Rep. 239; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 727; *Platte & D. Canal & Mill. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1039; *Southern Exp. Co. v. Ensley*, 116 Fed. 761.

Land, J., delivered the opinion of the court:

On November 27, 1906, the council of the city of New Orleans adopted ordinance No. 4,211, which reads as follows, to wit:

"Sec. 1. That it shall be unlawful for any person or persons to establish or operate a baseball park or parks on any of the following streets or avenues of this city, or within a radius of two squares from such streets or avenues, to wit: St. Charles avenue, Esplanade avenue, Carrollton avenue, and Canal street.

"Sec. 2. That any person or persons violating the foregoing section of this ordinance 7 L.R.A.(N.S.)

nance shall be subject to a fine of not more than twenty-five dollars (\$25.00), or to imprisonment for not more than thirty (30) days, or both, at the discretion of the recorder in whose jurisdiction such violation shall take place, and every day during which such baseball park or parks shall be operated in violation of this ordinance shall constitute a separate violation of the same, and shall be punishable as such."

On November 10, 1906, the New Orleans Baseball & Amusement Company, Limited, a corporation duly chartered for the purpose of establishing, operating, and maintaining a park for the playing of baseball, and to that end to acquire by purchase such property and ground as might be necessary to carry out the objects and purposes set forth in its charter, purchased a certain square of ground in the first district of the city of New Orleans, comprised within and bounded by Carrollton avenue and Banks, Palmyra, and St. James (now Pierce) streets, for the price of \$40,000, with the intention to erect and operate thereon a baseball park.

On December 10, 1906, said company filed suit in the civil district court of the parish of Orleans, praying for an injunction restraining the mayor and officials of the city of New Orleans from enforcing said ordinance against the petitioner, and from interfering with petitioner in erecting and operating a baseball park on said square of ground.

The petition charged that said ordinance is illegal, null, and void for the reasons, to wit:

(1) That the council of the city of New Orleans had and has no power, right, or authority to pass said ordinance, and the same is *ultra vires*.

(2) That said ordinance is oppressive, unreasonable, unjust, and illegal.

(3) That said ordinance deprives petitioner of its property without due process of law, in violation of the Constitution and laws of this state, and in violation of the Constitution of the United States, and especially the 14th Amendment thereof.

(4) That said ordinance denies to petitioner the equal protection of the laws, in violation of the Constitution and laws of this state, and in violation of the Constitution of the United States, and especially the 14th Amendment thereof.

(5) That said ordinance operates an illegal discrimination against petitioner, by preventing petitioner from owning and operating a baseball park within the limits named, while others are permitted to own and operate baseball parks within said area, and are so operating the same by and with

the consent and acquiescence of the said city of New Orleans.

The petition charges that said ordinance was adopted solely for the purpose of prohibiting petitioner from erecting and operating a baseball park on said square of ground, and that petitioner has been notified by the mayor of the city that said ordinance would be enforced against said company. The petition further alleges that the business of operating a baseball park is legitimate, and licensed by the city and state, and, if properly conducted, affords an innocent, harmless, and pleasant amusement to the people; and the enforcement of said ordinance will damage petitioner in many thousand dollars by deprivation of its franchise and property rights in the premises.

The district judge ordered the defendant city to show cause why the preliminary injunction should not be granted as prayed for by the plaintiff.

The city of New Orleans answered:

(1) That the court was without jurisdiction *ratione materiae* to issue an injunction to restrain the municipal authorities from enforcing a police ordinance penal in its nature.

(2) That plaintiff's petition discloses no cause of action.

(3) That the ordinance complained of is legal and valid.

After hearing argument of counsel, the district judge ordered the preliminary writ of injunction to issue as prayed for by the plaintiff. Defendant filed a motion for a new trial, which was denied, and thereupon application was made to the supreme court for a writ of prohibition. This court ordered the district judge to show cause why the writ of prohibition applied for should not be granted. The respondent judge, for answer, avers that the civil district court was seised of jurisdiction to issue the injunction and to grant the relief prayed for by plaintiff; and makes part of his answer the record of the cause, including his written opinion assigning reasons for his action, from which we make the following extracts, to wit: "The substance of the petition is that plaintiff purchased a piece of property and proposed to erect thereon a baseball park, in which to play baseball, and thereafter the city of New Orleans, for the purpose of preventing its operating that baseball park, passed an ordinance prohibiting baseball parks in a certain area. It is alleged in the petition that other baseball parks are operated in the same area, and in the argument of counsel on this application it is admitted or stated that there are from two to three baseball parks in that same

area, which had existed there for twenty-five years before the passage of this ordinance. This court has jurisdiction to preserve property rights. It makes no difference, where the court undertakes to preserve property rights, that it has to deal, in connection therewith, with criminal ordinances. Now, in passing upon this application, the allegations of the petition must be taken as true. The playing of baseball on a park, or keeping a baseball park, is not a nuisance *per se*. It cannot be declared a nuisance by ordinance, nor can an ordinance be passed to prevent the playing of baseball in a park in a certain area, in a park owned by certain persons, and permit certain other persons in the same area to play or continue to play the game of baseball in a park owned by them. Such an ordinance is discriminatory and personal, and, if the facts or allegations in the petition are true, it is certainly illegal, null, and void."

The writ of prohibition issues to the judge of the inferior court where the cognizance of the cause does not belong to such court, or it is not competent to decide it. Code Pr. § 846.

In the case at bar the city contends that the civil district court for the parish of Orleans is without jurisdiction to issue an injunction, when it appears that the effect of the injunction is to prohibit the enforcement of an ordinance in the nature of a police regulation; and that the question of the legality and constitutionality of such an ordinance should be left to the court in, and to the occasion upon, which the attempt is made to enforce it. It is argued that jurisdiction is vested in the recorders' courts in the city of New Orleans for the trial of offenses against city ordinances, subject to an appeal to the criminal district court for the parish of Orleans; and that the civil district court of said parish is without any criminal jurisdiction whatever. Articles 141, 139, and 133 of the Constitution of 1898. There can be no doubt, as a general proposition, that the civil district court has jurisdiction of all ordinary injunction suits against the city of New Orleans, but it is contended that such court is not competent to enjoin the enforcement of a quasi criminal ordinance, and in so doing exceeded its legitimate powers. In *State ex rel. Behan v. Civil Dist. Judges*, 35 La. Ann. 1075, it was pointed out that a court may have jurisdiction of the subject-matter in controversy, and at the same time exceed its legitimate powers in the premises, as when the court enjoined a city council from exercising its delegated power of removal of one of its officers.

In *Boin v. Jennings*, 107 La. 410, 31 So. 866, the plaintiff had enjoined the execution of an ordinance prohibiting the selling or giving away of spirituous liquors within the corporate limits of the town. This court held that the inferior court properly declined jurisdiction to maintain the injunction, the effect of which was to prohibit the enforcement of an ordinance in the nature of a police regulation, saying that "the question of the legality or constitutionality of such ordinance, whether as to all of its provisions, or in part, should be left to the court in which the attempt is made to enforce it, a remedy by appeal to this court being open, in such cases, to the party as against whom the attempt is made;" and citing *New Orleans v. Becker*, 31 La. Ann. 644; *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575; *Darcantel v. People's Slaughter-House & Refrigerating Co.* 44 La. Ann. 645, 11 So. 239; *State ex rel. New Orleans v. Theard*, 48 La. Ann. 1449, 21 So. 28; *Lecourt v. Gaster*, 49 La. Ann. 487, 21 So. 646; *State v. Crozier*, 50 La. Ann. 247, 23 So. 288. In the case of *Boin v. Jennings* plaintiff alleged irreparable damage to his business of conducting a barroom. In *Devon v. First Municipality*, 4 La. Ann. 11, it was held that an injunction would not lie to restrain a municipal corporation from instituting suit before a justice of the peace against a party for infractions of an ordinance prohibiting the sale of groceries in the vegetable market. In *Levy v. Shreveport*, 27 La. Ann. 620, it was held that the plaintiff could not test the authority of the mayor to enforce the ordinance of the city prohibiting private markets, and the legality of said ordinances, by an injunction.

In *Hottinger v. New Orleans*, *supra*, the same doctrine was announced as to an ordinance changing the location of dairies; the plaintiff alleging damage to her business and property rights. The court held that the ordinance was a police regulation, in the interest of public health, with a penalty for its violation, and if it was unconstitutional, as alleged, the plaintiff could suffer no injury, as she could urge her defense in the recorder's court, and, failing there, had her remedy by appeal to the supreme court.

In all of the cases cited the ordinances sought to be enjoined were relative to matters clearly within the domain of the police power, such as the traffic in intoxicating liquors, markets, dairies, slaughterhouses, and the like. There is a line of decisions, however, to the effect that, where penal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of 7 L.R.A. (N.S.)

equity, and their execution in a proper case enjoined.

In *L'Hote v. New Orleans*, 51 La. Ann. 93, 44 L.R.A. 90, 24 So. 608, this court said: "The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear to permit dispute."

The ordinance in that case was sustained as a proper exercise of the police power, yet the jurisdiction of the court to issue the injunction was affirmed. In that case the decision was bottomed on the principles announced in *High on Injunctions*, vol. 1, § 68, from which we make the following extracts, *viz.*: "So, equity will not interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large, or to municipalities, which are agents in the administration of the civil government. . . . If, however, the act concerning which an arrest or criminal prosecution is threatened affects civil property and its enjoyment, in protecting the property right, equity may properly enjoin the criminal prosecution. But in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights; and, where such rights are not clearly involved, the relief will be denied."

In the case of *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18, the question was thoroughly considered, and the following principles announced:

1. Municipal ordinances, and even legislative enactments, are subject to investigation by the courts, with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional rights to carry on a lawful business, make contracts, or use and enjoy property.

2. While the right to exercise the police power is a continuing one, and a business lawful to-day may in the future become a menace to the public welfare and be required to yield to the public good, the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.

3. Although an ordinance may be lawful on its face and apparently fair in its terms, yet, if it is enforced in such a manner as to work a discrimination against a part of the

community for no lawful reason, such exercise of power will be invalidated by the courts.

4. Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.

In that case the plaintiff had purchased grounds for the erection of gas works, within the prescribed limits for such plants, and had commenced the construction of the same, when the municipal authorities arbitrarily changed the limits so as to exclude such grounds and works. The court said that the allegations of the bill disclosed facts sufficient to bring the case "within the class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to a taking of property without due process of law, and an impairment of property rights protected by the 14th Amendment of the Federal Constitution."

As the plaintiff in this case claims the protection of such amendment, the views of the Supreme Court of the United States, above enunciated, must be accepted as controlling. The case as presented by the plaintiff's petition herein need not be repeated. Suffice it to say that, taking all the allegations of the fact for true, a case is presented of a personal, discriminatory, and arbitrary ordinance, the execution of which will greatly impair the plaintiff's right of property. We have not been referred to any provision of the city charter which subjects the game of baseball as described in the petition to the police power of the municipal authorities. The playing of baseball does not injuriously affect the public health or morals, and is not a public nuisance any more than any other athletic sport. The power of the city council to enact any such ordinance may well be questioned.

It is therefore ordered that the rule issued herein be discharged, and that relator's application be dismissed, with costs.

MINNESOTA SUPREME COURT.

O. N. LINDH, Resp't.,

v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(— Minn. —, 109 N. W. 823.)

Corpse—mutilation—damages.

An action *ex delicto* to recover damages for injured feelings lies at the suit of 7 L.R.A.(N.S.)

the husband against a common carrier for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and wilfully exposing it to rain.

(November 30, 1906.)

APPEAL by defendant from an order of the District Court for Polk County overruling a demurrer to the complaint in an action brought to recover damages for alleged mutilation of a corpse. Affirmed.

The facts are stated in the opinion.

Messrs. M. L. Countryman and A. C. Wilkinson, for appellant.

There can be no recovery for mental anguish or injury to the feelings caused by breach of contract.

Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; Gahan v. Western U. Teleg. Co. 59 Fed. 433; Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; West v. Western U. Teleg. Co. 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; Connell v. Western U. Teleg. Co. 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; Kester v. Western U. Teleg. Co. 8 Ohio C. C. 236; Morton v. Western U. Teleg. Co. 53 Ohio St. 431, 32 L.R.A. 735, 53 Am. St. Rep. 645, 41 N. E. 689; Butner v. Western U. Teleg. Co. 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087.

A similar strict rule has been adopted in cases of tort.

Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; Keyes v. Minneapolis & St. L. R. Co. 36 Minn. 290, 30 N. W. 888; Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 234, 50 N. W. 1034; Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98; Sanderson v. Northern P. R. Co. 88 Minn. 166, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542.

Messrs. W. E. Rowe and C. O. Longley for respondent.

Headnote by JAGGARD, J.

Note.—For cases on the subject of the right to recover damages for injury to a corpse, see Long v. Chicago, R. I. & P. R. Co. 6 L.R.A.(N.S.) 883, and case note thereto.

On the subject of rights and duties in regard to the burial of the dead, see note in 14 L.R.A. 85.

Jaggard, J., delivered the opinion of the court:

The following facts are alleged in the complaint in this action: The defendant and appellant, as a common carrier, undertook to transport a casket containing the body of the dead wife of plaintiff and respondent. In taking the casket through a named station, it became necessary to transfer the same to another of its trains. In so doing, defendant carelessly and negligently left the same out of doors upon a railroad truck, and exposed it to rain, and wilfully ignored the request of the plaintiff to place the truck under cover, so that the rain might not get into the casket and injure and destroy the same as well as mutilate the corpse. Thereby the casket was soiled and ruined, and the corpse mutilated and greatly disfigured. Plaintiff suffered great mental anguish to his damage in the sum of \$1,000. From an order overruling a demurrer by the defendant, this appeal was taken.

This case is concluded by *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238. It was there held: The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife, or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it, such as an unlawful mutilation of the remains, an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved. That case was followed and approved, for example, in *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471. In *Koerber v. Patek*, 123 Wis. 453, 68 L.R.A. 956, 102 N. W. 40, 43, Mr. Justice Dodge says of *Larson v. Chase*, and *Foley v. Phelps*, after citing them and other cases: "The first two—and especially the first—of these cases may be considered leading, as they have been cited as the basis for most of the later ones upon this immediate subject, and in many others approaching it." Later in the opinion he says: "In *Larson v. Chase*, supra, the remarks of Mitchell, J., on this subject (sentimental damages), are so philosophical that we cannot forbear quoting them." Scores of the cases in which *Larson v. Chase* has been followed and approved will be found collected in volume 2 of L.R.A. Cases as Authorities at pages 776 and 777. Modern text writers, with no known exception, recognize it as a leading authority on the subject, and as an 7 L.R.A.(N.S.)

nouncing the true principle. That this decision accords with the spirit of the earlier law on this subject is demonstrated in an article by Mr. Justice Elliott, of this court, in 16 Cent. L. J. 161; and see Perley, Mortuary Law, chap. IV. pp. 20 et seq.

No good reason is assigned for reversing that decision, or for differentiating it from the case at bar. Injury to the feelings of the family of deceased spring as naturally from disfigurement and mutilation of the body by exposure to the elements as by dissection. Nor is there any merit in the contention of the defendant that this was an action on the contract, and that therefore there could be no recovery for mental anguish because of the breach of contract. The plaintiff is right in his insistence that the present case sounded in tort. It is elementary "that a tort is a violation of legal duty and may involve as one of its elements a breach of contract." *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382; *Chase, Lead. Cas. on Torts*, 56; and see *Mykleby v. Chicago, St. P. M. & O. R. Co.* 39 Minn. 54, 38 N. W. 763; *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 927. The complaint set forth a cause of action in quasi tort at least, for which an action *ex delicto* lies. 1 *Jaggard, Torts*, 22 et seq. *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, which also approves *Larson v. Chase*, is on all fours with the instant case. There the declaration alleged "that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; . . . that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would be protected from the weather; and that the coffin and shroud were damaged to the extent of \$75 and the body was 'soaked, and otherwise mutilated.'" It was held that the declaration stated a cause of action.

Order affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

RIKCHEN WASSERMAN, Appt.,

v.

SOPHIA METZGER et al.

(105 Va. 744, 54 S. E. 893.)

Bona fide purchaser—outstanding title.

1. One to whose trustee the equity of

redemption of real estate has been conveyed while the title is in trustees for a mortgagee, and who has not paid more than one sixth of the purchase money, cannot be regarded as a bona fide purchaser entitled to protection against an attempt to set aside a fraudulent sale under a deed of trust in the chain of title; and the fact that he assumed the outstanding mortgage is immaterial, since his undertaking will fall if the consideration falls.

Case Note.—Effect of assumption of obligation before notice of defective title to sustain the bona fide character of purchaser of real estate: —Whether the assumption by the vendee of real estate of a debt of his vendor due to a third person is sufficient consideration to make him a bona fide purchaser, in the absence of all the other elements that might deprive him of that character, depends upon whether or not, by the assumption of such debt, he has placed himself in a worse position than if he had not assumed it; that is, whether he has so obligated himself that, even if he should lose the property in question, he would still be called upon to discharge the obligation he has assumed. If he has placed himself in such position, the few authorities that can be found are unanimous in holding that he will be protected. From these decisions, however, the inference is plain that, if such purchaser receives notice of other equities before paying the obligation he has assumed, and is in such position that he can be relieved from his promise to pay the same, he will not, if he pays such obligation, be deemed a bona fide purchaser, though *WASSERMAN v. METZGER* seems to be the only case in which that specific result was arrived at.

Thus, in *Warren v. Wilder*, 114 N. Y. 209, 21 N. E. 159, a creditor was held to be a bona fide purchaser, and to take a good title as against all other creditors of his grantor, where it appeared that he purchased the real estate in question of his debtor, in good faith, for the purpose of securing himself, and, as a consideration therefor, agreed to discharge his own debt and to pay certain other debts of the grantor, which was an adequate consideration, and the creditors whom he agreed to pay consented to the arrangement; though, before paying such debts, the grantee had notice that there were still other creditors of his grantor. The court said that upon the making of the agreement by the grantee to pay such debts, and the subsequent delivery and acceptance of the deed, and the adoption of the grantee's promise by the grantor's creditors, the grantee became the principal debtor and the grantor his surety; and the grantee was legally bound as such principal to pay such creditors the amount of their claims.

And in *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. 322, a vendee of land was held to be a bona fide purchaser as against the holder of an equitable mortgage of which the

Trust—violation—setting aside.

2. The beneficiary in a deed of trust of real estate to secure notes may procure the setting aside of a sale made in violation of the terms of the trust, as against a purchaser at the sale who was a party to the fraud.

Same—uncanceled note—negligence.

3. The beneficiary in a deed of trust of real estate to secure notes is not negligent in surrendering a note without cancelation

former had no notice, and an equitable lien was therefore denied against the land in question, in favor of the mortgagee, for the purchase money unpaid at the time of such notice, though the vendee had notice of such mortgage before he paid certain debts of the vendor assumed by him as part of the purchase price; upon the ground that such vendee had made a valid agreement by which he was bound to pay the money to other parties, and hence no longer owed it to his vendor, and that this obligation, therefore, though entered into before, remained in full force and effect after, he had notice of the mortgage.

Some authority for this principle may also be found in *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779, in which it appeared that the grantees in a conveyance of land had paid part of the purchase money in cash and executed their promissory notes for another part thereof, and for the balance assumed a mortgage on the property; and in which the court, upon the ground that, in contemplation of law, the entire consideration had been paid, refused to apply the rule, which it held to be undoubted, that, if a portion of the consideration for land remained unpaid at the time the grantee had notice of a prior existing equity, so much of the consideration as remained unpaid would be applied by a court of equity to such equitable claim. The specific question raised in this case, however, was whether the owner of the equitable claim was entitled to recover the amount of the notes because of notice of his rights having been brought to the grantee before the latter paid the notes.

So, in *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287, in which the question was, What notice was necessary to postpone a recorded deed of real estate to a prior unrecorded lease? it was said that, where a vendee of real property paid part of the purchase money in cash, and for the balance assumed the payment of an encumbrance on the property, there was an irrevocable agreement on the part of the grantee to pay such encumbrance, "and that of itself constituted him a purchaser for value."

And in *Jackson ex dem. Glover v. Winslow*, 9 Cow. 13, it was held that the assumption by the grantee, in a conveyance of land, of the payment of a debt due from his grantor to a third person, was a sufficient consideration, within the registry acts, to make a mortgage of land valid as against an unrecorded deed.

when it is paid, as the result of which a fraud is committed by securing the sale of the property under it to the detriment of the security of the other notes, so as to subordinate his equities to those of one claiming an interest derived from such sale, but who has not secured the title or paid the purchase money.

Same—receipt of proceeds.

4. The receipt by the beneficiary in a deed of trust to secure notes of a portion of the proceeds of the fraudulent sale of the property will not estop him from contesting the validity of the sale if he acted without full knowledge of the facts, where no prejudice has resulted to anyone from his act.

(Cardwell, J., and Keith, P., dissent.)

(September 13, 1906.)

APPEAL by defendant Rikchen Wasserman from a decree of the Law and Chancery Court of the City of Norfolk setting aside a sale under a trust deed of real estate. Affirmed.

The facts are stated in the opinions.

Messrs. White, Tunstall, & Willcox for appellant.

Messrs. Burroughs & Brother, for appellees:

The power of sale, in the trust deed, was to be exercised upon the request of Mrs. Metzger or her assigns. This request was a condition precedent to the exercise of the power. There being no such request, the sale was void. A purchaser from the trustee, the requisitions of the deed not having been complied with, does not, in equity, get a complete title.

Taylor v. King, 6 Munf. 367, 8 Am. Dec. 746; 1 Tucker's Bl. Com. bk. 2, p. 108; Norman v. Hill, 2 Patton & H. (Va.) 676; Gibson v. Jones, 5 Leigh, 370; Sulphur Mines Co. v. Thompson, 93 Va. 316, 25 S. E. 232; Welch v. Greenalge, 2 Heisk. 210; Shippen v. Whittier, 117 Ill. 286, 7 N. E. 642.

A purchaser is fixed with constructive notice of whatever appears in the conveyances constituting his claim to title.

23 Am. & Eng. Enc. Law, p. 508; Burwell v. Fauber, 21 Gratt. 463; Long v. Weller, 29 Gratt. 347; Wood v. Krebbs, 30 Gratt. 714; Jameson v. Rixey, 94 Va. 349, 64 Am. St. Rep. 726, 26 S. E. 861; Fulkerson v. Taylor, 102 Va. 314, 46 S. E. 311.

A mere examination of the records is not due inquiry.

2 Pom. Eq. Jur. § 607, pp. 44, 45, note 1; Wilson v. Hunter, 30 Ind. 446; Wood v. Krebbs, 30 Gratt. 708; Jameson v. Rixey, *supra*.

The tests of constructive notice are whether the facts are sufficient to put a prudent man upon inquiry, and whether an

inquiry has been prosecuted with reasonable care and diligence.

2 Pom. Eq. Jur. § 606, pp. 42, 43, note 1; Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587.

Mrs. Wasserman is not a purchaser for value. The purchaser must have paid all the purchase money before notice of the equity.

16 Am. & Eng. Enc. Law, p. 834; Lamar v. Hale, 79 Va. 147; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Preston v. Nash, 75 Va. 949.

The security of Mrs. Metzger for \$1,250 by trust deed cannot be affected by the fraud of third parties.

Coles v. Withers, 33 Gratt. 195; 2 Jones, Mortg. § 924; Stimpson v. Bishop, 82 Va. 198; Artrip v. Rasnake, 96 Va. 277, 31 S. E. 4; Western U. Telg. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Luther v. Clay, 100 Ga. 236, 39 L.R.A. 95, 28 S. E. 46; Marden v. Dorthy, 160 N. Y. 39, 46 L.R.A. 694, 54 N. E. 726; Reck v. Clapp, 98 Pa. 581.

Morris, not having obtained any title to the land by his crime, cannot transfer that which he did not have.

2 White & T. Lead. Cas. in Eq. 3d Am. ed. p. 72.

Buchanan, J., delivered the opinion of the court:

This is the second time this case has been to this court. Upon the former appeal, the merits of the case were not considered, but it was remanded in order that the bill might be amended bringing in a new party. 102 Va. 837, 47 S. E. 820. The material facts of the case are the same now, however, as they were then, and, briefly stated, are as follows:

By a deed dated December 10, 1892, Samuel Wasserman and wife conveyed to L. B. Allen, trustee, a house and a lot in the city of Norfolk to secure to Sophia Metzger the payment of two negotiable notes for \$1,250 each, payable one and two years after date, respectively, and dated December 10, 1892. In January, 1902, one P. J. Morris, representing himself to be the owner of one of the notes secured by the deed of trust, and the National Bank of Commerce of Norfolk, claiming to be the holder of that note as collateral security for a debt due it from Morris, informed Allen, trustee, that default had been made in the payment of the note, and directed him to sell the trust subject to satisfy the debts secured. The trustee thereupon advertised and sold the property at public auction, and Morris became the

purchaser at the price of \$2,200, on the 21st day of January, 1902. The trustee conveyed the property to Morris by deed dated as of the day of the sale, which was acknowledged for recordation two days afterwards. On the 25th of that month Morris and wife conveyed the property to trustees to secure to the Mutual Building & Loan Association of the City of Norfolk the payment of \$2,000, which Morris had borrowed from it. On the 30th day of the next month Morris and wife conveyed the property to David Kalberman, as trustee for Mrs. Rikchen Wasserman, the wife of Samuel Wasserman (but who was divorced from him soon afterwards), at the price of \$2,400, the grantee in the deed assuming the payment of the debt due the Building & Loan Association secured upon the property. After deducting the costs and expenses of the sale made by Allen, trustee, to Morris, the trustee paid one half of the proceeds of the sale upon the note which Morris and the Commercial Bank claimed to be the owner and holder of, as before described, and notified Mrs. Metzger, the payee and holder of the other note, that he had a sum of money in his hands to be paid upon that note. A few days afterward the agent of Mrs. Metzger, who seems to be quite an old woman, called upon the trustee, pursuant to the notice. The agent denied any knowledge of the sale made by the trustee, stated that the note held by the parties who had directed the trustee to make sale of the house and lot had been paid, and that his mother held the other note, which was still due and unpaid, and declined to receive the money in the hands of the trustee. Subsequently, he did receive and credit it upon the note held by his mother, but at the time he received the money he did not have knowledge of all the facts, nor had he or his mother taken the advice of counsel at that time. The note claimed by Morris and the bank had been paid five years or more before the sale by the trustee, and had been delivered by the payee or her agent to Samuel Wasserman, the maker. Mrs. Metzger, who lived in the city of Norfolk, had no notice of the sale made by the trustee, and gave him no direction to sell. Mrs. Wasserman, the vendee of Morris, and the present holder of the house and lot, had no actual notice of the fraud of Morris (who was in collusion with Samuel Wasserman) in claiming the note and causing the property to be sold by the trustee, nor that the sale made by Allen, trustee, was not made in accordance with the terms of the trust.

Upon a hearing of the cause, the trial court held that the sale of the trustee and the conveyances subsequent thereto were

null and void as to the plaintiff, Mrs. Metzger, and declared that she had a valid and subsisting lien upon the house and lot for the residue of the debt, and decreed its enforcement. From that decree, Mrs. Wasserman and her trustee alone appealed. The question we are to determine, therefore, is whether or not there is any error in that decree to their prejudice.

One of the grounds upon which it is insisted that the decree is erroneous is that Mrs. Wasserman was a purchaser for value and without notice of the fraud or irregularities in the sale made by the trustee. If she were a complete purchaser, it may be that she would be entitled to the protection which she claims; but upon that question I express no opinion, as I do not think it is involved in this appeal. Upon the facts of this case, I do not think that Mrs. Wasserman is a bona fide purchaser for value and without notice. Neither she nor her trustee has the legal title, nor has she paid the purchase money.

As a general rule, in order for a vendee to be protected as a purchaser for valuable consideration and without notice, he must have received a conveyance and paid the whole of the purchase money before notice of the defect in his title. But there is a qualification of that general doctrine, *vis.*, "that, where the first purchaser has not the legal title, and the subsequent one has paid his money, and has not received the legal title, but the best right to call for the legal title, before he receives notice, he shall be entitled to priority, notwithstanding he has not actually acquired such title." 2 Minor, Inst. 1st ed. 1029, 1030; Mutual Assur. Soc. v. Stone, 3 Leigh, 218, 236; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Cox v. Romine, 9 Gratt. 27, 29; Lamar v. Hale, 79 Va. 147.

It is true, as insisted, that Judge Christian, in his opinion in Preston v. Nash, 75 Va. 949, 956, 957, does state that he was of opinion that "a complete purchaser is one who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it." But that opinion was not the opinion of the court, though erroneously so stated in the report of the case in 75 Va. 949. The case was afterwards directed to be reported again (76 Va. 1, 11) so as to correct that mistake. Judge Moncure did not sit in the case; Judge Anderson concurred in Judge Christian's opinion; Judges Staples and Burks concurred in the result, but not in the reasoning of Judge Christian, and based their conclusion upon the doctrine of equitable estoppel. The view expressed by Judge Christian as to what will constitute a com-

plete purchaser, is not only contrary to the decisions of this court, above cited, but is in conflict with the maxim which prevails in equity as well as at law, that he who is prior in time is prior in law,—that, where two equities are equal, the prior equity shall prevail. For, if the mere fact that a subsequent purchaser has paid his purchase money and has the right to call for the legal title makes him a complete purchaser and entitles him to the protection which complete purchasers receive at the hands of a court of equity, the fact that another has an equal or superior equity, prior in point of time, will be of no avail.

In no view of this case can Mrs. Wasserman be regarded as a complete purchaser. It does not appear that she has ever paid more than one sixth of the price which she agreed to pay. It is true that in Morris's deed to her she assumed the payment of the debt due the Building & Loan Association. But she has not paid that sum, nor is she bound to pay it, if the consideration for her undertaking to pay fails. The only ground upon which the Building & Loan Association can hold Mrs. Wasserman liable for its debt is that of equitable subrogation. She made no contract with the association, nor did it furnish any consideration for her assumption. As was said by Judge Staples in *Willard v. Worsham*, 76 Va. 392, 401, 402: "Where the grantee of lands assumes the payment of a mortgage thereon, as between himself and grantor he becomes in equity the personal debtor and the grantor the surety, and the latter may insist that the grantee shall pay the debt for his relief and protection. The creditor, upon familiar principles, may claim the benefit of all the collateral securities held by his debtor, by way of equitable subrogation. In doing so, however, he stands in his debtor's shoes, and is substituted to the rights and remedies of the latter, but nothing more. In other words, the new creditor takes the place of the old one and succeeds to his rights." *Osborne v. Cabell*, 77 Va. 462, 463.

As between Mrs. Wasserman and Morris, if the consideration for her undertaking fails, and she does not obtain what she purchased, Morris could not compel her to pay the Mutual Building Association debt. And, as that association stands in his shoes, and has no greater rights against her than Morris had, it cannot compel her to pay. Mrs. Wasserman, not having paid that debt, is for the purposes of this case in no worse condition, than if she had not assumed to pay, because she can be fully protected against the debt assumed if she loses the house and lot.

Actual payment of the purchase money

is required in order to constitute a vendee a complete purchaser, as a general rule. *Lamar v. Hale*, supra; 2 Minor, Inst. 1029, 1030. Giving security for its payment—not even the giving of negotiable notes—is not sufficient, unless the parties are so circumstanced that a court of equity cannot prevent their enforcement. 23 Am. & Eng. Enc. Law, 2d ed. pp. 489, 490; 2 Pom. Eq. Jur. § 751.

Mrs. Wasserman was therefore not a complete purchaser, but the purchaser of a mere equity which had not been paid for, and she had no right to call for the legal title when she received notice of the fraud of Morris and the irregularity in the trustee's sale. A payment after notice would give her no right to call for the legal title, for whatever she does to perfect her title after notice is done *mala fides* and does not avail. 2 Minor, Inst. 1029–1031, and cases cited.

The general rule is that the purchaser of a mere equitable title must take the place of the person from whom he purchases. He stands in his vendor's shoes. He gets the title of his vendor and nothing more. *Yancey v. Mauck*, 15 Gratt. 300, 306; *Briscoe v. Ashby*, 24 Gratt. 454, 475, and cases cited; *Evans Bros. v. Roanoke Sav. Bank*, 95 Va. 303, 304, 28 S. E. 323; *Sands v. Stagg*, 105 Va. 444, 52 S. E. 633. See also 2 Pom. Eq. Jur. § 756. The principle underlying this doctrine is stated as follows, in *Briscoe v. Ashby*, supra: "The reason of the distinction between the purchaser of a legal and an equitable interest seems to be that the protection accorded to bona fide purchasers is a departure from the general rule of jurisprudence, which holds that no man can transfer a greater right than he possesses, and regards the vendee as standing in the same position as the vendor under whom he claims. This exception was made by equity against the rights and remedies which it had called into being, and in favor of purchasers who bought in good faith and under the impression that they were acquiring a good legal title. But when the purchase is of a mere equity which owes its existence to a court of chancery and cannot be enforced without its assistance, the reasons for departing from the general maxim, *Nemo plus juris in alium transferre potest quam ipse habet*, is at an end, and the right acquired by the vendee is necessarily limited to that of the vendor. When, therefore, a purchaser buys an equitable estate or interest with a knowledge of its real character, and without obtaining a legal title, he can found no claim on the mere fact of the purchase and must stand or fall by the title of the vendor. 2 White & T. Lead. Cas. in Eq. 95, and cases there cited. So, it

was declared in the most unequivocal manner by Chief Justice Marshall, in *Shirras v. Caig*, 7 Cranch, 34-48, 3 L. ed. 260-265, that the purchaser of an equitable title takes it subject to all existing equities. . . . In *Chew v. Barnett*, 11 Serg. & R. 389, Chief Justice Gibson said: "When it is asserted that a purchaser for valuable consideration takes the title free of every trust or equity of which he has no notice, it is intended of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfections on its head. It is his own fault that he confides in a title which appears defective to his own eyes, and he does so at his peril. Now, every equitable title is incomplete on its face. It is in truth nothing more than a title to go into chancery to have the legal estate conveyed and therefore every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice or not."

This language of Chief Justice Gibson in *Chew v. Barnett* was again quoted approvingly by this court in *Evans Bros. v. Roanoke Sav. Bank*, *supra*.

If the contest here was between Morris and Mrs. Metzger alone, there would be no question of her right to have the trustee's sale set aside, for the sale was not only made in violation of the terms of the trust, which of itself would be sufficient to justify the court in setting the sale aside at which he became the purchaser (*Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Harris v. Harris*, 6 Munf. 367; *Pownall v. Taylor*, 10 Leigh, 172, 34 Am. Dec. 725; *Norman v. Hill*, 2 Patton & H. [Va.] 676; *Sulphur Mines Co. v. Thompson*, 93 Va. 315, 25 S. E. 232; *Preston v. Johnson*, 105 Va. 238, 53 S. E. 1; *Shears v. Traders' Bldg. Asso.* [W. Va.] 52 S. E. 860), but he was also a party to the fraud by which the trust sale was procured to be made. Mrs. Wasserman, standing in his shoes, as under the authorities quoted she clearly does, can, under the facts of this case, make no defense as against Mrs. Metzger that he cannot make. The fact that she had no notice of the irregularity in the sale or of Morris's fraud is wholly immaterial, as she acquired only such rights in the property as he had; for, as already shown, the purchaser of a mere equitable title takes it subject to all prior equities, and this, too, without regard to the question whether he had notice of them or not, where the holder of the prior equity was not required to and could not give notice of it under the registry law. *Briscoe v. Ashby*, *supra*, and authorities cited; *Yancey v. Mauck*, *supra*.

While, as was said by Judge Carr in *Dos- 7 L.R.A. (N.S.)*

well v. Buchanan, 3 Leigh, 365, 382, 23 Am. Dec. 280, "the plea of purchaser for value without notice, if sustained, is a perfect defense, and that against such purchaser equity will not take the slightest step, not even to perpetuate evidence against him or to take from him any advantage the law gives him. . . . But it is equally clear that this plea is a complete defense or no defense at all,"—unless the purchaser can bring himself within the protection of § 2472 of the Code of 1904, which provides that, although a subsequent purchaser is not a complete purchaser, "as against any person claiming under a deed or other writing which shall not have been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall in equity have a lien on the property purchased by him for so much of his purchase money as he may have paid before notice."

It is insisted that Mrs. Metzger's equity, although prior in time to that of Mrs. Wasserman, is inferior to it because Mrs. Metzger surrendered the note held by her against Louis Wasserman when it was satisfied without marking it paid, and thus enabled him, in collusion with Morris, to perpetrate the fraud which resulted in the sale to Mrs. Wasserman without fault on her part. The payee in the note had the right to it when paid, and it was not negligence in her not to mark it satisfied to prevent the owner of it from perpetrating a fraud upon someone by the use of his own property,—an act which no one would anticipate, and which could not be done without the collusion of another. Certainly her failure to mark it satisfied, if negligence at all, was not such negligence as will deprive her of her prior equity. In discussing the question, Mr. Pomeroy says: "The rule extends to gross negligence, which is tantamount in its effects to fraud. An equity otherwise equal, or even prior in point of time, may, through the gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence. To admit the operation of this rule in either of its phases, and to displace the otherwise natural order of priority, there must be intentional deceit,—that is, intentional misrepresentation or suppression of the truth,—or else gross negligence. In the one case, the party possessing the claim which it is sought to postpone must both know of his own right and also of the other person's intention to acquire, or of his acts

in acquiring, an interest in the same subject-matter. In the other case there must be gross laches, for mere carelessness or ordinary negligence will not suffice according to the weight of modern authority." [2 Eq. Jur. 3d ed. § 687.]

In the note to *Bassett v. Nosworthy*, vol. 2, pt. 1, *White & Tudor's Lead. Cas.* in Eq. 4th Am. ed. 54, it is said: "It should nevertheless be remembered that a rule by which one is precluded from asserting a right which is indisputably his own, operates as a forfeiture, and should not be enforced, unless he has been guilty of the gross negligence which, if not conclusive, prepares the way for fraud. *Evans v. Bicknell*, 6 Ves. Jr. 190; *Plumb v. Fluitt*, 2 Anstr. 432; *Colyer v. Finch*, 19 Beav. 500, 5 H. L. Cas. 905. A man may fall short of the care which a large experience of life and business would suggest without being responsible to third persons for a loss which they might have avoided if he had been more cautious;" citing, among other cases, *Biddle v. Bayard*, 13 Pa. 150. In that case the plaintiff lost a pocketbook containing a negotiable certificate of stock indorsed in blank. The certificate was purchased by the defendant from a third person and without notice that the vendor had no title. The plaintiff brought trover, and it was contended for the defense that the plaintiff should have indorsed the instrument to his own order; that, by carrying it about with him indorsed in blank, he had enabled the finder to mislead the defendant, and should consequently bear the resulting loss. This argument was overruled and judgment entered for the plaintiff.

The action of *Mrs. Metzger* in receiving a portion of the proceeds of the trust sale cannot, under the facts and circumstances of the case, be regarded as a ratification of the sale made by the trustee; nor does it estop her from objecting to the validity of the sale. When she received the money she was not fully informed of all the facts connected with the sale (*Smith v. Miller*, 98 Va. 535, 541, 542, 37 S. E. 10), and no prejudice has resulted to anyone by reason of her receiving the money which was paid her. *Smith v. Powell*, 98 Va. 431, 36 S. E. 522. Prior to that time the trustee had conveyed the property to *Morris*, *Morris* had executed the deed of trust to secure the Building & Loan Association the payment of the money loaned him, and *Mrs. Wasserman* had purchased the equity of redemption in the property from *Morris*, assumed the payment of the Building & Loan Association debt, and had paid the residue of the purchase price in cash. The only effect of *Mrs. Metzger's* refusal to receive the money paid her by the trustee would have been to leave it in his

hands until after the controversy in this case was settled.

I am of opinion that there is no error in the decree complained of to the prejudice of the appellants, and that it should be affirmed.

Cardwell, J., dissenting:

I am constrained to adhere to a view of this case entirely opposed to that taken by the majority of the court, and shall review the case as presented in the petition for the appeal and as argued by counsel here.

The case was formerly before this court, at which time the court, without passing upon the merits of the case, decided that the court below should have directed the complainant to amend her bill so as to make the National Bank of Commerce a party defendant. 102 Va. 837, 47 S. E. 820. When the case went back, the bill was so amended and the bank made a party. It answered, stating its connection with the note in question, which it had at one time held as collateral; denied knowledge of the fraud alleged, or that it received any part of the proceeds of the sale made by *L. B. Allen*, trustee. Depositions were taken, the case reheard, and on February 25, 1905, the court held that there was no liability on the bank, and as to other parties made the same decree which was entered at the previous hearing. From this decree the case is again before us on appeal, but no error is assigned to the decree so far as it decides that there is no liability on the bank, and therefore the case upon its merits is the same as to the parties concerned, other than the bank, that it was on the former appeal.

It will be necessary to restate the principal facts of the case, which may be summarized as follows:

By deed bearing date on the 10th day of December, 1892, *Samuel Wasserman* and wife conveyed to *L. B. Allen*, as trustee, certain real estate in Norfolk, Virginia, in trust to secure to appellee, *Sophia Metzger*, two negotiable notes of even date with the deed, each for the principal sum of \$1,250, and bearing interest at the rate of six per cent per annum from December 26, 1892, and payable, respectively, one and two years after date.

By deed dated March 20, 1893, the said *Samuel Wasserman* and wife conveyed the property to *Louis Wasserman* for certain considerations, part of which was the assumption by *Louis Wasserman* of the payment of the above-mentioned notes.

In January, 1902, one *P. J. Morris*, representing himself to be the holder of one of the above-mentioned notes, and the president of the National Bank of Commerce, representing that this note was held by it as

collateral for an indebtedness of P. J. Morris to the bank, informed L. B. Allen as trustee in the deed of December 10, 1892, that default had been made in the payment of the said note, and directed him to sell the property under said deed of trust, as thereby required, to satisfy the debts secured.

The trustee, L. B. Allen, having satisfied himself that the conditions had arisen under which he was required to execute the trust, advertised the property for sale, as required by the deed, for at least ten days in the Norfolk Landmark, a newspaper of large circulation, printed in the city of Norfolk, and pursuant to said advertisement, on the 21st day of January, 1902, at the Real Estate & Stock Exchange of Norfolk, sold the property at public auction to the said P. J. Morris for \$2,200 cash. He accordingly conveyed the property to P. J. Morris by deed bearing date the 21st day of January, 1902, and acknowledged on the 23d day of January, 1902.

In this deed the trustee made the following recital: "And whereas the said S. Wasserman having made default in the payment of said notes, the holder thereof had directed that the said property be sold by said trustee, as provided by said deed."

The "said notes" referred to in this recital were identified by the previous recital in the deed as the notes secured by the said deed of trust.

By deed bearing date the 25th day of January, 1902, P. J. Morris and wife conveyed the property to certain trustees, to secure to the Mutual Building Association of Norfolk, \$2,000 money borrowed. By deed bearing date the 30th day of January, 1902, P. J. Morris and wife sold and conveyed the property to David Kalberman, as trustee for Rikchen Wasserman, for \$2,400; she assuming as part of the purchase money the above-mentioned lien of \$2,000. Mrs. Wasserman fully complied with the terms of her purchase, and her deed went to record on the 31st day of January, 1902.

The bill filed by Mrs. Metzger claims that she was the holder of one of the notes secured by the deed of trust to Allen, trustee; that she had received from the trustee on the note only \$995.47, leaving a balance due as of February 20, 1902, of \$334.93; that the note which P. J. Morris and the National Bank of Commerce represented themselves as holding had in fact been paid long before the trustee, Allen, had been requested by them to sell; that she knew nothing of the sale, which was therefore void as to her; and praying that the series of deeds above mentioned since the trust deed of December 10, 1892, be set aside, and the property subjected to pay the balance due her.

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The decree appealed from grants the prayer of the bill; that is to say, it sets aside as null and void all deeds made conveying the property in question since the deed to Allen, trustee, December 10, 1892, and subjects the property to the payment of the balance claimed by Mrs. Metzger as being due to her on the second note secured by said deed of trust.

The proof in the cause discloses that Mrs. Metzger has been continuously living in Norfolk since the deed to Allen, trustee, was made, as were her grown sons (who were business men), all during the period the property was being advertised by the trustee for sale and at the time it was sold; she did not, however, go upon the witness stand to prove she knew nothing about the sale or the advertisement. It is practically conceded that the note held by Morris had been paid prior to the direction to the trustee to sell the property; but it clearly appears from the proof that Mrs. Wasserman, the purchaser of the property from Morris, had no notice or knowledge whatever of this fact, and, before receiving such notice, she had purchased for a valuable consideration, and had practically paid the entire purchase money, and received a conveyance of the property. It further appears that while Mrs. Wasserman had been the wife of Samuel Wasserman, who doubtless participated in the fraud perpetrated by Morris when he caused the property to be advertised and sold by Allen, trustee, she had lived apart from him for many years, and finally, and before any of the transactions connected with the sale and purchase of this property, had secured from him an absolute divorce. There is not the slightest evidence in the record that Mrs. Wasserman had actual notice of the fraud and wrongdoing complained of in this case; and, as expressly found by the lower court as a fact, "Mrs. Wasserman had no actual notice of the fraud of Morris and Sam Wasserman, nor of the irregularity of the sale." She had employed counsel to examine the title, and counsel employed, after investigation, reported to her in favor of the title, and she thereupon consummated the transaction.

It will be observed, therefore, that the fraud complained of is that the note on which the direction to Allen, trustee, to sell had been given, had in reality been paid; and the fact that the sale was made pursuant to the request of a holder of a paid note is the irregularity relied on by the complainants in the court below. It will also be observed that Mrs. Wasserman was not the purchaser from the trustee, but was the purchaser from that purchaser. Were the controversy here between Mrs. Metzger and P. J. Morris, the purchaser from the trustee,

it would be of easy solution, since the fraud of Morris is made so apparent that he would have no standing whatever in a court of equity. The question, therefore, to be determined is, whether a purchaser from a purchaser who bought at a trustee's sale has constructive notice that the recitals made by the trustee in his deed to the purchaser are false. The court below practically held such to be the case; and this is the only error assigned for a reversal of the decree appealed from.

Upon the face of the deed from Allen, trustee, to Morris, there is nothing whatever to suggest irregularity in the sale by the trustee, or anything to suggest to a purchaser from Morris that the recitals made by the trustee in his deed were false. We therefore have a case where the purchaser from a purchaser at a trustee's sale is a purchaser for value and without actual notice of fraud or irregularity in the sale made by the trustee. It is a case of the highest importance to the security of titles in this state, and requires the gravest consideration at the hands of the court.

It has been the law in this state since the case of *Taylor v. King*, 6 Munf. 365, 8 Am. Dec. 746, that a trustee in a deed to secure debts does not exercise a mere "naked power," and that a deed of such a trustee passes the legal title, even though made in violation of the trust. The opinion in that case, decided in 1819, says: "With respect to the deed in this case, it is not at this day to be questioned that the deed of a trustee conveys a legal title. The trustee himself takes a legal, though defeasible, title; and that title became absolute in his vendee by the deed in a court of law. We are also of opinion that in a court of law the vendee need not show that the conditions of the trust deed have been complied with." See also *Underwood v. McVeigh*, 23 Gratt. 409; *Sulphur Mines Co. v. Thompson*, 93 Va. 315, 25 S. E. 232, and authorities there cited.

The case is, however, different with respect to title attempted to be made by a person clothed with a mere "naked power," not coupled with an interest, for in such a case it is necessary for the person claiming the title to establish the fact that every requisite to the exercise of the power preceded it. *Carrington v. Goddin*, 13 Gratt. 601; *Sulphur Mines Co. v. Thompson*, supra.

In the first class of cases mentioned—that of a title made by a trustee in a deed of trust to secure debts—a bona fide purchaser for value and without notice of the breach of the trust is protected; while in the last class mentioned—that of a sale under a "naked power"—such a purchaser is not protected.

It is not controverted that in Virginia the 7 L.R.A.(N.S.)

legal title passes by deed of the trustee, and hence the title of the purchaser is perfect at law; but it is contended that this principle does not govern in a court of equity, and it has been so held in cases where the title of the purchaser from a trustee was called in question. To this effect are the cases of *Norman v. Hill*, 2 Patton & H. (Va.) 676; *Brown v. Lambert*, 33 Gratt. 256; *Loving v. Ashlin*, 76 Va. 911.

But that is not the case here. As remarked, if the controversy was between Mrs. Metzger and Morris, it would be proper to set aside the conveyance obtained by Morris from Allen, trustee, because, if for no other reason, of the fraud of Morris. But the controversy here involves the right of Mrs. Wasserman to the property, who was in no way connected with, or had knowledge of, the fraud of Morris.

If it were conceded that a purchaser from a trustee clothed with not merely a "naked power" to sell, but an absolute power, because coupled with an interest, must see to it that all of the prerequisites to the exercise of the power have been complied with, is this rule to be applied to a purchaser from a purchaser from the trustee? And if so, would not the rule have to be extended to a purchaser of the same property, however far he may, by intervening conveyances, be removed from the original purchaser from the trustee? Were such the established rule of law, it will be seen that our registry acts would be of little avail.

In *Sulphur Mines Co. v. Thompson*, supra, it was held that a trustee clothed only with a naked power, not coupled with an interest and therefore not absolute but conditional, would not by his deed invest a purchaser from him with title unless the conditions existed upon which a sale was authorized, and the sale made in accordance with the trust; that the burden of proving these facts was upon the party claiming under the deed, and the recitals in the deed, unless made so by statute, were not prima facie evidence of the existence of such facts. There is nothing, however, in the opinion that can be construed as extending the rule to a deed from a trustee clothed with absolute, not conditional, power to sell; and the only inference to be drawn from the opinion is, that where this power is in the trustee his deed invests a purchaser from him with title, and the recitals in the deed that the prerequisites to the exercise of the power preceded it were to be considered as prima facie evidence of the existence of such facts. It is now so declared by statute, passed February 10, 1898 (Acts 1897-98, chap. 293, p. 322), and amended March 7, 1900 (Acts 1899, 1900, chap. 1145, p. 1247; Code 1904, § 3333a, p. 1760), and the rule is made applicable to all

deeds made in the execution of a deed of trust, mortgage, or any judicial proceeding theretofore or thereafter made. I am not unmindful of the well-settled principles relied on by appellee, Mrs. Metzger, stated at page 508, 23 Am. & Eng. Enc. Law, and sustained in *Wood v. Krebbs*, 30 Gratt. 714, *Long v. Weller*, 29 Gratt. 347, and other cases that might be cited, that a purchaser of real estate must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there will conduct him; that he has no right to shut his eyes and his ears to the inlet of information, and then say he is a bona fide purchaser without notice; and whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. But the binding force of the principles maintained by these authorities is to be measured by the facts and circumstances of the particular case to which it is sought to apply the principles.

It is said by the court below, in its opinion made a part of the record, that although Mrs. Wasserman "had no actual notice of the failure of Mrs. Metzger to direct Allen to sell, she had constructive notice of the trust to Allen and of all of its provisions, by reason of such constructive notice she knew that Allen could not sell without Mrs. Metzger's direction, and it was her duty to ascertain by inquiry if such direction had been given." In this view I cannot concur, and do not think that the authorities cited in support of it sustain the view. They are the authorities to which I have just adverted. If the view be correct as to Mrs. Wasserman, the rule must be applied to a purchaser of property once conveyed by a trustee, no matter how far removed from the immediate purchaser from the trustee, and when it would be impossible for him to obtain the information that it is held that Mrs. Wasserman should have obtained before taking her conveyance from Morris. Such a rule, it seems to me, would be attended with baleful consequences to purchasers of real estate in this state.

There is nothing whatever upon the face of the deed from Allen, trustee, to Morris, to suggest inquiry as to the validity of the title it conveyed; but let us, for the sake of the argument, admit that it became Mrs. Wasserman's duty to inquire if the prerequisites of the power in Allen to sell the property preceded the exercise of the power. Of whom was she to make the inquiry? Surely the inquiry was first to be made of Allen, the trustee; and can it be doubted that he would have told her that the recitals of his deed to Morris were correct? 7 L.R.A.(N.S.)

Should she then have doubted Allen's statement and inquired further, and, if so, of whom? Had she inquired of Morris, doubtless he would have told her the same that Allen did, and perhaps have shown her the note in question either in his possession or Allen's, past due, and not marked paid, in the condition it was in by reason of the failure of Mrs. Metzger to so mark it when she delivered it to Sam Wasserman or to someone for him.

In *Carrington v. Goddin*, 13 Gratt. 602, the opinion by Moncure, P., says: "A bona fide purchaser without notice, from one clothed with a mere power of sale, but who, in making the sale and conveyance, has pursued the terms of the power, is entitled to the same advantage and protection with such a purchaser from a trustee invested with the legal title." That case is clearly authority for the position that a bona fide purchaser from the trustee invested with a legal title, and with an absolute power to sell, would be protected, even though the trustee did not pursue the terms of his power; and this on the principle that the plaintiff who seeks to upset the title must resort to equity to do so, and equity will withhold its hand whenever the defendant has equal equity, and will permit the law to prevail. A court of equity will not disarm a bona fide purchaser for value of his legal estate in favor of one who has a prior equity in point of time.

In *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, Marshall, Ch. J., says: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which according to every legal test are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned." See also *Snyder v. Grandstaff*, 90 Va. 477, 70 Am. St. Rep. 863, 31 S. E. 647.

In *Siter v. McClanachan*, 2 Gratt. 280, the opinion says: "The doctrine that whatever puts a party upon inquiry amounts to notice is inapplicable to the provisions of the stat-

ute in regard both to registered and unregistered conveyances. The registry is not intended to put subsequent purchasers and encumbrancers upon inquiry, but to put an end to the necessity of all inquiry. It is notice in point of law to all persons of the contents, import, and legal effect of the registered instrument; but not of other matters connected with the subject, not apparent upon the face of the instrument. The statute contrasts this notice in point of law, . . . with notice in point of fact of any title or claim not disclosed by a registered instrument. The notice in point of fact must be such as to affect the conscience of the subsequent purchaser or encumbrancer. It may be either actual,—in other words direct and positive,—or it may be circumstantial and presumptive. But it is not sufficient if it merely puts the party upon inquiry. It must be so strong and clear as to fix upon him the imputation of *mala fides*. *Dey v. Dunham*, 2 Johns. Ch. 182.”

“It is not enough that an overprudent and cautious person, if his attention had been called to the circumstance in question, would have been likely to seek an explanation of it. There must be some clear neglect to inquire, after actual notice that the title is in some way defective, or some fraudulent and wilful blindness, as distinguished from mere want of caution.” *Briggs v. Rice*, 130 Mass. 50; *Grundies v. Reid*, 107 Ill. 304; *Woodworth v. Paige*, 5 Ohio St. 70.

The reasoning of the learned judge below in his written opinion, and of the argument here for Mrs. Metzger, is, that the deed of trust to Allen was a part of the record title; and, as it provided that he was to sell when directed by a holder of one of the notes secured, this put upon any person who dealt with the property at any time within the period of the statute of limitations on inquiry, and, if the trustee committed a technical breach of his trust, although misled by fraud, any person dealing with the property within the period mentioned has constructive notice of the breach, and must bear its consequences. This proposition clearly denies the whole doctrine of innocent purchaser for value, as applied to the acts in *pais* of such a trustee, and according to it every such purchaser must be affected with constructive notice of the breach of the trust. No distinction is made in the argument for that proposition between a purchaser from the trustee and derivative purchasers; so that any purchaser of the property within the period of the statute must, at his own peril, inquire into and establish the fact, not by *prima facie*, but by conclusive, proof, that everything mentioned in the deed as a direction to the trustee has in fact been fol-

lowed. Of the two classes of requirements made by deeds to secure the payment of a debt, one calls for acts on the part of the trustee which necessarily involve public notoriety, such as advertising in a prescribed way and for a prescribed time, and that the sale shall be on certain terms of cash or credit. The other class embraces acts that do not involve notoriety, are essentially private in their nature, and cannot be inquired into and ascertained, if at all, without the greatest inconvenience in many instances, among which is whether the holder of the debt has actually directed the sale to be made. As to the first class of requirements, there seems to be nothing unreasonable in holding, as was held in the recent case of *Preston v. Johnson*, 105 Va. 238, 53 S. E. 1, and other cases, that the purchaser at the trustee's sale has constructive notice of these requirements, and must see that the advertisement of the sale at which he is bidding conforms to the requirements of the deed, and that the terms of sale are those prescribed by the deed; and there is no hardship to him, nor inconvenience to the public interest, in requiring this simple act of reasonable prudence on his part, the neglect of which would be gross negligence. But these cases go no farther than that, and are certainly not authority for the proposition that a subsequent purchaser of the property is to be charged with constructive notice that the creditor secured had not directed the trustee to make the sale he made, or that the debt secured had in fact been paid.

The authorities do not hold it sufficient to affect a person with constructive notice that he might have acquired the information, but that he ought to have acquired it, and would have done so but for gross negligence on his part.

Says the opinion in *Wilson v. Wall*, 6 Wall. 90, 18 L. ed. 730: “A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point, we need only to refer to *Sugden on Vendors* [page 622], where he says: ‘In *Ware v. Egmont*, 4 DeG. M. & G. 473, Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the busi-

ness in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

It is, of course, not to be lost sight of that "means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself." But means of knowledge are not sufficient. There must, in addition, be the duty of using them.

This court has often declared the principle, as to what is required to make it the duty of a person to use his means of knowledge to ferret out undisclosed facts, to be that the person must have "knowledge of facts and circumstances which are naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence." *Fischer v. Lee*, 98 Va. 163, 35 S. E. 441, and authorities cited.

In *Williams v. Jackson*, 107 U. S. 482, 27 L. ed. 530, 2 Sup. Ct. Rep. 814, there were two deeds of trust to secure debts. The first gave to the trustees power to release the land on payment of the notes secured, but the payment of the notes was a condition precedent to their power to release. The notes were assigned to a third party by the payee, and, after this was done, the original payee and the trustees united in a release deed. Being assured that the record was clear as to the title of the property which was conveyed in the first deed and which he purposed to loan money upon, Williams loaned the money, taking the second deed upon the property to secure the loan. He had no actual knowledge of the facts connected with the release of the first deed, and the question was whether he had constructive notice, or was entitled to the position of a bona fide purchaser for value without notice. The opinion of the court, citing a number of authorities to sustain the conclusion reached, says: "To charge Williams with constructive notice of the fact that the notes [secured by first deed] had not been paid, in the absence of any proof of knowledge, fraud, or gross or wilful negligence on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business. . . . The equity of Williams being at least equal with that of the plaintiffs, the legal title held for Williams must prevail, and he is entitled to priority."

That case is quoted from and approved in *Evans Bros. v. Roanoke Sav. Bank*, 95 Va. 301, 28 S. E. 323, where there was a release by a marginal entry on the deed book by the original payee of notes secured by a

first deed of trust after the transfer of the notes and before they were paid. The question was between the innocent transferee of these notes and an innocent lender of money upon the faith of the record, taking in good faith a trust deed upon the property to secure the money loaned. Held, that the trustee in this second deed obtained the legal title for the benefit of the lender of the money secured, and the lender had a right to rely upon the public record as to the title to the property conveyed; that to charge him with constructive notice that the notes secured by the first deed of trust had not been paid, in the absence of any proof of knowledge, fraud, or wilful negligence on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.

Since it is conceded in the case at bar that Mrs. Wasserman had no actual knowledge of the failure of Mrs. Metzger to direct Allen to sell, or that her first note had been paid; and especially in view of the fact that both notes secured by the deed to Allen were long past due,—what was said in the cases just adverted to applies with equal force to this case. The deed from Allen did not give Mrs. Wasserman notice that the note in question was paid; on the contrary, it advised her that the note was unpaid. So there is nothing whatever upon the face of the deed from Allen, or by way of proof in this record, upon which to rest the imputation to Mrs. Wasserman of means of knowledge to ferret out the undisclosed fact that the note was paid, which it was her duty to use, and the neglect to make use of which was gross or culpable negligence, and such negligence is essential to constructive notice. *Wilson v. Wall*; *Williams v. Jackson*; and *Evans Bros. v. Roanoke Sav. Bank*,—*supra*; *Staunton Nat. Valley Bank v. Harman*, 75 Va. 608; *Siter v. M'Clanachan*, 2 Gratt. 280.

Our statute, *supra*, provides that the recitals made by a trustee in his deed of conveyance "shall be prima facie evidence that such sale was regularly made, and that the other recitals in such deed or conveyance are true." Is a purchaser from a purchaser from a trustee to be required to disregard the statute and treat the recitals in the trustee's deed as not prima facie evidence that his sale was regularly made and the other recitals untrue, and, if he fails to ascertain all the facts behind the record, to be held guilty of gross or wilful negligence? I think not. The principle upon which a purchaser for value without notice is protected in a court of equity has its origin in the necessity for one of two innocent persons to suffer; the question be-

ing which one. Leaving entirely out of view the fact that Mrs. Metzger made it possible for Morris and Sam Wasserman to defraud her by delivering to one of them the note in question without canceling it, to hold that Mrs. Wasserman was a purchaser for value without notice would be no greater hardship upon Mrs. Metzger than had to be borne by the losing parties in the cases to which I have referred.

The distinction between the original purchaser at the sale under the deed of trust or mortgage and a subsequent purchaser is well recognized in the authorities, and the latter is held to be entitled to protection in the absence of actual notice.

In *Wilson v. South Park*, 70 Ill. 46, the opinion says: "In this case there are innocent purchasers; and, where there are such and the deed executed by the trustee recites a compliance with all such requirements, they are not bound to go behind the deed to ascertain whether or not the recitals are true. This rule is announced in the cases of *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336; *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562. In such a case the remote purchaser to be affected must be chargeable with notice. In such cases the person executing the trust deed selects his trustee, and usually conveys to a person in whom he reposes confidence, both as to his integrity and business capacity, and, having reposed the confidence and conferred the power on him to act, if it is abused, he must be held responsible for the improper selection. Even where he authorizes the assignee to execute the power, he must be equally responsible, as he confers the power; and, if imprudently done, the innocent must not suffer for his want of prudence, unless they can be charged with notice of the abuse of the power. It would be highly inequitable and unjust to hold otherwise, and would lead to ruinous sacrifice of the trust property, as none but the speculator would purchase, and he at low rates, if the remote purchasers, at every step in the chain of title, were compelled to collect and preserve the evidence of the regularity of the trustee's sale."

To what was there said as to the responsibility of the grantor in a deed of trust, with reference to the character and business capacity of the trustee he selects, it may be added, according to the rule prevailing in this state, that the trustee in a deed of trust to secure the payment of debt is to be as acceptable to the creditor secured, both with respect to his integrity and business capacity, as to the grantor.

In *Hamilton v. Lubukee*, supra, it is said: "It is certainly true that the record of the

mortgage was notice to them [subsequent purchasers] and that informed them only of the facts stated in it. It gave them no information of the kind of notice published for the sale of the mortgaged premises, nor of any irregularities which might have been committed in it, nor that the price paid was inadequate. All those were matters *in pais*, and must be brought home to their knowledge on a proper case-made, sustained by proof."

As opposed to the views taken in the cases above cited, counsel for Mrs. Metzger rely upon a class of cases to which belong *Burwell v. Fauber*, 21 Gratt. 463, and *Long v. Weller*, 29 Gratt. 347; but those cases are easily to be distinguished from the case here. In one of them the purchaser traced his title to a will, and it was held that he was chargeable with constructive notice of that will and what it disclosed, and in the other the purchaser bought from a special commissioner, and he was charged with notice of the decree directing the sale.

So, in *Wood v. Krebs*, 30 Gratt. 714, it was held that purchasers under a decree of a court were bound to know all that the suit in which the decree was made disclosed, and could not rely on the certificate of the clerk, that the records of his office disclosed no liens or encumbrances on the property, as sufficient to entitle them to the defense of bona fide purchasers without notice. In that case, as in *Briscoe v. Ashby*, 24 Gratt. 454, the purchaser was claiming title under a decree in a chancery cause, and it was held that the case did not come within the registry laws, and that the purchaser was chargeable with notice of what the record in the chancery cause disclosed.

Counsel for Mrs. Metzger cite, also, cases in which it was held that a conveyance by a trustee in a deed, after the debt it secured was paid, conveyed no title to the grantee, and the principal case is *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642. It would unduly extend the length of this opinion to state that case fully. Suffice it to say the opinion shows that the decision turned on three propositions: (1) That there had been a conveyance of the mortgagor's estate to the mortgagee, and the grantee in that conveyance had extinguished the first deed-of-trust debt, which in equity had the effect of a merger; (2) that the trustee who sold and conveyed the property was clothed with only a "naked power," and a purchaser under a mere "naked power" purchases at the peril of the sale being void if a material condition precedent to the existence of the power does not exist; and (3) that the express provision in the deed, that it should be void if the note it secured was paid, was, in view of the limited power in the trustee

to sell, sufficient to impose upon a purchaser of the property the duty of showing the existence of the debt at the time of the trustee's sale. The court does not evince a disposition to impair as authority its older decisions which I have cited and others, and does not even allude to them. On the contrary, the opinion says: "This case is not analogous to those where a title passes which is subject to be defeated on the ground of the fraudulent acts of the parties, and in which it is held that a bona fide purchaser without notice is to be protected. In this case no title passed. What appears to be a conveyance is not a conveyance any more than the deed of a person in no wise connected with the title to the property."

It is suggested, both in the opinion of the learned judge below and in the argument for Mrs. Metzger here, that the weight of the decisions by the Illinois court is to be lessened by the fact that they were actions in ejectment. This is true as to some of them, but not as to all; notably the case of *Gunnell v. Cockerill*, 79 Ill. 79, which was a bill in equity and a case in point. There the trustee was empowered to sell on demand of one fourth of the creditors, and was required to give notice of the time, place, and terms of the sale. He violated the trust by selling privately to one Caswell, who afterwards sold and conveyed to Howell & Lord. Held that, while a purchaser under a trust deed containing a power of sale is chargeable with notice of defects and irregularities attending the sale, and their effect cannot be evaded by him, the rule is different as to remote and subsequent purchasers; that, if there is nothing upon the face of a deed from the trustee in a deed of trust to the purchaser showing that the sale was made in violation of or contrary to the power contained in the deed of trust, a subsequent purchaser who has no notice in fact of any irregularity in the sale by the trustee will be protected as an innocent purchaser. See also the more recent case in point, decided by the same court in 1901, of *Lennartz v. Quilty*, 191 Ill. 174, 85 Am. St. Rep. 260, 60 N. E. 913.

We are also cited by the learned counsel for Mrs. Metzger to the cases of *Kenney v. Jefferson County Bank*, 12 Colo. App. 24, 54 Pac. 404; *Bent-Otero Improv. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140, 54 Pac. 1023; *Penny v. Cook*, 19 Iowa, 539; *Wells v. Estes*, 154 Mo. 291, 55 S. W. 255, and *Walker v. Beauchler*, 27 Gratt. 511, as sustaining the view taken by the lower court of this case; but I do not consider these cases as authority for that view. In the first named the purchaser asking protection as an innocent purchaser without notice was

clearly not such a purchaser. The second was a case of an immediate purchaser. The third was a case in which the controversy was between the beneficiary in the deed of trust and the grantor; the beneficiary being also the purchaser of the property, and had all possible notice that the sale was wrongful. In the fourth the case was also between the grantor in the deed of trust and a purchaser from the trustee, who was also the beneficiary in the trust deed, and was plainly not a bona fide purchaser. In the fifth it was merely held that, where the debtor was within the Confederate lines and the creditor within the Union lines during the Civil War, the former could not pay, nor the latter receive, the debt, and therefore the deed of trust could not be enforced and a sale under it was invalid; that the purchaser from the purchaser at the trustee's sale could stand in no better condition than the purchaser at the sale, as he was present at the sale and knew as well the circumstances as did the first purchaser, but the decree protected the last purchaser in all respects by restoring the *status quo* without loss to anyone.

In none of the cases to which we have been cited, or that I have been able to find, is the strength of the decisions of this court and others which I have mentioned and which maintain the principle that in order for Mrs. Metzger to succeed in this case upon the proposition under consideration she must convict Mrs. Wasserman not only of gross negligence, but of bad faith, in the least impaired. The record failing to so convict Mrs. Wasserman, she is in equity, as at law, to be considered a bona fide purchaser without notice, and as such entitled to protection.

It is contended, however, that she is not a complete purchaser, inasmuch as she has not paid the debt of the building association, which she assumed, nor has she the legal title.

The view taken by the majority of the court is that while the building association, to the extent of its lien, is a complete purchaser, having loaned Morris that amount of money and caused the legal title to be conveyed to the trustees in the deed of trust securing its debt, and therefore giving it priority over Mrs. Metzger's debt, Mrs. Wasserman cannot be regarded as a complete purchaser because it does not appear that she has paid more than one sixth of the purchase price she agreed to pay.

I fully agree that to the extent of its lien the building association is a complete purchaser, with priority of right over Mrs. Metzger to have its lien satisfied out of the property in question; but cannot agree that Mrs. Wasserman is to be regarded as

having paid only one sixth of the purchase money she agreed to pay Morris, and for that reason not entitled to protection as a complete purchaser. True, Morris conveyed to her only an equity of redemption; but, in my view, this carried with it the right to call for the legal title from the trustees of the building association, who, after the conveyance from Morris to Mrs. Wasserman, held the legal title for her benefit, subject only to the lien in favor of the building association. Upon the payment of this lien, and its release on the record, the release would not inure to the benefit of Morris or anyone else other than Mrs. Wasserman. As between her and Morris, her grantor, clearly she stands in the same position as if she had paid him the whole of the purchase money in cash. *Moore v. Holcombe*, 3 Leigh, 597, 24 Am. Dec. 683; 23 Am. & Eng. Enc. Law, p. 489; *Jackson ex dem. Glover v. Winslow*, 9 Cow. 13; *Partridge v. Chapman*, 81 Ill. 137.

Payment in actual cash is not indispensable. It is enough that there is an absolute change of the purchaser's legal position for the worse. Such a condition is brought about by the undertaking of the purchaser to pay a debt due from his vendor to a third person, in such manner that he is absolutely substituted as the debtor in the place of his vendor. 2 Pom. Eq. Jur. § 751, and notes.

It is conceded, as it would seem from the argument, that, if Mrs. Wasserman had paid in cash, before notice of Mrs. Metzger's claim, the whole of the purchase money to Morris; or had she so paid the building association's debt assumed by her,—she would be entitled to absolute protection as a complete purchaser for value; and I am unable to see that she would have been, in either of those positions, any more entitled to protection than she is now, occupying the position of an innocent purchaser who has paid the purchase price, so far as her vendor is concerned, and cannot hold the property without the payment of the debt of the building association; it not being questioned that the amount she actually paid Morris and the amount of the debt she assumed was a full and fair consideration for the property.

But let it be conceded, for the sake of the argument, that Mrs. Wasserman cannot be regarded as a complete purchaser. Which has the better equity, Mrs. Metzger or Mrs. Wasserman? I am of opinion that the equity of the latter is superior to that of the former. Is the manner in which Mrs. Metzger has dealt with her equity to be left out of view? Surely not. By delivering up the first of the two notes she held when it was paid, without canceling it by indorsing thereon "Paid," Mrs. Metzger made possible

the fraud of Morris, resulting in injury to Mrs. Wasserman, who, as is conceded, is innocent of that fraud; and it needs no citation of authority for the proposition that in such a contest as is here between Mrs. Metzger and Mrs. Wasserman, where one of the two parties is to suffer, the one guilty of no neglect or wrongdoing must be regarded as having an equity superior to that of the other party. It is only where equities are equal that the maxim, "Prior in time, prior in right," has application. Whether negligence is to be regarded as gross or not is to be measured by its resulting injury to the party affected. Not only was Allen, trustee, Mrs. Metzger's agent, for whose acts Mrs. Wasserman was in no way responsible; but, had Mrs. Metzger herself not been negligent, Mrs. Wasserman would not be in the position she now occupies and have to suffer to the extent, at least, of the amount of the claim asserted by Mrs. Metzger. In my view, the negligence of Mrs. Metzger cannot, under the circumstances, be regarded by a court of equity other than gross; and therefore the equity she asserts should not be preferred over that of Mrs. Wasserman.

With reference to the remaining contention of appellants, that Mrs. Metzger should be held to have ratified the sale of Allen, trustee, to Morris, by accepting from the trustee a part of the purchase money as a payment on the note she then held, I agree with the opinion of the court that the conduct of Mrs. Metzger, as disclosed in the record, was not such as should estop her on this ground to assert her right to payment of the balance due on that note.

For the reasons stated, I am of opinion that the decree appealed from should be reversed and annulled, and that this court should enter the decree the lower court ought to have entered, dismissing the bill of Mrs. Metzger, with costs to appellant.

Keith, P., dissenting:

Conceding that Mrs. Wasserman was not a complete purchaser clothed with the legal title, or with the right to call for it; that she acquired only an equity,—I am of opinion, notwithstanding, that, upon the facts of this case, for which I refer to the opinion of Judge Cardwell, she is better entitled to consideration at the hands of a court of equity than Mrs. Metzger. In other words, that, while neither one of them has more than an equitable interest in the subject of controversy, their equities are not equal; and it is only where equities are equal that priority of time becomes decisive as to priority of right.

In my view of the case, Mrs. Metzger has so acted as to require the court to postpone her right to that of Mrs. Wasserman. Mrs.

Metzger held a lien by deed of trust of record. She so dealt with that lien that the record upon which Mrs. Wasserman had a right to rely showed that the deed had been executed and the lien created by it satisfied. It is conceded that the building association, as a result of the action of Mrs. Metzger's trustee, gets a legal title and is a purchaser for value and without notice. It is conceded that Mrs. Wasserman purchased the equity held by her in good faith and without actual notice of Mrs. Metzger's rights. So far as the record goes, it not only gave her no notice of any adverse right; but, showing as it did the deed of trust securing Mrs. Metzger and its execution and satisfaction, it lulled her suspicions and was an assurance that she had nothing to fear from that quarter; and yet, while these facts are held sufficient to transmit the legal title and a complete equity to the building association, the conclusion of the court leaves Mrs. Wasserman, who was equally deceived by the false appearances and equally innocent, to suffer the consequences and to be postponed in her rights to Mrs. Metzger, who could have protected herself and others,—to Mrs. Metzger, whose agent made the sale under conditions which on their face it is admitted authorized him to sell, and whose deed conferred upon Morris the legal title which he in turn conveyed to secure the loan to him from the building association.

In the face of the conduct of Mrs. Metzger; in the face of the acts of the trustee in the deed to secure her debt, who was her agent and not Mrs. Wasserman's,—I cannot think that the equities existing between Mrs. Wasserman and Mrs. Metzger are equal.

In *Hume v. Dixon*, 37 Ohio St. 67, it is said: "When the equities are equal, the rule of law is adopted that the oldest in point of time will prevail; but it is a mistake to suppose that the age of an equity is of material significance when the relative character of equities are otherwise not equally meritorious. It is only where, all things considered, the conflicting equities are equally meritorious in quality that the element of time becomes material."

In *Rice v. Rice*, 2 Drew. 76, 77, 78, it is said: "What is the rule of a court of equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form: 'As between persons having only equitable interests, *qui prior est tempore potior est jure*.' This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their

equitable interests are of precisely the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it. Another form of stating the rule is this: 'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.' This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For, when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity?' For example, when we say that A has a better equity than B, what is meant by that? It means only that, according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever,—say on the ground of priority of time,—how can it be said that the equities of the two are equal? i. e., in other words, How can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: 'As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure*.'"

Sugden, Vendors, chap. 19, § 32, approves the law as stated in *Rice v. Rice*, *supra*.

Cyc. Law & Proc. vol. 16, p. 139, states the rule to the same effect as follows: "Where conflicting equities are otherwise equal in merit, that which first accrued will be given preference; but this test is the last resorted to and does not prevail when any other equitable ground for preference exists." See also 1 Pom. Eq. Jur. 3d ed. § 413.

But, in addition to this, when the first note fell due and was paid to Mrs. Metzger, she should have canceled or in some way so marked that obligation as to disable it from being restored to circulation, and, by passing into the hands of an innocent holder, become a competitor with the second note of the series representing the deferred payment upon the property originally sold by

her, and thus bringing about the situation which must result in loss either to her or to Mrs. Wasserman. It is true that Mrs. Metzger was the payee in the note, and that she never assigned it to anyone; but it is also true that a note may be transferred without written assignment so as to pass an equitable right to the transferee (*Bell v. Moon*, 79 Va. 351); and, by surrendering the note which was the evidence of the debt, and had been paid to her by the maker, with nothing upon it to indicate that it had been satisfied, she enabled Wasserman to transfer it by delivery to Morris, and thus became responsible, however innocently, for the first link in the chain of circumstances ending in this controversy. The note was in her possession, the money which it represented was paid to her, it was wholly within her power to have prevented the catastrophe; and, as her conduct is responsible for the conditions which have arisen, I think that her equity should be subordinated, though prior in point of time, to that of Mrs. Wasserman, who is wholly innocent and without fault in the transaction.

As showing a better equity in Mrs. Wasserman than that claimed by Mrs. Metzger, I rely then, first, upon the fact that it was the trustee in the deed to secure Mrs. Metzger who made the sale under circumstances which the court holds were sufficient to transfer the legal title without carrying notice of any infirmity in the transaction to those who purchased at that sale, and that, as a result of the act of the trustee, the building association is a complete purchaser for value without notice and holds the legal title for its protection; that, as a result of the conduct of the trustee, Mrs. Wasserman acquired an equity, not only without any notice of prior equities, but was lulled to sleep by the act of the trustee who executed the trust and thus satisfied the lien created by it; and from that moment the record gave assurance to Mrs. Wasserman and all the world that there was nothing further to fear from the lien of that deed of trust.

Now, the trustee in that deed was the agent, not of Mrs. Wasserman, but of the grantor and beneficiary in that deed. A trustee in a deed of trust is the agent of both parties,—that is, of the grantor and the beneficiary in the trust,—said this court in *Rossett v. Fisher*, 11 Gratt., at page 498. If anyone is to suffer, therefore, by his acts performed in good faith, but the effect of which has been to impose a loss upon one of two innocent persons, each of them holding an equity, surely it should fall upon her whose agent he was, and not upon one a stranger to that transaction.

In the second place, I rely upon the fact 7 L.R.A. (N.S.)

that Mrs. Metzger surrendered a note which had been paid and satisfied to her by the maker, constituting one of a series secured by deed of trust, into the possession of the maker without any mark upon it by which she could easily have rendered it impossible for anyone to assert or to transfer any right under it and bring it into competition with the second note representing the deferred payment upon the land originally sold by Mrs. Metzger.

For these reasons I am of opinion that the equities between Mrs. Metzger and Mrs. Wasserman are not equal, and that Mrs. Wasserman holds the better equity, though junior in point of time to that of Mrs. Metzger.

Petition for rehearing denied November 22, 1906.

COLORADO SUPREME COURT.

JOHN BEST, Impleaded, etc., Plff. in Err.,
v.
ROCKY MOUNTAIN NATIONAL BANK
OF CENTRAL CITY.

(— Colo. —, 85 Pac. 1124.)

Party—real party in interest.

1. A bank for whose benefit a note is taken in the name of its president, and which has always had exclusive ownership and possession of it, may maintain an action thereon in its own name as the real party in interest, notwithstanding the statute provides that an action may be maintained by a trustee of an express trust, which will include a person in whose name a contract is made for the benefit of another.

Note—failure of consideration—burden of proof.

2. Upon the introduction, by the maker of a promissory note, of evidence tending to show absence of consideration, the burden of showing consideration by a preponderance of the evidence is upon the one seeking to enforce it.

(May 7, 1906.)

ERROR to the District Court for Gilpin County in plaintiff's favor in an action

Note.—The right of beneficial owner of undorsed note payable to order of a third person to maintain an action thereon in his own name as the real party in interest is fully covered by an exhaustive note in 64 L.R.A. 581, on "Who is the real party in interest within the meaning of statutes defining the parties by whom an action must be brought?" Since the compilation of such note, no cases seem to have arisen upon the precise point herein involved.

brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Clinton Reed, L. M. Goddard, S. C. Warner, and H. A. Hicks for plaintiff in error.

Messrs. Wolcott, Vaile, & Waterman, Chase Withrow, A. B. Seaman, and W. W. Field for defendant in error.

Gunter, J., delivered the opinion of the court:

This was an action against Byron J. Smith, Joseph H. Smith, and plaintiff in error, John Best, to recover upon a promissory note executed by them. There was a judgment by default against Byron J. Smith, and a verdict and judgment against Joseph H. Smith and plaintiff in error, John Best. Two points are principally relied upon for a reversal.

1. The plaintiff had no right to maintain the action; that is, that it was not the real party in interest, under § 3, Mills's Anno. Code. The facts pertinent to this contention were these: In October, 1889, Joseph H. Smith and Byron J. Smith were interested in developing a mine, their bank account was overdrawn, and further funds were necessary for continuing the operation of the mine. Defendant in error, through its then cashier, its now president, Thomas H. Potter, loaned to Byron J. Smith and Joseph H. Smith \$2,200, and a note was executed payable to it, signed by Joseph H. Smith and John Best. As will appear hereinafter, there was evidence for plaintiff in error that he signed this note at the request of the bank as an accommodation maker, and that the object in his signing the note, and the purpose of the bank in requesting him to do so, was to enable it to negotiate the note. There was testimony for defendant in error that John Best was a joint and several maker of the note with reference to it, and that it accepted the note upon faith of the signature of plaintiff in error. The note that was taken in 1889 was a number of times renewed. The original note and all subsequent renewals thereafter down to March, 1893, were signed only by Joseph H. Smith and John Best, but subsequent to March, 1893, the renewal notes were signed by Byron J. Smith as well as by the two original makers above named. Upon such renewal the old note was held until the new one was fully executed and delivered, whereupon the preceding note was surrendered to the makers. As to the renewal note here sued on, being that of date December, 1898, an original draft of the note was sent to Joseph H. Smith at Denver to execute. This copy of the note was misplaced, and another note was prepared in Denver, executed by Joseph H. Smith, and returned to the defendant in error, in which note the name of Thomas H. Potter appeared as payee instead of the name of the defendant in error, which had appeared in all of the preceding notes. Substituting the name of the bank by that of Potter was simply an oversight of Joseph H. Smith in redrafting the note. The consideration for the original note and all the subsequent renewals was paid by the defendant in error. When the note sued on returned from Denver Mr. Potter noticed that it ran to himself instead of defendant in error. The note was delivered to the bank as its property, and it has ever since been its property, and in its possession. To repeat, the undisputed testimony is that the note at the date of its execution was and ever since has been the property of defendant in error, and has at all times been in its possession, as it was so at the time of the institution of this action.

Plaintiff in error contends that this suit should have been brought in the name of the payee of the note, Thomas H. Potter, and that it could not be brought or maintained in the name of defendant in error. Defendant in error contends that, under § 3, supra, it was the real party in interest, and that the action was properly brought in its name. The determination of this question rests upon the construction to be given the following sections of our Code. Section 3 reads: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." Section 5 prescribes: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name the contract is made for the benefit of another." It will be observed that § 3 provides that the action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the act, while § 5 prescribes that the trustee of an express trust, which includes a person in whose name a contract is made for the benefit of another, may sue without joining with him the person or persons for whose benefit the action is prosecuted.

Whatever conflict of authority there may be in other jurisdictions upon the right of the plaintiff to maintain this action, we think the question practically settled here in favor of the contention of the defendant in error. The undisputed facts here are: Defendant in error is, and at all times has

been, the sole owner of the note sued upon, and the note is, and has been at all times, in its possession. The note, immediately upon its execution, was delivered to defendant in error as its property, and ever since such date, in such right, it has held the note. There was no indorsement made upon the note transferring it from Potter to defendant in error. In *Davis v. Johnson*, 4 Colo. App. 545, 547, 36 Pac. 887, among other questions, the validity of a decree was involved which provided for the foreclosure of two trust deeds securing notes. The decree was in favor of the owner of these notes; the notes had not been indorsed, they were transferred only by delivery. It was contended that, under our statute, they could not be transferred by delivery so as to pass title to the purchaser. It was contended that such a transfer did not invest the purchaser with title to the notes. The court held that such manner of transfer did pass title, and that such holder of the note was the real party in interest, and that an action could be maintained in her name. *Inter alia*, it said: "But it is not true that such transfer of a note does not invest the purchaser with title. At common law he took the equitable title, and at law could sue only in the name of the last holder of the legal title; but this distinction has been abrogated by the requirement of the Code that actions shall be prosecuted in the name of the real parties in interest." *Gumaer v. Sowers*, 31 Colo. 164, 167, 71 Pac. 1103, 1104, was an action by the indorsee against the makers of promissory notes. The only evidence at the trial consisted in the production by plaintiff of the promissory notes, upon the back of each of which was what purported to be a written transfer by the payee to the plaintiff. The court, after holding that there was sufficient evidence through the indorsements and possession to establish the right in the plaintiff to maintain the action, said: "If such was not the law, still, under the doctrine of *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887, the judgment in this case was right. For it was there held that, under our law and Code of Procedure, a note payable to order may be transferred by delivery only, and without indorsement, so as to vest in the purchaser a complete title, subject, of course, to defenses in favor of the maker existing at the time of notice of the transfer. It is also held that such purchaser can sue in his own name. This case meets with our approval." The holding of the court of appeals in the case cited was that an indorsement was not necessary to transfer the title to a promissory note, that the title passed by delivery, and that a title so passed

was sufficient to permit the holder thereof to institute a suit in his own name; he was the real party in interest for the purpose of instituting and maintaining the action. This doctrine was expressly approved in the case we have just cited from the supreme court. *Westcott v. Patton*, 10 Colo. App. 544, 546, 51 Pac. 1021, 1022, was an action by the assignee against the maker on certain promissory notes. The court said: "The only question to be determined, therefore, is: Did the answer present an issue which required a trial? Did it put in issue any fact necessary to be proved by plaintiff before she could recover judgment? We think it did not. The answer, it is true, put in issue the alleged assignment by the payee to plaintiff, but this was not essential to the plaintiff's recovery. The answer did not attempt to put in issue the allegation that plaintiff had become and was the legal owner and holder of the note for value. This was the material part of plaintiff's allegation. If she were the legal owner and holder of the note for value, and had possession of it, she was entitled to recover even though the payee may not have made any formal assignment to her. The answer expressly admitted the execution and non-payment of the notes, and did not set up as a defense any matter which would, if admitted, defeat a recovery."

In *Maxwell on Code Pleading*, 4th ed. p. 22, it is said: It may be stated as a general proposition that "where a thing in action is assigned absolutely, so that the assignee becomes in fact the owner thereof, he is the real party in interest, and it is not material whether his title is legal or equitable, he may maintain an action in his own name." *Mr. Pomeroy, in Remedies and Remedial Rights*, 2d ed., at § 138, says: "It is no longer, consistently with the provisions of the Codes, possible for one person to sue 'to the use of' another, as was common in some states. The parties beneficially interested must themselves bring the action. There are cases which hold that when there is a trustee of an express trust he must bring the action, and that the beneficiary can, in no such case, sue in his own name, at least alone. The correctness of this ruling may well be doubted. The section relative to the real party in interest is, in all the Codes, imperative; while that in relation to the trustee of an express trust is permissive." And at § 140: "Upon the same principle, the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no indorsement, and possession of the instrument is *prima facie* evidence of such

ownership. In fact, wherever the spirit of the reformed system is carried out,—and this is now very generally, if not universally, the case,—the equity rule as to parties is freely applied to all legal actions; and this one principle will easily solve all particular cases of difficulty or doubt." Professor Bliss says: "By the law merchant, the legal title to commercial paper payable to order can pass only by indorsement, and the purchaser who would sue as holder must show his right as indorsee. But one may become the equitable owner without indorsement, and, as being the real party in interest, is required to sue in his own name. No particular mode of transfer is required; written indorsement or assignment upon the back of the paper, evidencing the debt, is to be desired as a matter of evidence; but, so far as concerns the right of a holder to become plaintiff, the transfer may be shown by other evidence. Thus, it may be made upon a separate paper; even a verbal sale is sufficient." Bliss, Code Pl. § 50. The same principle is announced in the following Colorado cases: *Walker v. Steel*, 9 Colo. 389, 12 Pac. 423; *Jackson v. Hamm*, 14 Colo. 58, 23 Pac. 88; *Moulton v. McLean*, 5 Colo. App. 454, 462-464, 39 Pac. 78; *Austin v. Snider*, 17 Colo. App. 176, 182, 68 Pac. 128. Many other authorities might be cited in support of our conclusion that defendant in error was the real party in interest, and that suit is maintainable in his name, among them *Eaton v. Alger*, 57 Barb. 189, in which there is a valuable discussion of this question.

Plaintiff in error has cited many cases as *contra* the conclusion we have reached; we will confine our consideration of them to those cited from this state. *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986, was an action by the First National Bank of Central City to collect certain money which it had been expressly authorized to collect by Risdon, to whom the money was owing. It was contended that the suit should have been brought in the name of the beneficial owner, Risdon. The court held that the suit could be maintained in the name of the plaintiff, the trustee. The holding is entirely consistent with the conclusion we have reached in this case. *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383, was an action before a justice of the peace upon a promissory note alleged to have been executed and delivered by the defendant to a third party, and by the latter assigned to the plaintiff. Also upon an account due to a third party and assigned to the plaintiff. The principal ground of reversal relied upon was the dissolution of the attachment; but it seems

to have been further contended that the suit was not properly brought in the name of the assignee of the note and the account. The court said the suit was properly brought in the name of the assignee, "even though the consideration of the assignment may have been a payment to the assignor after the recovery in the suit by the assignee." The holding simply is that the trustee of an express trust could sue. There is nothing in the opinion in conflict with our conclusion herein. In *Gomer v. Stockdale*, 5 Colo. App. 489, 39 Pac. 355, *Stockdale*, the owner of lands and timber, entered into a contract with one Jackson, a mill owner, engaged in making lumber. The contract provided that Jackson might locate his mill machinery, and such temporary structures as were essential to his milling operations, on certain parts of *Stockdale's* land. *Stockdale* sold to Jackson by the contract the right to fell trees and reduce them to lumber. As a consideration Jackson gave certain promissory notes maturing monthly, and to secure payment Jackson agreed to give a mortgage on the mill machinery. Jackson assigned the contract to *Gomer*, who brought suit upon this contract. The court held that, as the legal title to rights created by the contract was in *Gomer*, an action would lie in his name. The court said: "It has accordingly been decided that it is no infraction of this statute to bring the suit in the name of the person to whom the claim has been assigned, whether it be an open account or otherwise, although there may be annexed to the transfer the condition that when the sum is collected the whole or some part of it must be paid over to the assignor. . . . Since this doctrine prevails in Colorado, it is clear *Gomer* had the right to bring the suit on the transferred claim. The agreement between *Gomer* and *Jackson* concerning the disposition of the proceeds did not affect the recovery." We see nothing in this holding contrary to our conclusion in the present case. *Gomer* was simply the trustee of an express trust, and, under § 5 of the Code, the action would lie in his name. In *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473, *Allen* sued *Walsh* upon a promissory note; defendant insisted that, on account of some understanding between *Allen* and *Gordon*, the original payee of the note, that a portion of the avails of the note when collected were to be paid to *Gordon*, and that plaintiff was not the real party in interest, and, therefore, not entitled to maintain the suit. The court held that, as the legal title to the note was in *Allen* by reason of the assignment, the action would lie in his name.

These are all the cases cited from this

jurisdiction as in conflict with the conclusion we have reached. We think no one of the cases to be *contra* such conclusion. Cases are cited from other jurisdictions, and cases can be found supporting the contention of plaintiff in error, but they conflict with the weight of authority, and conflict with the rule laid down in this state. It would serve no useful purpose to extend this opinion by reviewing them.

2. It is contended that the court committed reversible error in the giving of the instruction No. 3, whereby it placed upon defendant John Best the burden of showing that the note sued on was without consideration. The facts pertinent to this instruction were these: Plaintiff introduced the note signed by the defendant John Best, Byron J. Smith, and Joseph H. Smith. The defendant Best then introduced evidence tending to show that he was only an accommodation signer of the original note, and all renewal notes, including the note sued on, that he signed such note at the request of the payee, the plaintiff, for its accommodation, and solely to enable it to negotiate the note. There was evidence for the plaintiff that defendant Best was not an accommodation maker, but a joint and several maker, and that his signature to the note was the security upon which plaintiff relied in making the loan. An issue of fact was thus presented to the jury for determination. Who should prevail thereon depended largely upon whether credit should be given to the testimony of Potter, or to that of Best. It is important for the jury to know upon whom was the burden of proof as to this issue. The court thus charged the jury at plaintiff's request: "The jury are instructed that, under the law in this case, the chief matters for them to consider, between the plaintiff and the defendant Best, are whether or not the defendant John Best signed the said note sued upon in this case, without consideration, and solely at the request, and for the benefit of, and for the accommodation of, either the said Potter, or the plaintiff herein. And the jury are further instructed that the said promissory note itself is *prima facie* evidence that the said John Best signed the same as maker thereof for a valuable consideration, and the jury are further instructed that the burden is upon the defendant John Best to show by a preponderance of evidence, that he signed the said note sued upon in this action, solely at the request of the said Potter, and solely for the accommodation of the said Potter, or the said plaintiff, and wholly without considera-

tion; and, unless the jury believe from the evidence, that the said defendant John Best did so sign the said promissory note sued upon in this action, solely at the request of, and for the accommodation of, the said Potter, or the said plaintiff, and without any consideration whatever, then their verdict must be for the plaintiff and against the defendant John Best. . . ." It will be seen that the burden of the proof that the note was without consideration was thus placed upon the defendant below.

The weight of authority is clearly against the correctness in this particular of this instruction. Daniel's Negotiable Instruments, 5th ed. vol. 1, § 164, says: "Weight of Evidence. While a bill, or negotiable note, imports in itself a consideration, yet, when evidence has been introduced to rebut the presumption which it raises, the burden is upon the plaintiff to satisfy the jury upon all the evidence, and by the preponderance of evidence, that there was a consideration; and the mere production of the instrument does not shift upon the defendant the burden of proving that there was no consideration. The production of the note, as has been said, is *prima facie* evidence of a consideration sufficient, if not rebutted, to maintain plaintiff's case. But to hold that such an admission in the note of a consideration therefor (as the words 'value received') changes the burden of proof and compels defendant to assume it, would be to hold that such an admission, when made orally, and when not contained in the instrument, would have the same effect." In *Black River Sav. Bank v. Edwards*, 10 Gray, 387, the following instruction was approved: "The burden of proof is on the plaintiffs to establish a consideration, and the burden does not shift from them to the defendant. The note containing the words 'value received,' in law imports a consideration, and, upon the evidence of the note itself, the plaintiffs are entitled to a verdict, unless there is some other evidence to affect it. The note, being produced, is *prima facie* evidence of a consideration; yet the burden is upon the plaintiffs to satisfy the jury upon all the evidence, and by the preponderance of the evidence, that there was a consideration." In *Huntington v. Shute*, 180 Mass. 371, 91 Am. St. Rep. 309, 62 N. E. 380, decided in 1902, the court said: "The rule is well settled in this commonwealth that, in an action on a promissory note, the burden of proof is upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission

or proof of the signature, makes a prima facie case, yet, if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury by a fair preponderance of the evidence that the note was for a valid consideration." In *Small v. Clewley*, 62 Me. 155 and 156, 16 Am. Rep. 410, the court said: "The effect of the instruction was to impose the burden of proof upon the defendant to show that there was a want of consideration for the notes, and in this respect the instruction was erroneous." See also *Delano v. Bartlett*, 6 Cush. 364; *Search v. Miller*, 9 Neb. 26, 30, 1 N. W. 975; *Campbell v. McCormac*, 90 N. C. 491; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Solomon v. Huey*, 1 Posey, Unrep. Cas. (Tex.) 265; *Stevenson v. Gunning*, 64 Vt. 601, 614, 25 Atl. 697; *Conney v. Macfarlane*, 97 Pa. 361.

The weight of authority is clearly in support of the contention of plaintiff in error, defendant below; that is, that the burden of proof was upon the plaintiff to show that the note was not without consideration. We can see no reason for not following the prevailing doctrine. Cases are cited by defendant in error as *contra* this conclusion; some of them can be explained and reconciled; some cannot. There is no sufficient reason for taking them up and discussing them. We will confine our consideration to the two Colorado cases which are cited against our conclusion. They are not in conflict with our conclusion, and do not touch the point before us. *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391, was an action by plaintiff upon certain promissory notes given by one Isaac Cooper against his administratrix. Payment was the principal defense relied upon. All that is said in the opinion, in the most remote degree bearing upon the question of consideration, is this: "The execution and delivery of the notes being admitted, the presumption would be, in the absence of proof, that they were founded upon a sufficient consideration to sustain the plaintiff's cause of action. In addition to this, a full consideration for the notes was expressly admitted on the trial." This language is not inconsistent with our conclusion. It simply is that, the execution and delivery of the notes being admitted, the presumption is that they were founded upon a sufficient consideration. It does not say that, when rebutting proof going to show that there was no consideration has been introduced, the burden is not on the plaintiff

to show that a valuable consideration existed for the notes. The case does not rule the question before us. *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613. *Groth & Company*, to whom Welch was indebted, drew an order upon Welch payable to Mayer, which order Welch accepted. There was an attempt by the debtor, Welch, to show that Mayer gave no consideration for the order. The court held that the want of consideration between Mayer and the drawer, *Groth & Company*, was not a defense to an action on the bill or order against Welch, the drawee. The case does not go into or decide upon whom rests the burden of proof for want of consideration in a case like the one before us. *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951, is not cited by appellate as sustaining its contention that the burden of proof as to want of consideration was upon the defendant, appellant. It is well, however, to distinguish that case. In the case we are deciding the action was brought by the payee against the maker. In such case the burden was upon the payee, the plaintiff, to show that a valuable consideration existed for the note. In *Murphy v. Gumaer*, the action was by an indorsee before maturity against the maker. In such case the burden as to want of consideration is upon the maker. A different rule obtains in this particular when the suit is by the indorsee from that which applies when the suit is by the payee. There the suit was by the indorsee, here by the payee. The distinction between the rule as to the burden of proof in the one case from that obtaining in the other developed in §§ 164, 165, vol. 1, 5th ed. *Daniel on Negotiable Instruments*.

It has been suggested that instruction No. 6, asked by defendant Best and given, lays down the law as defendant Best contends it to be, and as we have here held it to be, as to the burden of proof of consideration. If we assume that this instruction declares the law properly as to the burden of proof in the matter of consideration, which we do only for the purpose of this ruling, it is in direct conflict with instruction 3 given at the request of plaintiff; and, as we cannot say such conflict did not work a prejudice, we must declare that instruction 3, given at the request of plaintiff, was erroneous, was not cured by instruction 6, and worked reversible error. *Grant v. Varney*, 21 Colo. 329, 334, 40 Pac. 771.

The judgment will be reversed as to defendant Best.

The Chief Justice and Maxwell, J., concur.

ILLINOIS SUPREME COURT.

WABASH RAILROAD COMPANY, Appt.,
v.
F. E. THOMAS.

(222 Ill. 337, 78 N. E. 777.)

Carrier—shipment beyond line.

1. By accepting freight marked for a particular place, a carrier is *prima facie* bound to carry it to and deliver it at that place, although beyond the terminus of its own line.

Same—limitation of liability—assent.

2. Whether or not a stipulation in a bill of lading limiting the liability of the carrier to his own line is understood and assented to by the consignor is a question for the jury to determine.

Case Note.—Reasonableness of the time fixed in a contract of shipment of live stock for presentation of claim for damages:

—By the great weight of authority, a carrier may stipulate in his contract of shipment that, as a condition precedent to bringing suit for any loss or injury to the live stock, the shipper must give notice of his claim for such loss or injury within a certain time, or before the stock is taken from the place of destination or delivery, or is mingled with other stock. In view of the fact that the greater amount of stock shipped is usually mingled with other stock immediately upon its delivery, or is slaughtered, and all stock shipped is liable to be injured in various ways after the carriage is completed and without any fault on the part of the carrier, such a stipulation is usually considered as preventing fraud in the presentation of ungrounded claims for loss or injury to the stock. But it is just as generally held that the requirements of the stipulation as to time must be reasonable, and not of such a nature as to work undue hardship upon the shipper, or unduly permit the carrier to escape the consequences of his negligence. But what is a reasonable stipulation in one case may not be in another. As has been frequently said, much must depend upon the facts of the individual case.

And the courts not infrequently determine the reasonableness or unreasonableness of the time allowed by the stipulation with reference to the actual facts as they afterwards developed; in other words, with reference to the question whether the time stipulated proved, under all the circumstances of the case as they afterwards developed, reasonably sufficient for the shipper to ascertain the nature and extent of his loss or damage, and to give notice of his claim as required by the stipulation.

It will be observed that the decision in *WABASH R. Co. v. THOMAS* is not based upon the ground that a contract of shipment limiting the time within which notice of claim for injury or loss must be given is necessarily invalid, but upon the ground

Same—claim for damages—presentation—reasonableness.

3. It cannot be said, as matter of law, that a stipulation in a bill of lading that a claim for damages for injury to freight must be presented within ten days after the freight is removed from the car is reasonable, when applied to live stock, the character of the injury to which cannot be determined within ten days.

Same—limited liability—burden of proof.

4. The carrier has the burden of showing that a shipper assented to special conditions in the bill of lading, limiting the liability of the carrier for injury occurring beyond its own line and requiring claims to be presented within a specified time.

Evidence—rejection—error.

5. There is no reversible error in refus-

that a limit of ten days was not reasonable in that case, it appearing that the injury could not by any reasonable degree of diligence have been discovered within that time.

So, in *Baltimore & O. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214, where the defendant asked the trial court specifically to charge that, if the notice of the claim for damages was not given within the five days required by the contract, the plaintiff could not recover, it was held that all the circumstances connected with the unloading and the injuries should be examined, and, if the exact nature of the injuries could not have been discovered within the time stated in the contract, it would be considered unreasonable and not binding. The court said: "As stated by counsel for defendants in error, the owners were entitled to time sufficient to know whether the claim should be for injury to a live horse, or for the value of a dead one."

Among other cases holding similarly may be noticed *Richardson v. Chicago & A. R. Co.* 149 Mo. 311, 50 S. W. 782; *Harned v. Missouri P. R. Co.* 51 Mo. App. 482; *Louisville, N. A. & C. R. Co. v. Steele*, 6 Ind. App. 183, 33 N. E. 236.

And where the carrier, by his own act, rendered it impossible for the shipper to give the notice within the time limited by the contract, it has been held that the failure to give such notice would not bar a recovery. *Gulf, C. & S. F. R. Co. v. York*, 2 Tex. App. Civ. Cas. (Willson) § 814; *Richardson v. Chicago & A. R. Co.* supra; *Baker v. Missouri P. R. Co.* 19 Mo. App. 321.

The following cases, more or less clearly recognizing the principle that the reasonableness or unreasonableness of a stipulation limiting the time within which to give notice of loss is to be determined from the facts as they finally developed, hold that the event did show that the time allowed by the stipulation was reasonable in the particular case:

Within one day. *Missouri P. R. Co. v. Park*, 66 Kan. 248, 71 Pac. 586; *Kansas & A. Valley R. Co. v. Ayers*, 63 Ark. 331, 36 S. W. 515.

ing to admit in evidence an application for carriage of freight where it is not materially different from the carriage agreement which is admitted.

(Scott, Ch. J., and Cartwright, J., dissent.)

(April 17, 1906.)

APPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Vermilion County in plaintiff's favor in an action brought to recover damages for injuries to freight while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Mr. C. N. Travous for appellant.

Mr. Walter C. Lindley, with Messrs. W.

Within five days. *Wabash, St. L. & P. R. Co. v. Black*, 11 Ill. App. 465, Affirmed in 111 Ill. 351, 53 Am. Rep. 628; *Cleveland, C. C. & St. L. R. Co. v. Newlin*, 74 Ill. App. 638.

Within sixty days. *Thompson v. Chicago & A. R. Co.* 22 Mo. App. 321.

There are many cases, however, which have held or assumed the time allowed to be reasonable, and the stipulation therefore valid, without expressly making the question of unreasonableness turn upon the facts of the particular case as they afterwards developed, though it is to be said that it did not appear in these cases that the time allowed was unreasonable, tested by such facts. In this class of cases the following periods have been held or assumed to be reasonable:

Where the notice was to be given within one day. *Smith v. Chicago, R. I. & P. R. Co.* 112 Mo. App. 610, 87 S. W. 9.

Within three days. *Oxley v. St. Louis, K. C. & N. R. Co.* 65 Mo. 629.

Within five days. *Eckert v. Pennsylvania R. Co.* 211 Pa. 267, 107 Am. St. Rep. 571, 60 Atl. 781; *Anderson v. Lake Shore & M. S. R. Co.* 26 Ind. App. 196, 59 N. E. 396; *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68; *Dawson v. St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Leonard v. Chicago & A. R. Co.* 54 Mo. App. 293; *Brown v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 568; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445; *Hamilton v. Wabash R. Co.* 80 Mo. App. 597; *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628; *Chicago, C. C. & St. L. R. Co. v. Bozarth*, 91 Ill. App. 68; *Pavitt v. Lehigh Valley R. Co.* 153 Pa. 302, 25 Atl. 1107.

Within ten days. *Bellows v. Wabash R. Co.* 118 Mo. App. 500, 94 S. W. 557; *Case v. Cleveland, C. C. & St. L. R. Co.* 11 Ind. App. 517, 39 N. E. 426; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

Within twenty days. *Metropolitan Trust Co. v. Toledo, St. L. & K. C. R. Co.* 107 Fed. 628.

7 L.R.A. (N.S.)

H. Clinton, H. S. Tanner, and Penwell & Lindley, for appellee:

A common carrier is an insurer of the safe delivery of live stock, and as such is answerable, in the absence of a special contract to the contrary, for every loss that cannot be attributed to God, public enemies, or to the vices of the animals themselves.

Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393; *Burke v. United States Exp. Co.* 87 Ill. App. 505.

Carriers seeking to avoid this common-law liability by means of a special contract have the burden of showing that the restrictions on the common-law liability, contained in a bill of lading or alleged shipping contract, were assented to by the consignor.

Boscowitz v. Adams Exp. Co. 93 Ill. 523,

Within thirty days. *Armstrong v. Chicago, M. & St. P. R. Co.* 53 Minn. 183, 54 N. W. 1069.

Within ninety days. *Houston & T. C. R. Co. v. Mayes* (Tex. Civ. App.) 97 S. W. 318.

Very frequently the contract of shipment of cattle requires the notice of claim for loss to be given to some officer of the carrier, or its nearest station agent, before the stock is moved from its place of destination or delivery, or is delivered to the consignee or mingled with other stock. Such contracts also usually provide for the transportation of the shipper or his agent to accompany the cattle, who, being present at the unloading, is presumably in a position to discover the loss or damage, and to give the required notice within the stipulated time. Many cases hold, or assume, that such a stipulation is reasonable and consequently valid, without showing that the reasonableness is or is not dependent upon the circumstances as they are finally developed in connection with the individual case. Among these cases may be noticed *Sprague v. Missouri P. R. Co.* 34 Kan. 347, 8 Pac. 465; *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *Missouri, K. & T. R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261; *Owen v. Louisville & N. R. Co.* 87 Ky. 626, 9 S. W. 698; *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* (N. D.) 107 N. W. 1087; *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. Civ. Cas. (Willson) § 330; *Missouri P. R. Co. v. Scott*, 2 Tex. App. Civ. Cas. (Willson) § 324; *Galveston, H. & S. A. R. Co. v. Harman*, 2 Tex. App. Civ. Cas. (Willson) § 136; *Texas C. R. Co. v. Morris*, 1 Tex. App. Civ. Cas. (White & W.) § 374; *Missouri P. R. Co. v. Harris*, 1 Tex. App. Civ. Cas. (White & W.) § 1257; *Baxter v. Louisville, N. A. & C. R. Co.* 165 Ill. 78, 45 N. E. 1003; *Atchison, T. & S. F. R. Co. v. Crittenden*, 4 Kan. App. 512, 44 Pac. 1000; *Selby v. Wilmington & W. R. Co.* 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. E. 608; *Gulf, C. & S. F. R. Co. v. Tra-*

34 Am. Rep. 191; Chicago & N. W. R. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; Field v. Chicago & R. I. R. Co. 71 Ill. 462; Webbe v. Western U. Teleg. Co. 169 Ill. 618, 61 Am. St. Rep. 207, 48 N. E. 670; Cleveland, C. C. & St. L. R. Co. v. Patton, 104 Ill. App. 550, Affirmed in 203 Ill. 376, 67 N. E. 804.

This is true even though the bill of lading or alleged contract was signed by the consignor.

Cleveland, C. C. & St. L. R. Co. v. Patton, supra; Chicago & N. W. R. Co. v. Calumet Stock Farm, 96 Ill. App. 337, Affirmed in 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; Baltimore & O. S. W. R. Co. v. Fox, 113 Ill. App. 180.

Whether the plaintiff in the present case

wick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567.

But other cases where the contract contains stipulations of this character recognize more or less clearly the principle that the reasonableness of the requirements as to the time within which notice of claim for damages must be given is to be determined by the circumstances as they afterward develop; and the validity or invalidity, as the case may be, of the contract, and its conclusiveness upon the shipper, are determined according as the result shows that the shipper could or could not have reasonably given the notice so as to have accomplished the result aimed at by the stipulation,—namely, the prevention of fraud in the presentation of ungrounded claims.

Thus, in Ormsby v. Union P. R. Co. 2 McCrary, 48, 4 Fed. 170, 708, it was held that a stipulation in the contract requiring that a demand for any loss to live stock should be made in writing to the agent of the company before the stock was removed from the point of destination was of no effect as to sickness, the extent of which could not have been known for some time after the removal of the stock from the car.

So, also, in Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, it was held that, where the shipper did not discover, and by ordinary diligence could not have discovered, the injury and its extent, before the animals were removed, notice thereof within such reasonably short time after their removal as effectually secures the carrier from fraud is a substantial and sufficient compliance with the condition.

Where horses were injured by the burning of a car in which they were shipped, it was held, in Houston & T. C. R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308, that a stipulation requiring notice of claim for damages to be given before the removal of the shipment from the station, which notice should contain a statement of "the full amount of such loss or damage," bore on its face prima facie evidence of its unreasonableness; and nothing short of an af-

firmative showing by the defendant that the full extent of the injury had been developed in time for such notice to be given within the time required by the contract would relieve it from this objection.

And to the same general effect: Wood v. Southern R. Co. 118 N. C. 1056, 24 S. E. 704; Goggin v. Kansas P. R. Co. 12 Kan. 416; Atchison, T. & S. F. R. Co. v. Temple, 47 Kan. 7, 13 L.R.A. 362, 27 Pac. 98; Atchison, T. & S. F. R. Co. v. Collins, 47 Kan. 11, 27 Pac. 99; Rice v. Kansas P. R. Co. 63 Mo. 314.

To the contrary, however, was Kalina v. Union P. R. Co. 69 Kan. 172, 76 Pac. 438, where the court distinctly held that the contract was to be determined by its prima facie reasonableness, and, if it was reasonable upon its face, the facts as they developed would not have any bearing upon the question. The plaintiff in this case insisted that the stipulation in the shipping contract did not contemplate a case where plaintiff's loss could not be ascertained, and therefore no claim could be made for it, until after the sale of the cattle; and that the carrier was not injured in any way by failure to make timely claim. In reply to this argument, the court said: "It is a sufficient answer to this to say that the contract, in terms, conditions plaintiff's right to recover upon the timely making of this claim, and such contract is within the power of the parties to make."

Numerous cases hold that a stipulation requiring notice before removal, although it may be reasonable as a general proposition, will not be held binding upon the shipper where it does not appear that there was an officer or station agent at the point of destination, or so situated that notice could be reasonably served upon him within the time stipulated.

Thus, it was held in St. Louis, A. & T. R. Co. v. Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008, that, if a carrier desired to claim exemption from damages because of failure to give notice, in accordance with the contract of shipment, to some officer, or to the nearest station agent, before the stock

had knowledge of and assented to the provisions of the so-called shipping contract was a question for the jury.

Cleveland, C. C. & St. L. R. Co. v. Patton, 104 Ill. App. 554, 203 Ill. 376, 67 N. E. 804; Chicago & N. W. R. Co. v. Calumet Stock Farm, 194 Ill. 13, 88 Am. St. Rep. 68, 61 N. E. 1095; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; Erie & W. Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Chicago & N. W. R. Co. v. Simon, 160 Ill. 653, 43 N. E. 596.

The appellant, having assumed the duty of carrying the horses to Paris, Illinois, was liable for any loss or injury on any road over which the cars passed from Council Bluffs.

Chesapeake & O. R. Co. v. Radbourne, 52 Ill. App. 203; St. Louis, S. W. R. Co. v. Elgin Condensed Milk Co. 175 Ill. 557, 67 Am. St. Rep. 238, 51 N. E. 911.

Wilkin, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court for the third district, affirming a judgment of the circuit court of Vermilion county in favor of the appellee, against the appellant, for \$2,400 and costs of suit. The declaration consisted of two counts substantially alike, charging the defendant, as a common carrier, with a breach of duty in failing to safely carry 25 head of horses from Council Bluffs, Iowa, to Paris, this state; negligently failing to properly feed and water the animals while *en route*; carrying them by slow trains; and suffering the cars in which they were loaded to stand on the track for an unreasonable length of time,—all of which resulted in 'heir becoming reduced in flesh, diseased, and lessened in value, and in consequence of which neglect 12 of them died. A plea of not guilty was filed by the defendant, and upon the trial by jury a verdict was returned and judgment rendered in favor of the plaintiff.

It appears from the evidence that at the

date of the shipment appellee resided in Paris, Illinois, though for sixteen years immediately preceding that time he had been in western Nebraska, where he was engaged in raising and shipping stock. The horses in question were first shipped from Nebraska to Council Bluffs over the Union Pacific Railway, arriving at Council Bluffs about 9 o'clock Saturday evening. They were unloaded, fed, and watered, and the next morning appellee called on the Wabash agent at that place to arrange for shipment over the appellant's line. He testified that he told the agent, that he wanted the stock sent to the stock yards at St. Louis, and there fed before being sent to Paris. The agent prepared an application and contract of shipment, the former of which purports to have been signed by the plaintiff, and the latter by the agent, on behalf of the company, and by the plaintiff. The contract was for shipment from Council Bluffs to St. Louis, and stated that the carrier had agreed to forward the car of horses from Council Bluffs to St. Louis; that its responsibility extended only to its own line; that appellee had agreed to care for the horses while in transit, load and unload, and feed and water them at his own risk and expense; and that in case of loss or damage he would make and present his

was removed from the point of shipment, or from the place of destination, and before it was mingled with other stock, it must furnish reasonable facilities for such notice to be given; and the court said it was not prepared to say that it would be reasonable to require a shipper to leave his stock to go to a station in another state in search of someone upon whom to serve notice.

And there are numerous other decisions to the same effect. Missouri P. R. Co. v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78; Galveston, H. & S. A. R. Co. v. Short (Tex. Civ. App.) 25 S. W. 142; Missouri P. R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776, 9 S. W. 749; Ft. Worth & D. C. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Engesether v. Great Northern R. Co. 65 Minn. 168, 68 N. W. 4; Carpenter v. Eastern R. Co. 67 Minn. 188, 69 N. W. 720.

Where the delivery is to be made by a connecting carrier, numerous cases hold that, if the carrier wishes to take advantage of the condition requiring notice to be given before the stock is removed from its place of destination, it must show that it had an officer or agent where the shipper could reasonably find him, so as to give the required notice.

Thus, in Baxter v. Louisville, N. A. & C. R. Co. 165 Ill. 78, 45 N. E. 1003, where the contract required notice to be given to "some officer" of the carrier, or "its nearest station agent," before the stock was removed from its place of destination, and it

appeared that the shipment terminated upon a connecting line, it was held that the provision requiring notice to be given to some officer was unreasonable and uncertain because it in no way indicated or designated what officer, nor where he was to be found; and that the requirement that notice should be given to the nearest station agent was impracticable of performance because no means were given to the shipper to ascertain who such agent was, nor where his station was. In speaking of such a condition in the contract, the court said: "When the carrier seeks to apply it to a shipment terminating on a connecting line, it must show that it had an officer or station agent at or near the place of delivery, upon whom the required notice could have been served, and who could, by reasonable diligence on the part of the consignee, have been ascertained and found."

And to the same effect is Coles v. Louisville, E. & St. L. R. Co. 41 Ill. App. 607, where it was held that such a stipulation would be unreasonable in a contract of shipment when the place of destination was about 150 miles distant from the nearest point of the initial carrier.

Where the contract provided that notice should be given to an officer or agent of the company before the cattle were removed from the place of delivery, and before they were mingled with other stock, it was held, in Missouri P. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574, that it was incumbent upon

claim in writing, verified by affidavit, within ten days after the horses were unloaded, or be barred from recovering anything on account of the same. The horses were loaded into a Street's Western Stable car about 12 o'clock Sunday night, and delivered to the company about 2:45 Monday morning, July 27th, leaving for St. Louis about fifteen minutes later. They arrived at the yards in North St. Louis at 6:12 o'clock the following morning, and the car in which they were being shipped was immediately delivered to the Terminal Association of St. Louis, which, in turn, delivered it to the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company at East St. Louis for transportation to Paris. Plaintiff offered evidence to the effect that he told the conductor in charge of the train to St. Louis that he wanted the horses unloaded, fed, and watered at the stock yards in St. Louis, and was assured that it would be done. This was denied by the conductor. Appellee claims that, after thus being assured that the horses would be unloaded at the stock yards, he left the train at St. Louis to get his breakfast, and then went to the stock yards to see about his horses, but could not find them, and spent the day searching for them, until about 11 o'clock at night, when he learned that they had

been forwarded to Paris. The car stood all day in the yards at St. Louis, and the horses were neither fed nor watered until after they arrived in Paris. They left St. Louis some time during the night, arrived at Paris the next day, and were unloaded. They had been *en route* about fifty-two hours, and when unloaded went immediately to a pool of stagnant water and began to drink, but were driven into another pen. Their manes and tails were partly eaten off, and they were very weak and gaunt. They were removed to a farm not far distant, where they were attended by a veterinary surgeon but 12 of them died as a result of their treatment, and 8 were sold two months later for \$375. On the back of the contract of shipment was the following: "July 26, 1903.—Shipper, F. E. Thomas, Kimball, Nebraska; consignee, F. E. Thomas, Paris, Illinois; No. of cars 3455 S. W. S.—Pass F. E. Thomas, parties in charge and accompanying stock. F. S. Blanchard, Agent." The car in which the animals were shipped was marked Paris, Illinois. The night operator of the company at Luther, North St. Louis, testified: "July 28, 1903, train 96 [in which the horses were shipped] arrived at North St. Louis 6:12 o'clock in the morning. There was a car of horses in the train for Paris, Illinois, care of the

the defendant to show that the carrier had an officer or agent so situated that the notice could be readily and easily given; and, where the place of delivery was beyond the line of the appellant's railway and in another state, no presumption would arise that the carrier had an officer or agent near the place of destination. The decision in this case was followed in *Texas & P. R. Co. v. Reeves*, 90 Tex. 499, 59 Am. St. Rep. 830, 39 S. W. 564; *Gulf, C. & S. F. R. Co. v. Vaughn* (Tex. App.) 16 S. W. 775; *Galveston, H. & S. A. R. Co. v. Williams* (Tex. Civ. App.) 25 S. W. 1019; *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 11 S. W. 854.

But, in *Wichita & W. R. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013, where a railroad company contracted to carry stock beyond its own terminus, and there was a stipulation that the shipper must give notice of his claim to an officer of the company, or its nearest agent, before the stock was removed from the place of destination or delivery, or was mingled with other stock, it was held that the officers and agents of the connecting line should, for the purposes of the contract, be treated as officers and agents of the initial carrier; and, where notice was not given to the carrier within twelve days after the delivery, it was not given within reasonable time, where the injury and loss were known immediately, and notice to the officers of such connecting company could have been given immediately.

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It will be noticed that in the latter case the court, in passing upon the reasonableness of the stipulation in the contract, distinctly took into consideration the facts as they finally developed, and based its decision of the reasonableness of the stipulation upon the fact that the shipper failed to give notice of his claim for loss, which notice he could have reasonably given.

It appears to be the general rule in Texas, where this subject has been a fruitful source of litigation, that the reasonableness of such a contract is wholly one for the jury; and this ruling has been held in numerous cases. *Missouri, K. & T. R. Co. v. Leibold* (Tex. Civ. App.) 55 S. W. 368; *Gulf, C. & S. F. R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *International & G. N. R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Missouri P. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76; *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80; *Ft. Worth & D. C. R. Co. v. Greathouse*, *supra*.

In some states it has been held that a contract limiting the time within which notice of claim for loss must be given violates a statute or the Constitution of the state, and is therefore invalid irrespective of whether or not it is reasonable as to time; and in these states, of course, the question considered in this note will not arise.

Big Four. The consist showed this. I reported this car load of stock to the Merchants' Bridge connection," etc.

Appellant's line east from Council Bluffs, Iowa, terminated at St. Louis, and it is insisted by its counsel that the burden of proof was upon the shipper to show a special agreement on its part to transport the horses beyond its own line, without which the carrier's obligations were fully discharged when it delivered the freight in good condition to its connecting carrier. We think, even under this claim, the evidence fairly tended to prove that the contract was for a through shipment. The company, from its conduct, must have so understood it. When, however, a carrier receives freight to be transported, marked to a particular place, he is *prima facie* bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for the loss. *Illinois C. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois C. R. Co. v. Johnson*, 34 Ill. 389; *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 97, 5 Am. Rep. 92.

But it is said the agreement on its face limits the liability of the defendant to its own line. Even if it should be admitted that such is the fair construction of the bill of lading, it was still a question of fact for the jury and the appellate court whether or not that contract was assented to by the shipper. Whatever may be the rule in other jurisdictions, it is well settled in this state that whether the terms of a special agreement limiting the liability of the common carrier was understood, and entered into by the consignor and assented to by him, is a question of fact. The earlier cases so holding will be found cited in *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. In that case we said: "By the adjudications of this court the rule is established, as a principle of the common law, that, where a carrier receives and accepts goods marked to a place beyond the terminus of its own line, its receipt for goods so marked is to be construed as a *prima facie* contract to carry and deliver at the point so marked. . . . Neither can the carrier limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property. *Starr & C. Anno. Stat. chap. 114, § 96*, and chap. 27, § 1. By these two sections (the first adopted in 1872, and the second in 1874) the right to limit a common-law duty in a receipt was prohibited. It has, however, been recognized by frequent decisions of this and other courts

that a common-law duty may be limited by express contract. . . . The rule that a limitation of a carrier's liability for safe carriage and delivery of freight beyond the terminus of the carrier's own line may be made by restrictions contained in that part of the bill of lading which may constitute a contract has been recognized in this state. [Citing cases.] Where a contract limiting the liability of a carrier is contained in a bill of lading which in its entirety constitutes both a receipt and contract, the onus is on the carrier to show the restrictions of the common-law liability were assented to by the consignor (*Field v. Chicago & R. I. R. Co.* 71 Ill. 458; *Boscowitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191); and whether there is such assent is a question of fact. The mere receiving the bill of lading without notice of the restrictions therein contained does not amount to an assent thereto,"—citing cases. And in that case it was further held, whether the limitations in the bill of lading were assented to by the consignor was a question of fact determined by the appellate and trial courts adversely to the appellant. To the same effect are *Illinois C. R. Co. v. Carter*, 165 Ill. 570, 36 L.R.A. 527, 46 N. E. 374, and *Chicago & A. R. Co. v. Davis*, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382.

If it be conceded that the case of *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628, announces a different rule, still the later cases would govern. The *Black Case* does, however, hold that all facts and circumstances connected with the execution of the special contract were proper to be considered by the jury. The reasons for imposing the burden of proof upon the carrier in such case, as distinguished from ordinary cases of contract between parties, will readily suggest themselves. But it is sufficient for the purposes of this case to say that the law is settled adversely in this state to appellant's contention. The parol evidence is admitted, not for the purpose of changing or varying the terms of a written contract, but for the purpose of showing whether the written contract was assented to by both parties.

The tenth condition in the contract of shipment provides that no action shall be brought for damages "unless a claim for such loss or damage shall be made in writing, verified by an affidavit of the party of the second part, or their agent, and delivered to the freight-claim agent of the party of the first part, at his office in the city of St. Louis, within ten days from the time said stock is removed from said cars; and it is also agreed that, if any loss or damage occurs upon a connecting line, then

such line shall not be liable unless a claim shall be made in like manner and delivered in like time to some officer or general agent of the line on which the loss or injury occurred." That there was on the part of the connecting carriers gross negligence, amounting to absolute cruelty to the horses, cannot be denied. Nor can it be said that, in view of the nature of the injury to the animals, the actual damage could, by any reasonable degree of diligence, have been discovered and sworn to within ten days after they were unloaded; and it cannot therefore be said, as a matter of law, that the foregoing provision was reasonable. *Baxter v. Louisville, N. A. & C. R. Co.* 165 Ill. 78, 45 N. E. 1003. But the question of the plaintiff having understandingly assented to that provision having been determined adversely to appellant by the jury and the appellate court, he was not barred of his right of action by his failure to comply with it.

The contention that the trial court erred in instructing the jury that the burden of proof was upon the carrier to show that the plaintiff had assented to the terms and conditions of the contract of shipment is answered by *Chicago & N. W. R. Co. v. Simon* and *Illinois C. R. Co. v. Carter*, supra, and by the still later cases of *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095, and *Cleveland, C. C. & St. L. R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804.

It is also insisted that the trial court erred in refusing to admit in evidence the application of the plaintiff purporting to have been made by the plaintiff to the agent of the company at Council Bluffs. The plaintiff testified, though somewhat indefinitely, that he did not sign the application, and there is no positive evidence that he did. We are unable, however, to see what particular injury resulted to the defendant by the court's refusal to admit it in evidence. It was not materially different from the agreement which was admitted in evidence.

All controverted questions of fact having been conclusively settled adversely to the appellant, and questions of law alone being subject to review here, we are of the opinion that the judgment of the Appellate Court must be affirmed.

Cartwright, J., dissenting:

It is the law of this state that a railroad corporation cannot limit its common-law liability by any stipulation or limitation expressed in the receipt given for the

property. Section 33 of the act in relation to fencing and operating railroads, in force July 1, 1874 (Rev. Stat. 1874, chap. 114), so provides. But a bill of lading may contain provisions and restrictions which, if assented to by the shipper, will amount to a contract, and the carrier may thereby limit its liability to such damage or loss as may arise on its own line. *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Illinois C. R. Co. v. Carter*, 165 Ill. 570, 36 L.R.A. 527, 46 N. E. 374. A limitation of that character in a bill of lading is not binding on the shipper unless he knew of and assented to the limitation, and that is a question of fact, as to which the judgment of the appellate court is conclusive. *Chicago & A. R. Co. v. Davis*, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382. The carrier must show that there was an express contract for the exemption; and, where the limitation is contained in a bill of lading not signed by the shipper, the burden is on the carrier to prove the contract by showing that the shipper assented to the limitation. *Chicago & N. W. R. Co. v. Simon*, supra. That is merely proving that there was a contract, and, if the proof is made, the limitation in the bill of lading will bind the shipper as effectually as though he had signed it. *Boscowitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191. In this case there was an express contract, signed by the plaintiff and the agent of the defendant, restricting the defendant's liability to its own line; but it is held that the burden was upon the defendant to prove by other evidence that the plaintiff assented to the terms and conditions of the contract which he signed. I have not been able to discover any good reason for reversing the rule applied to other contracts and transactions, that one who has signed a contract is presumed to have understood and assented to its provisions. The validity of such a contract may be impeached. *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628. But I cannot agree with the conclusion that there is no presumption that the contract was assented to by the parties to it, and that the fact of such assent must be proved by other evidence. The only case where such a rule was applied to a contract which appeared from the facts stated to have been signed by the shipper is *Cleveland, C. C. & St. L. R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804, where it was said that, in the absence of evidence that the terms of the contract were assented to by the consignor, the presumption followed that he did not assent to the terms

of such contract. I think that decision ought not to be followed in this case.

Scott, Ch. J., dissenting:

I concur in the views of Mr. Justice Cartwright, above expressed.

Petition for rehearing overruled October 10, 1906.

WISCONSIN SUPREME COURT.

GEORGE L. SHUMAN, Respt.,
v.

BENJAMIN F. STEINEL, Appt.

(— Wis. —, 109 N. W. 74.)

Married woman — necessities — Stoddard's Lectures.

1. A set of Stoddard's Lectures is not a necessary, which a woman may purchase on the credit of her husband.

Same—ratification.

2. To render a man liable on his promise to pay for goods not necessities ordered by

Case Note.—Validity of husband's express promise to pay debt previously contracted by wife:—With the exception of a few cases subsequently cited, relating to the liability of the husband after his wife's death upon his express promise to pay antenuptial debts contracted by her, it is assumed, for the purposes of this note, that, prior to the express promise, there was no liability on the part of the husband to pay the debt. As indicated in the foregoing opinion, the distinction between debts incurred by the wife upon the credit of the husband and those incurred by her on her own credit is vital for the purposes of this subject. The following cases, in which the husband, by virtue of his subsequent express promise to pay, was held liable for debts contracted by the wife under such circumstances that he was not originally liable, are upon the ground that the debts were contracted by the wife on the husband's credit, and that his subsequent promise to pay them amounted to a ratification. *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72; *Conrad v. Abbott*, 132 Mass. 330; *Allen v. Aldrich*, 29 N. H. 63; *Day v. Burnham*, 36 Vt. 37. This is also implied in *Shreve v. Dulany*, 1 Cranch, C. C. 499, Fed. Cas. No. 12,817, and *Theriot v. Bagioli*, 9 Bosw. 578.

In *Day v. Burnham*, supra, the court said that the rule would apply notwithstanding that at the time of the purchase the wife requested the merchant not to call on her husband for payment as she wished to pay for the goods herself, there being no proof that the request was made or granted with a fraudulent purpose, and it being the intention of the parties that the sale should be made on the husband's credit.

There are also, of course, cases in which 7 L.R.A. (N.S.)

his wife, she must have purported to act as his agent in making the purchase, so that his promise is a ratification of her act.

Pleading—contract—departure.

3. Proof of a contract by ratification of an agent's act is not a departure from the theory of a complaint seeking recovery on a direct contract.

(October 9, 1906.)

APPPEAL by defendant from a judgment of the Superior Court for Milwaukee County in plaintiff's favor in an action brought to recover the contract price of certain goods alleged to have been sold and delivered. Reversed.

Statement by Marshall, J.:

Action to recover on alleged contract liability. The complaint was to the effect that, October 15th, 1902, defendant contracted in writing to take of the plaintiff a set of "Stoddard's Lectures" and pay therefor \$36.00; that plaintiff fully performed his part under such contract, but

the husband has been held liable upon an implied ratification without any express promise. (See note to 65 L.R.A. 549.) This question, however, is not within the scope of the note.

If the wife contracted the debt in her own name and on her own credit, the husband's subsequent promise to pay cannot, of course, be upheld upon the theory of ratification, nor, according to principle, though there is but comparatively little specific authority on the point, can it be upheld as an original promise, in the absence of any new consideration other than the moral obligation that may be supposed to rest upon a husband to pay debts contracted by his wife in her own name and on her own credit.

In *McBride v. Adams*, 84 N. Y. Supp. 1060, the court, after holding that there was not sufficient evidence of a ratification by the husband of a purchase of goods made by the wife on his credit, said that liability was not to be imposed upon the husband on the weight of his bald promise to remit when finally apprised of the claim, which, upon the facts, was the debt of the wife, in the absence of anything which would suggest a consideration for his promise.

A promise made by the husband before marriage, to pay a debt against his intended wife for which the creditor had no lien on her estate, is without a legal consideration, and void. *Agnew v. Williams*, 1 Bush, 4.

In *Leipird v. Stotler*, 97 Iowa, 169, 66 N. W. 150, testimony was admitted, in an action against the husband to recover the amount of a promissory note executed by his wife in her lifetime, to show a verbal promise by him after her death to pay the note; but this was upon the theory that the testimony was to be followed by other

that defendant refused to pay for the property.

Defendant answered denying that he agreed to purchase, or that he received the property mentioned. The signature to the contract was duly put in issue so as to cast on plaintiff the burden of proof as to whether it was that of the defendant. The evidence was undisputed that the paper was made by defendant's wife, she using his or her own name. There was some testimony tending to show that she signed her own name to the paper, and that it was subsequently changed by an erasure of the letter "s" from "Mrs." There was no evidence that the contract was made for the benefit of the defendant, or that his wife pretended to act by his authority, or as his agent, in making it, except as indicated by evidence tending to show that she signed his name. There was an indorsement on the paper by the person who acted on behalf of plaintiff, as follows:

Report of agent on subscriber:

Name: Mr. B. F. Steinel.

Age: 27 years.

Occupation: Mil. Sptg. Review Pub. Co.
Married.

Reputation for paying debts: Good.

Other information:

The subscriber is reliable and trustworthy, and I hereby certify that this agreement contains all the conditions made between me and the subscriber, and that his signature is genuine.

J. L. Day, Jr., Solicitor.

The evidence further tended to show that defendant's wife received the books; that some time thereafter, when his attention was called to the matter, he said that, if she ordered them, he would pay for them; and that subsequently he declined to do so and offered to return the property. After the testimony was closed, defendant's counsel asked leave to introduce further evidence as to the signature having been

evidence tending to show that the promise of the husband was made on a new and independent consideration, to accomplish some purpose of his own, *e. g.*, to prevent administration of his wife's estate, or for some other reason promising a benefit or advantage to him. It is clearly implied that, in the absence of a new consideration to the husband, his promise would be invalid. That, however, would have been true by reason of the statute of frauds, if for no more fundamental reason, since, in the absence of a new consideration, the promise, at best, would have been but a verbal one to pay another's debt.

In *Schnuckle v. Bierman*, 89 Ill. 454, holding that a husband, in the absence of an express agreement to pay, would not be liable for board furnished his wife while she, without justification, was living apart from him; and that there could be no recovery on his agreement to pay for her past board because the agreement was upon the condition that she return to his home, which condition was not complied with,—it seems to be implied that, if the agreement had been unconditional, the husband would have been liable thereon. This point, however, was not decided; and the judgment in favor of the plaintiff was reversed for the reasons above stated.

In *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. 881, expressly approving the last case, the decision is that, in the absence of a special promise of the husband to pay for the board and lodging of his wife living apart from him, he will not be responsible therefor, unless she lives separate from him by his consent, or his conduct was such as to justify her in leaving him. Here, too, there seems to be an implication that the husband would be lia-

ble upon an express promise. The implication in these cases may, perhaps, be accounted for upon the assumption that the board was furnished the wife upon the husband's credit, in which case, under the authorities previously cited, his subsequent express promise would amount to a ratification.

In *Thompson v. Brown*, 121 Ga. 814, 49 S. E. 740, the syllabus by the court (there being no opinion) is to the effect that, where a wife made a contract in her own name for the improvement of her husband's house, the husband is not liable therefor when it does not appear that the wife was his authorized agent, or that he knew that the work was being done on his property, "or that he adopted the contract as his own." The last phrase seems to imply that the husband would have been liable if he had adopted the contract as his own notwithstanding that it was made by the wife in her own name. The facts assumed in the syllabus, however, included the fact that the improvement benefited the husband's property; and, as shown in the note in 53 L.R.A. 375, there is authority for the proposition that a subsequent promise to pay for improvements placed on one's property without his knowledge or consent is valid. This is upon the ground that, while there is no pre-existing legal obligation, there is a material benefit conferred, and therefore something in addition to a mere moral obligation to sustain the subsequent promise.

The principle which precludes an action upon the husband's express promise to pay a debt previously contracted by the wife in her own name and on her own credit has been applied in a somewhat different, though analogous, class of cases holding that the husband's common-law liability for antenu-

changed, and asked to have the question submitted to the jury as to whether the credit was given to the wife and the contract signed in her name. The court ruled that the property purchased was not of the class called necessities; that it made no difference how the contract was signed, or whether there was any contract at all; that the paper did not cut any figure, except that it fixed the price of the property; and that, if defendant's wife ordered the goods and received them, and he subsequently promised to pay therefor, he was liable. Accordingly, a question covering those matters only was submitted to the jury, and was answered in the affirmative. Both sides

then moved for judgment upon the verdict and the minutes of the court and the evidence. Plaintiff's motion was granted and the defendant's denied.

Mr. James F. Trotman, with Mr. Edward J. Yockey, for appellant:

Except, possibly, as to necessities, neither husband nor wife has any right to contract for the other unless duly authorized.

1 Jones, Ev. § 262; *Savage v. Davis*, 18 Wis. 608; *Sturtevant v. Starin*, 19 Wis. 268; *Meek v. Pierce*, 19 Wis. 300; *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 160; *Brown v. Worden*, 39 Wis. 432.

tial debts contracted by the wife, which, by the common law, ceased upon the death of the wife before a recovery against the husband, could not be continued by the husband's express promise, not founded upon a new consideration, made during the wife's lifetime, to pay the same. *Mitchinson v. Hewson*, 7 T. R. 348; *Callan v. Kennedy*, 3 Cranch, C. C. 630, Fed. Cas. No. 2,319; *Crawford v. Verry*, 13 Ind. 427; *Waul v. Kirkman*, 13 Smedes & M. 599; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587.

Nor revived by an express promise without a new consideration after the wife's death. *Hetrick v. Hetrick*, 13 Ind. 44; *Waul v. Kirkman*, supra.

The case of *Beach v. Lee*, 2 Dall. 257, 1 L. ed. 371, seems to be opposed to the cases just cited. That was an action on express assumpsit, brought after the death of defendant's wife, to recover the amount of an antenuptial debt contracted by her, it appearing that, in consequence of the marriage, the defendant became possessed of property belonging to the wife more than sufficient to pay the debt, and that during her lifetime he had assumed to pay the debt, and had actually made several payments on account of it, and had promised to pay the remainder, even subsequent to her decease. It is stated in the report of the case that, upon these facts, it was agreed by counsel for the defendant, and sanctioned by the court, that the plaintiff was entitled to recover; though it was not admitted that without proof of the special assumpsit the defendant would have been liable for the debt.

In *Crawford v. Verry*, supra, where, during the marriage, the husband, with the wife's consent, undertook to pay an antenuptial debt of hers by selling to the creditor a piece of land belonging to her, but the wife died before the deed was made, and the heirs refused to execute a deed, it was held that the husband was liable to the creditor. This decision was rendered in 1859. It does not appear whether the marriage was celebrated prior or subsequent to the act of 1852, by which the husband's liability for the antenuptial debts of the wife, to the extent of the property received from her, was declared to continue after her death. (L.R.A. (N.S.)

death. This act did not apply where the marriage was celebrated prior to its enactment. *Hetrick v. Hetrick*, supra.

In *Allen v. McCullough*, 2 Heisk. 174, 5 Am. Rep. 27, it was said that, if a husband released by the wife's death from the antenuptial debt of the wife promises to pay it, the promise will create a valid obligation. This was said to follow, by parity of reasoning, from the proposition that if, after the husband's death, the wife, being under a moral obligation to pay debts contracted by her during the marriage, but for which she could not have been sued, promises to pay, the moral obligation is a sufficient consideration to support the promise, and the action can be maintained.

As shown in the note to *Gilbert v. Brown*, post, 1053, the proposition from which this conclusion was drawn is contrary to the weight of authority. As shown in that note, however, there are sound reasoning and judicial authority in support of the doctrine that a new promise, after discovery, to pay a debt incurred during coverture, is valid,—at least where the consideration for the original promise inured to the wife personally. It is obvious, however, that the analogy fails if the doctrine which upholds the new promise after discovery is limited to cases where the wife personally received the consideration for the original promise; and the analogy is not perfect even if that doctrine be extended to cases where the husband received the consideration for the wife's original promise; since there is obviously more reason for holding a woman bound by her promise after discovery, to pay an obligation which she undertook to assume during coverture, even though the consideration therefor moved to her husband, than to hold the husband liable on his subsequent express promise to pay a debt incurred by his wife in her own name and on her own credit, and where no reliance was originally placed on his responsibility. In the last case there is at best nothing but a moral obligation, in the sense of a conscientious duty, to support the express promise; and it is well established that a moral obligation in this sense is insufficient to constitute a consideration. See note to 53 L.R.A. 353.

The variance between pleading and proof is fatal.

Bowman v. Van Kuren, 29 Wis. 209, 9 Am. Rep. 554; *Atkinson v. Harran*, 68 Wis. 405, 32 N. W. 756; *Little v. Staples*, 98 Wis. 344, 73 N. W. 653; *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

It was the wife's contract, and the husband is not liable without his express promise to pay, based on a new and independent consideration.

Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. Supp. 1031; *Connerat v. Goldsmith*, 6 Ga. 14; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Taylor v. Shelton*, 30 Conn. 122.

The contract in this case being that of the wife, and not that of the husband, there can be no ratification by the husband.

Butts v. Newton, 29 Wis. 632; *Gaffield v. Scott*, 33 Ill. App. 317, 40 Ill. App. 380; *Meiners v. Munson*, 53 Ind. 138.

A married woman has no power, under our statute, to make a purchase of this kind, and her contract therefor is of no effect, and void.

Gallagher v. Mjelde, 98 Wis. 509, 74 N. W. 340; *Stack v. Padden*, 111 Wis. 42, 86 N. W. 568; *Ritter v. Bruss*, 116 Wis. 55, 92 N. W. 361.

Messrs. Carroll & Carroll, for respondent:

A contract of a married woman may be made binding upon her husband by his subsequent ratification thereof.

15 Am. & Eng. Enc. Law, 2d ed. pp. 871, 872; *Seaton v. Benedict*, 5 Bing. 28; *Mickelberry v. Harvey*, 58 Ind. 523; *Woodward v. Barnes*, 43 Vt. 330; *Morgan v. Chetwynd*, 4 Fost. & F. 451.

And such ratification may arise by his subsequent promise to pay the debt.

West v. Wheeler, 2 Car. & K. 714; *Jenner v. Hill*, 1 Fost. & F. 269; *Day v. Burnham*, 36 Vt. 37; *Conrad v. Abbott*, 132 Mass. 330; *Allen v. Aldrich*, 29 N. H. 63.

The husband will be bound where he allows the wife to retain articles purchased by her, and to use them without expressing any disapprobation.

Heney v. Sargent, 54 Cal. 396; *Sterling v. Potts*, 5 N. J. L. 773; *Ogden v. Prentice*, 33 Barb. 160; *Hamilton v. Peck* (Tex. Civ. App.) 38 S. W. 403; *Walling v. Hannig*, 73 Tex. 580, 11 S. W. 547; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

Marshall, J., delivered the opinion of the court:

The assignments of error urged by appellant may be stated thus: (1) The court should have granted a nonsuit on appel-

lant's motion because the complaint was on contract, charging him with being the maker thereof, while the proof showed that the contract was made by his wife, and that he did not subsequently ratify the same; (2) the contract was that of appellant's wife, and so he was not liable without an express promise to pay, based on a new and independent consideration; (3) the contract was shown to be void because altered fraudulently in a material part; (4) the court refused to submit to the jury the question of whether appellant's wife signed the contract, and the credit was given to her; (5) there was no proof that appellant promised to pay for the property. These various propositions we will not discuss in detail, but treat the case in a somewhat general way.

We can make little or no headway in determining whether the facts found by the jury are sufficient to render appellant liable by reviewing such authorities as *Day v. Burnham*, 36 Vt. 37; *Conrad v. Abbott*, 132 Mass. 330, and *Allen v. Aldrich*, 29 N. H. 63, cited to our attention by counsel for respondent. They are all cases where the wife purchased necessities on her husband's credit. Here it was properly held that the property purchased was not necessities, and the question of whether the purchase was made on the credit of the husband or on the credit of the wife was held by the learned court to be immaterial. The subject dealt with in *Conrad v. Abbott*, supra, is well indicated in the following language of the syllabus: "A promise by a husband to pay for necessities which have been furnished to his wife upon his credit, if they are such as he is bound to supply her with, . . . amounts to a ratification of her contract, upon which an action may be maintained, even if she had no previous authority to purchase them." The decision went upon the ground, which all such do, that the wife, in making the purchase, was presumed to assume authority to act for her husband. The court said: "The act of one assuming to be an agent, but done without authority, may be ratified; and in such case the liability of the principal arises from the ratification."

Cases cited by respondent to support the contention that the mere promise of the husband to pay for goods, not necessities, purchased by the wife on her own credit, makes him liable, do not so hold. They all proceed upon the theory of ratification of the act of the wife assuming to act for her husband. Of course, in case of necessities the element of assumed agency is much more readily proved than in case of other property. When a wife contracts an

indebtedness on her own credit, then the mere promise of the husband to pay it is of no greater dignity than any promise without consideration to answer for the debt of another. That is elementary. It must be assumed that the trial court so understood the law and held appellant liable under the doctrine of ratification, upon the theory that it applied to the circumstances of the case though they only included the elements of ordering the goods by the wife, receiving the same by her, and promise by appellant to pay therefor; that the elements of whether she assumed to act as agent in the matter, or ordered the goods on her own credit, were immaterial.

As to the importance of the omitted elements, in *Mechem on Agency*, at § 127, the rule is stated thus: "The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account it cannot thus be ratified."

The judicial authorities are in harmony therewith. In *Meiners v. Munson*, 53 Ind. 138, cited by appellant, we have a good example. There the court said: "The rule of law is, that a ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person." And further, citing from *Chitty on Contracts*, 11th Am. ed. vol. 1, p. 293: "But where the party making the contract had no authority to contract for the third person, and did not profess, at the time, to act for him, it seems that the subsequent assent of such third party, to be bound as principal, has no operation." And further, citing from 1 *Parsons on Contracts*, *346, where the author was speaking of a situation similar to that before us, "we may add that such a case would perhaps fall within the rule that no act is capable of ratification by the principal which was not performed by the agent as agent, and in behalf of the principal."

To the same effect are *Saltmarsh v. Candia*, 51 N. H. 71-76; *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Mitchell v. Minnesota Fire Assn.* 48 Minn. 278, 51 N. W. 608; *Schreyer v. Turner Flouring Co.* 29 Or. 1, 43 Pac. 719; *Minnich v. Darling*, 8 Ind. App. 539, 36 N. E. 173.

The argument advanced, that appellant could not become liable in the absence of an express promise, based on a new and independent consideration, in any event, is answered by the rule that the liability of

one who ratifies as principal the unauthorized act of another, who assumed to contract in his behalf, goes upon the ground of adoption of the unauthorized act, and therefore requires no consideration. So, if appellant's wife, assuming to act as his agent, ordered the books from respondent and received them, and he subsequently, with knowledge of the facts, adopted her act as his own by promising to pay for the property, or by accepting the benefit of the transaction, or in any other way, he thereby became liable for the indebtedness.

From the foregoing it seems plain that the question of whether appellant's wife signed his name to the contract, and the one as to whether she assumed to act for him, were material on the question of his liability. There was some evidence that she signed her own name to the paper; and we must assume that other evidence on that line, which appellant asked leave to present after both sides had rested, would have been offered and received had the court not held that, if she signed her own name, and the credit was given to her, the promise by her husband to pay the debt made it his obligation, since the rejection of the offer of additional evidence was placed on the ground of immateriality.

What has been said seems to govern all the questions raised which need attention. The motion for a nonsuit upon the ground that the signature of the appellant was put in issue, and no proof was produced to show that he did sign the paper, but, on the contrary, the evidence was to the effect that his wife signed her own name thereto, and that subsequently the signature was fraudulently changed, was properly overruled because, as to whether the signature was changed, the evidence was in conflict, and as to whether the signature should be regarded as appellant's turned on the question of ratification. If the wife signed appellant's name, assuming to act as his agent, and he afterwards adopted her act, the contract became, in legal effect, his from the beginning, and was enforceable as such. It follows that the claim that a recovery based on ratification was a departure from the one set forth in the complaint cannot be approved.

The claim that, assuming, for the purposes of the case, the circumstances were such that a promise on the part of appellant to pay for the books would have ratified the act of the wife as his, there was no proof of such a promise, the court properly ruled in respondent's favor. The testimony to the effect that appellant said that, if my wife ordered the goods, I will pay for them at the rate of about \$10.00

a month, was in effect assented to, as the jury were warranted in concluding. The person who represented plaintiff testified that he said to the appellant he thought the condition of payment suggested would do, and in subsequent communications in respect to the matter there was no change as to such assent.

So the case comes down to this: The trial court erred in not submitting to the jury in some proper way whether appellant's wife assumed to act as agent for her husband, or signed her own name and the credit was given to her. If she signed her name to the paper, and did not assume to act as agent for her husband, as before indicated, there could be no ratification, and, under the circumstances of the case, no liability on the part of appellant created by his mere promise to pay for the goods.

The judgment is reversed, and the cause remanded for a new trial.

KENTUCKY COURT OF APPEALS.

JOHN H. GILBERT et al., Appts.,

v.

LYDIA D. BROWN.

(29 Ky. L. Rep. 1248, 97 S. W. 40.)

Note—married woman—presumption.

1. In the absence of proof that a note executed by a man and wife was for neces-

saries ordered by the wife, the presumption is that it was for the husband's debt.

Same—ratification.

2. A woman cannot, after discovery, ratify a note which was executed by her during coverture, and was void because not for a debt for the payment of which she could contract.

Same—renewal note.

3. The execution, by a woman, of a note to take up one of her deceased husband, is without consideration if she received nothing from his estate.

(November 8, 1906.)

A PPEAL by defendants from a judgment of the Circuit Court for Clay County in plaintiff's favor in an action brought to enforce payment of a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. B. B. Golden and A. B. Hampton for appellants.

Messrs. W. W. Rawlings and Stivers & Wright for appellee.

Lassing, J., delivered the opinion of the court:

In December, 1891, W. H. Brown and Nancy Brown, his wife, executed a note to F. M. Brown for \$200. In December, 1895, this note was renewed for \$264, this being the amount due on said note. After the execution of this second note, W. H. Brown died, and Nancy Brown executed and deliv-

Case Note.—Validity of new promise by woman after discovery, to pay debt incurred during coverture:—It is assumed, for the purposes of this note, that the debt was not originally enforceable at law against the promisor, though some cases are included in which the original promise was binding in equity. As shown in the note in 53 L.R.A. 366, the doctrine of GILBERT v. BROWN on the point under discussion is in accord with the weight of authority,—numerically considered at least,—though the other side of the question is well sustained by both reason and authority. The question has generally been discussed from the point of view whether the moral obligation arising from the void promise during coverture, in connection with the consideration upon which it was made, is sufficient to sustain the new promise after discovery. As shown in the note referred to, it is well established that a moral obligation, in the sense of a mere conscientious duty not arising from a precedent promise or the receipt of material value by the promisor, is insufficient to sustain a subsequent promise. A good illustration of the application of the rule to a moral obligation in this sense is furnished by cases like *Mills v. Wyman*, 3 Pick. 207, holding that an express promise to pay for the past support of a relative is not binding where

the promisor was not before under an implied obligation to pay for such support. There is a great difference of opinion as to the scope and extent of this rule. There are many instances in which an express promise to pay has been sustained, although there was no new consideration, nor enforceable legal obligation. The exception to the rule is stated comprehensively by Gaynor, J., in *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, as follows: "The rule seems to be that a subsequent promise founded on a former enforceable obligation, or on value previously had from the promisee, is binding." This statement of the exception, although from the opinion of a lower court, is to be commended not only for its clearness, but for its comprehensiveness. The first alternative, i. e., where there was a former and enforceable obligation, is well illustrated by the numerous cases applying the well-settled rule that a new promise to pay a debt barred by the statute of limitations or discharged by operation of law is valid and enforceable without any new consideration. The exception to the general rule that a moral obligation is not sufficient to sustain a promise is frequently stated in a form which excludes from the exception, and therefore leaves within the general rule, a case presenting merely the second alternative of Judge Gaynor's statement,—that is,

ered to F. M. Brown her note for \$285.12 in satisfaction of the note which he held against her and her deceased husband; thereafter, she paid through Lee Brown, her son, \$50 on this note. F. M. Brown assigned and transferred this note to Lydia D. Brown, his wife. No further payments were made upon this note by Nancy Brown or anyone else for her. After her death, Lydia D. Brown, the holder of said note, brought suit against her heirs at law to enforce its collection, and to subject certain real estate which had been given them by their mother just prior to her death to its payment. The plea of no consideration was interposed in the trial court, proof taken, and judgment

entered in favor of plaintiff, and from that judgment defendants appeal.

The only question in this case necessary for determination is, Was there any consideration for the execution of this note from Nancy Brown to F. M. Brown upon which suit was brought? This question of necessity relates back to the execution of the original note in 1891. When the original note was executed a wife could not bind her estate, except for necessities; and she was wholly incapable of making any contract for any purpose, except for the purpose described by the statute,—that is, for necessities. And, where one is seeking to hold her upon a contract, it must be shown af-

where there was value previously had from the promisee, but no enforceable legal obligation. It will be observed that, in the most favorable aspect for its validity, a new promise after discoveriture, to discharge a void contract made during coverture, falls within the second of the alternatives stated by Judge Gaynor. It must be conceded that it is more difficult to sustain his statement of the exception with respect to this alternative than with respect to the first; that the exception has, however, been frequently applied to cases presenting the second alternative is illustrated by cases upholding the validity of an express promise to repay one who has voluntarily paid the promisor's debt, or to pay one for past services rendered to the promisor under such circumstances as not originally to create any legal obligation upon his part, and unaccompanied by any contemporaneous promise, void or otherwise, to pay the same. (See note to 53 L.R.A. 372.) It may be noted in passing, though they have been alluded to merely by way of illustration, that there is a conflict of authorities on both these specific questions.

Coming to the specific question covered by this note, as to the validity of a new promise after discoveriture, to pay a debt incurred during coverture, and which, by reason of the coverture, was not legally binding: As already intimated, the authorities—numerically considered at least,—are against the validity of such promise. The following cases hold that the moral obligation resting upon the promisor under such circumstances is insufficient to sustain the new promise after discoveriture: *Eastwood v. Kenyon*, 11 Ad. & El. 438, 4 Jur. 1081 (this case has been generally regarded as overruling the contrary doctrine asserted by *Lee v. Muggeridge*, 5 Taunt. 36); *Dixie v. Worthy*, 11 U. C. Q. B. 328; *Watson v. Dunlap*, 2 Cranch, C. C. 14, Fed. Cas. No. 17,282; *Loyd v. Lee*, 1 Strange, 94; *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *Maher v. Martin*, 43 Ind. 314; *Putnam v. Tennyson*, 50 Ind. 456; *Thomas v. Passage*, 54 Ind. 106; *Long v. Brown*, 66 Ind. 160; *Austin v. Davis*, 128 Ind. 472, 12 L.R.A. 7 L.R.A. (N.S.)

120, 25 Am. St. Rep. 456, 26 N. E. 890; *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539; *Davis v. Schmidt* (Ind. App.) 31 N. E. 840; *Ruppel v. Kissel*, 23 Ky. L. Rep. 2371, 74 S. W. 220; *Holloway v. Rudy* (Trimble v. Rudy) 22 Ky. L. Rep. 1406, 53 L.R.A. 353, 60 S. W. 650; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382 (the last two cases overruled *Franklin v. Beatty*, 27 Miss. 347, to the contrary); *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Bragg v. Israel*, 86 Mo. App. 338; *Parker v. Cowan*, 1 Heisk. 518 (*obiter*); *Manard v. Cawood*, 1 Tenn. Ch. App. 36 (*obiter*); *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

And the following cases sustain the general rule, with the qualification, express or implied, that the new promise will be valid if the original promise, though unenforceable at law, was binding in equity upon the separate estate of the wife: *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614; *Felton v. Reid*, 52 N. C. (7 Jones, L.) 269; *Long v. Rankin*, 108 N. C. 333, 12 S. E. 987; *Wilcox v. Arnold*, 116 N. C. 708, 21 S. E. 434; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594.

Probably the qualification expressly made by the cases last cited is also to be understood as a qualification of the decisions previously cited in support of the general rule. And the following cases expressly hold that the rule above stated does not apply to an express promise made after discoveriture, where the original obligation, though not legally enforceable, was binding upon the wife's separate estate. *Vance v. Wells*, 8 Ala. 399; *Viser v. Bertrand*, 14 Ark. 267; *Doss v. Peterson*, 82 Ala. 253, 2 So. 644; *Craft v. Rolland*, 37 Conn. 491; *Cleland v. Low*, 32 Ga. 458; *Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 637; *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239.

The leading case against the doctrine which denies the validity of the new promise by a woman after discoveriture, to pay an obligation incurred by her during coverture, and not originally binding either in law or equity, is *Goulding v. Davidson*, 26 N. Y. 604, which, within certain limitations,

firmatively that the claim comes within the statutory exception. *Price v. Keeney*, 5 Ky. L. Rep. 706. The proof in this case shows: That at the time of the execution of the original note W. H. Brown sought the loan. That he was indebted for taxes due upon his wife's land for perhaps as much as two years, for grocers' bills, and other bills. That he applied to his son, F. M. Brown, for the money, and, after some delay, the loan was negotiated. The note was forwarded by W. H. Brown and Nancy Brown to F. M. Brown, who sent his check to them for \$200, payable to W. H. Brown. W. H. Brown owned no estate, but his wife, Nancy Brown, owned a farm. There is not the

slightest proof in the record as to the amount of taxes due, or the amount of the grocers' bills, or that credit therefor had been extended to Nancy Brown; but, on the contrary, the fact that the loan was sought by W. H. Brown, and the check made payable to him, goes to show that the debt was the debt of W. H. Brown, and not the debt of his wife, Nancy Brown. In the absence of any proof that the note was executed for necessities contracted for by the wife, Nancy Brown, the presumption is that it was the debt of her husband, and that she attempted to sign the note as security for him. The renewal of the note in 1895, and the execution of her own note in lieu thereof

upholds the validity of the new promise. In that case a married woman carrying on trade as an unmarried woman in her own name bought goods for her business on her own credit and responsibility, and gave her notes for part of the price; and, after her husband's death, promised to pay the notes and the residue of the price of the goods. The court held that such subsequent promise had a sufficient support in the moral obligation founded upon the antecedent valuable consideration created for the promisor's own personal benefit. This case, in effect, excepts from the rule declared by it cases where the original debt, though contracted in the name of the wife, was in legal effect originally the debt of the husband. The distinction thus suggested is also recognized in *Smith v. Allen*, 1 Lans. 101; *Watkins v. Halstead*, 2 Sandf. 311; *Kennerly v. Martin*, 8 Mo. 698; and *Stockton Bros. v. Reed*, 65 Mo. App. 605, although these cases do not necessarily imply that the subsequent promise would be good, even though the original promise did not create a liability on the part of the husband.

The doctrine of *Goulding v. Davidson* is also adopted in Pennsylvania. See *Hemp-hill v. McClimans*, 24 Pa. 367; *Leonard v. Duffin*, 94 Pa. 218; *Brooks v. Merchants' Nat. Bank*, 125 Pa. 394, 17 Atl. 418; *Holden v. Banes*, 140 Pa. 63, 21 Atl. 239; *Rathfon v. Locher*, 215 Pa. 571, 64 Atl. 790; *Kelly v. Eby*, 141 Pa. 176, 21 Atl. 512.

There is an *obiter* statement to the same effect in *Allen v. McCullough*, 2 Heisk. 174, 5 Am. Rep. 27.

It was also held in *Lafitte v. Delogny*, 33 La. Ann. 659, and *Brownson v. Weeks*, 47 La. Ann. 1042, 17 So. 489, that a wife may, after the death of her husband, ratify an act during his lifetime by which she bound herself and her property for his debt. But these decisions were upon the ground that the nullity of the contract was not such as to make it absolutely nonexistent, and that it simply remained, during the marriage, without effect.

It will be observed that in *Goulding v. Davidson*, supra, the wife personally received the consideration for which her original promise during coverture was made; and 7 L.R.A. (N.S.)

that fact is alluded to in the opinions, though it is not clear that it was intended to be made a limitation of the decision. In this connection, it may be noted that in *Rathfon v. Locher*, supra, the original note, given during coverture, the renewal of which after discovery was held to be valid, was executed by the wife as surety for her husband's debt.

As suggested in the conclusion to the note in 53 L.R.A. 376, if, as a general rule,—and the cases other than those involving a new promise after discovery seem to sustain such rule,—the receipt of value by the promisor under circumstances creating no legal, but merely a moral, liability is sufficient to sustain a promise, it is not apparent why the fact that a void promise has intervened should make any difference, since it would seem that the void promise might be eliminated altogether and the new promise made to rest upon the moral obligation arising from the promisor's receipt of value. In this view, it must be admitted that there would be more reason for upholding the subsequent promise if, as in *Goulding v. Davidson*, the original consideration moved to the promisor personally, than in a case like *GILBERT v. BROWN*, where the consideration moved to the husband. As already shown, some of the cases uphold the validity of the new promise, even in the latter event.

It is obvious that the question discussed in this note does not legitimately arise where there was a new consideration at the time of the new promise, whether that consideration consists of a benefit to the promisor or a detriment to the promisee. In *Spitz v. Fourth Nat. Bank*, 8 Lea, 641, the court expressly refrained from passing upon the question whether the surrender of a note executed by a married woman alone would constitute a good consideration for a note executed by her after discovery, and upheld the validity of the new note upon the ground that the surrender by the holder of his right to proceed immediately against the indorsers on the original note constituted a sufficient contemporaneous consideration to sustain the new promise.

after the death of her husband, were without consideration; and this court has held that, where the original obligation is void, a promise to pay after she became discover does not make it binding on her. The contract of a married woman, being void, cannot be ratified. *Chaney v. Flynn*, 2 Ky. L. Rep. 417; *Bagby v. Bagby*, 10 Ky. L. Rep. 540; *Marble v. Marble*, 4 Ky. L. Rep. 360. The original note in this case, not being for necessities furnished the wife, was void as to her. And, following the rule laid down in the above-cited cases, the execution of the renewal note in 1895, and her individual note executed in lieu thereof after the death of her husband, was void, and of no binding force and effect whatever. In the case of *Grimes v. Grimes*, 28 Ky. L. Rep. 549, 80 S. W. 548, in which the wife was induced to execute her own note in satisfaction of the note against her deceased husband, it was held that there was not consideration sufficient to support the execution of this last note, as the wife received nothing from the estate of her deceased husband. In the case before us there is no evidence that any property subject to execution was received by Nancy Brown from the estate of her deceased husband, W. H. Brown. And there was therefore no consideration for the execution by her of the note to take up the note of her deceased husband.

We do not deem it necessary to pass upon the other question raised upon this appeal; but, for the reasons given, the judgment is reversed for further proceedings consistent with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

CHARLES L. TUCKER.

(189 Mass. 457, 76 N. E. 127.)

Appeal—withdrawal of plea.

1. The appellate court cannot review the action of the trial court in refusing to permit an accused to withdraw his plea of

not guilty and file a special plea to the indictment.

Jury—venire—service—qualification of officer.

2. That a constable has not given the bond required by statute to qualify him for serving civil process does not disqualify him for serving a venire for the summoning of a jury in a criminal case.

Evidence—poverty of accused.

3. For the purpose of connecting one accused of murder with money taken from the possession of the victim, evidence is admissible that, before the crime, accused was short of money, pawning his belongings, and that, after the crime, he had money, as well as his statements as to his lack of money, his losses, and his financial transactions before and after the crime; and the fact that it has not been shown as yet that money had been taken from the possession of the victim is immaterial.

Bill of exceptions—sufficiency—introduction of evidence.

4. That evidence upon a certain question was presented at the trial is sufficiently shown by a bill of exceptions which states that no question was made but that there was evidence for the jury upon all the issues submitted to them, where the instructions show that the issue upon which the evidence is claimed to be wanting was submitted to them.

Evidence—erroneous admission—waiver.

5. Failure to request the exclusion of evidence which has become immaterial because not connected with the point in issue will waive the error of its admission, although objection was made to it at the time it was offered, which was overruled upon the promise to connect it with the issue.

Trial—opening speech—promises.

6. In the absence of anything to show want of good faith on the part of the prosecuting attorney in making statements in his opening speech to the jury, the court is not in error in relying upon them, although he is not able to produce evidence promised.

Evidence obtained wrongfully—admissibility.

7. If officers armed with a search warrant, upon presenting it at the home of one accused of crime, are invited by his mother to enter and search the premises, so that they do not act under the warrant, evidence obtained during the search is not

Case Note.—Elements of deliberation and premeditation as affected by the brevity of the period elapsing between the resolution to kill and the homicide: —The statement in the foregoing opinion, to the effect that the law will not undertake to state any limit to the time which must elapse between the formation of an intent to kill and its consummation in the homicide, in order to admit of a finding of the existence of the elements of deliberation and premeditation essential to a conviction of murder in the first degree, is abundantly sus-

tained by the authorities, as is apparent from the cases hereafter cited. That a very brief period is sufficient for this purpose is manifest from the general declarations that the courts have made with reference to the subject, as well as the holdings in concrete cases.

In the cases herein cited nothing appeared to show that an intent to kill had been entertained prior to the beginning of the affray which culminated in the homicide; yet in all of them it was held that sufficient time elapsed between the evident formation

inadmissible against accused, although the act may have been a trespass as against him.

Handwriting—comparison—standard.

8. Under a rule that a standard for comparison of handwriting must be established by direct proof or equivalent evidence, a signature may be established for such purpose by showing that it was attached to a slip handed in by the one whose name it is, and whose signature it is alleged to be, and whose duty it is to fill out and sign such slips, in the absence of evidence to the contrary.

Same—question for court.

9. Although the preliminary question as to the authenticity of standards for the comparison of handwriting is for the court, it is not error to submit the final determination of that question to the jury.

of the intent to kill and the killing, even though of the briefest duration, to admit of a finding of deliberation and premeditation essential to constitute murder in the first degree.

In *Bailey v. State*, 70 Ga. 617, the court said that it is not necessary that the deliberate intention to take life should exist for any particular length of time, even before the killing; that, if it enters the mind of the slayer the moment before he fires the shot, that is sufficient; it is deliberately intentional at the time he makes up his mind to shoot, and, if it exists only that length of time, it is sufficient in law.

In *Peri v. People*, 65 Ill. 17, where the deceased, together with friends, went into the defendant's saloon, and one of his friends became involved in a dispute with the defendant, the latter seized a knife, for which one of the party remonstrated with him, and stabbed deceased with it. The court, in affirming a conviction of murder in the first degree, said: "Whilst it appears that there was but a short space in which to form a deliberate purpose, still, when we can see no such assault as to create a well-founded apprehension of great bodily harm, or such provocation as was calculated to produce an irresistible passion on the part of . . . [defendant] as would justify the homicide or reduce it to manslaughter, we must conclude the accused acted with sufficient deliberation."

It is sufficient, in order to constitute premeditation in the eye of the law, that the defendant had the intention for a minute, as well as for an hour, or a day, before he stabbed deceased. *State v. Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598, 47 S. W. 892.

In *Daughdrill v. State*, 113 Ala. 7, 21 So. 378, the court said that the words "deliberate" and "premeditated," as used in the statute, mean only this: That the slayer must intend, before the blow is delivered, though it be for only an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow; or, in other words, if the slayer had any time to think before

Evidence—photograph—discretion.

10. The trial court has discretion to admit in evidence a photograph of wearing apparel taken from a murdered body, although the apparel is in court at the time of the trial.

Same—writing.

11. Upon a trial for murder, it is not error to admit in evidence the name and address on a card found in the pocket of accused, in connection with a slip of paper found near the dead body, containing a name and address which are alleged to have been written shortly after the crime was committed, and which are similar to that on the card, as tending to connect accused, through an association of ideas, with the writing on the paper.

Same—experiment.

12. Evidence of an experiment made by

the act, however short such time may have been, even a single moment, and did think, and struck the blow as a result of an intention to kill, produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of the statute.

Thus, in *Mitchum v. State*, 11 Ga. 615, the court said if "the intention to shoot entered the mind even a moment before the firing, and the slayer does shoot, and the effect of the shot is death, I can see no reason why a deliberate intention to kill is not manifested by the circumstances."

"Whilst malice and premeditation involve a prior intention to do the act in question, it is not necessary that this intention should have been conceived for any particular time. It is as much premeditation if it be entered into the mind a moment before the act as if it entered years before." *State v. Dennison*, 44 La. Ann. 135, 10 So. 599.

Thus, in the following instances where the length of the period elapsing between the formation and consummation of the intent to kill was measured by the time required for the intervening acts and occurrences while presumably following in rapid sequence, the period, though very brief, was held sufficient to admit, so far as it was concerned, of a finding of premeditation and deliberation essential to murder in the first degree:

Where defendant, after the fancied provocation, put on his shoes, arose, stepped back about two steps, drew his pistol, and shot deceased. *McKenzie v. State*, 26 Ark. 334.

Where deceased, after having attacked defendant with an axe, but failing to strike him, walked away, and, when about 60 feet from defendant, the latter stealthily approached, and, seizing the axe, slew him. *King v. State*, 68 Ark. 572, 82 Am. St. Rep. 307, 60 S. W. 951.

Where defendant, after having turned his gun on deceased and threatened to kill him, turned and walked away with the gun, followed by deceased, then turned about and shot the latter; even upon the assump-

an expert to determine whether or not a stab in the body of a murdered person severed a particular vein is properly excluded.
Same—supporting witness—statements.

13. The mere making of contradictory statements on cross-examination does not justify the admission of evidence of prior statements to support the witness by corroborating the testimony given on direct examination, although the contradiction consisted of the admission of the making of prior statements in conflict with the testimony given, so that it may be contended that the testimony is a matter of recent contrivance.

Same—talking with defense.

14. The mere fact that a witness admits that he has talked with a person assisting in preparing the defense in a criminal case does not show such bias or moral duress as to make admissible evidence of state-

ments made prior to that time, tending to support his testimony.

Same—statements in argument—effect.

15. The view of the cross-examination of a witness taken by the attorney general in arguing the case to the jury cannot affect a ruling upon the admissibility of evidence to support the witness, under a view of the cross-examination which the court had a right to take at the time.

Same—expert—identification of article.

16. The question whether or not a particular pin is one shown in a photograph is not one for expert testimony.

Murder—first degree—definition.

17. To bring a homicide within the statute defining murder in the first degree as one committed with deliberately premeditated malice aforethought, all that is necessary is that a resolution to kill must have followed deliberation and premeditation, and

tion that the intent was formed after the first attempt and threat. *McAdams v. State*, 25 Ark. 405.

7 Where defendant, after picking up a gun, immediately went down a stairway and shot deceased; even assuming that the intent to kill was formed after taking up the gun. *Dixon v. State*, 128 Ala. 54, 29 So. 623.

7 Where defendant, upon seeing deceased, a stranger, walking with his wife, approached, and, after some words, stabbed him. *State v. Peppers*, 80 Iowa, 580, 46 N. W. 662.

Where deceased having resisted defendant's efforts to eject him from a saloon, defendant drew a knife and struck him on the shoulder, whereupon the deceased drew a knife but dropped it, the defendant picking it up and then drawing a revolver and shooting him. *Mitchum v. State*, supra.

Where defendant, having gone to the deceased's home to collect a bill, was thrown from the door by the latter and ran out of the yard, cursing the deceased and daring him to come out, and shot the latter as he reached the gate. *Lovett v. State*, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550.

7 Where defendant, having been ordered off an engine, and having reached the ground, asked the engineer to hold a light so that he could find his hat, and, while the engineer was complying with the request, shot him. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722.

7 Where defendant, after receiving the provocation, drew a revolver from his pocket with his left hand, transferred it to his right hand behind his back, and shot deceased. *State v. Daniel*, 139 N. C. 549, 51 S. E. 858.

7 Where, deceased and another having engaged in a scuffle, and the deceased, having been struck with a roll of tar paper, seized a stick of wood, the defendant came up and seized a wagon spoke and killed him. *Savary v. State*, 62 Neb. 166, 87 N. W. 34.

7 Where defendant, a patient in a hospital, after receiving his fancied provocation from a nurse, borrowed a knife from another patient, the latter opening it at his request, 7 L.R.A. (N.S.)

and rapidly followed the nurse and inflicted a fatal wound upon her, although but ten or twenty seconds elapsed between the first intimation of his purpose and the infliction of the fatal wound. *Com. v. Buccieri*, 153 Pa. 535, 26 Atl. 228.

Where defendant, immediately after receiving the provocation, held his head down a moment with his hand in his pocket, and suddenly drew a knife and inflicted the fatal wound. *State v. Bell*, 136 Mo. 120, 37 S. W. 823.

Where defendant, an escaped convict, who was walking with deceased, with whom he had just become acquainted, was heard to say, "You will raise hell," and immediately shot deceased. *State v. Tabor*, 95 Mo. 585, 8 S. W. 744.

Where the defendant, being angered by deceased, drew a pistol, but was prevented from using it, and, some moments afterwards, called deceased names, reached over the bar and struck him a blow in the face, and again drew his pistol, and, being seized by bystanders, broke away from them and shot deceased. *State v. Wieners*, 66 Mo. 13.

Where defendant drew a knife and stabbed deceased while engaged in a fight with him. *State v. Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598, 47 S. W. 892.

Where defendant, having made an assault with a heavy cane upon the deceased, and the cane having been taken away by bystanders, followed the deceased, who was retreating, and, drawing a pistol, shot him. *State v. Dennison*, 44 La. Ann. 135, 10 So. 599.

Where sufficient time elapsed to permit the defendant to draw a revolver from his pocket and fire it. *People v. Brunt*, 27 N. Y. Week. Dig. 427, 11 N. Y. S. R. 59.

Where sufficient time elapsed to permit of defendant to put his hand in his pocket and release a revolver, which was caught in the lining, and shoot the deceased. *People v. Conroy*, 97 N. Y. 62.

Where defendant choked the deceased to death, about three minutes being required.

that the killing must have been in pursuance of the resolution, regardless of the rapidity with which the commission of the crime followed its first suggestion.

Juror—taking notes—effect.

18. Taking notes of the testimony, by a juror, does not require the setting aside of the verdict; but the matter is within the discretion of the trial court.

(November 28, 1905.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County convicting him of murder. Overruled.

In June, 1904, Mabel Page was found to have been murdered. Suspicion fell upon defendant, and he was placed upon trial for that crime.

People v. Pullerson, 159 N. Y. 339, 53 N. E. 1119.

Where defendant, a convict, having engaged in a fight, broke away from keepers who interfered, drew a knife which he had previously concealed about his person, and stabbed another convict. *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920.

Where defendant came up to where deceased, a policeman, was scuffling with an intoxicated person, whom he was assisting home, and struck deceased with a stick, in *People v. Clark*, 7 N. Y. 385, it was said: "It is enough that the intention precedes the act, although that follows instantly."

In *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593, the court approved a charge to the effect that there is, in law, sufficient deliberation to constitute murder in the first degree, no matter whether the design to take life had been for a long time contemplated by the slayer, or whether the design to kill was formed by him at the instant of the fatal shot. That it is enough that the intention to kill preceded the fatal act although the act followed instantly.

Where defendant, who was intoxicated, broke down a door, and dragged deceased from his house, and struck him in several places with a club. *Com. v. McFall*, Addison (Pa.) 255.

Where defendant, having engaged in a dispute with deceased and been knocked down by him, turned, arose, and walked toward deceased, but turned and walked back, and, turning again with his hand behind him, came up to deceased and stabbed him with a knife he had concealed in his hand. *Com. v. Morrison*, 193 Pa. 613, 44 Atl. 913.

Where defendant fatally stabbed a street-car conductor, who was attempting to eject him from a car. *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414. The court said that an intent to kill, distinctively formed even "for a moment" before it is carried into effect, is sufficient.

Where, a dispute having arisen among defendant and others riding in a wagon, re-

The case sufficiently appears in the opinion.

Mr. Philip Mansfield, with Messrs. James H. Vahey, Thomas F. Vahey, and Charles H. Innes, for defendant:

Evidence of poverty cannot be shown for the purpose of proving crime.

1 Wigmore, Ev. § 392; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *Moses Drayne*, L. D. 1654, 5 London Legal Obs. 123; *M. D'Anglade*, A. D. 1687, 5 London Legal Obs. 231; *Com. v. Montgomery*, 11 Met. 534, 40 Am. Dec. 227; *Com. v. O'Neil*, 169 Mass. 394, 48 N. E. 134.

The broken pieces of knife were procured by means of a search warrant, which was obtained for the purpose of searching defendant's house in order to obtain them and to use them as evidence against him. By

sulting in a scuffle, the defendant, after saying, "let's quit," jumped from the wagon, taking with him a bundle, from which he drew a pistol and shot deceased. *People v. Calton*, 5 Utah, 451, 16 Pac. 902. The court said, however, that the evidence warranted the inference that the defendant formed the design to kill before he jumped from the wagon.

Where deceased approached defendant after a dispute with him, and tried to induce him to go into a barroom, and defendant went 8 or 9 feet away, drew a pistol with which he had previously armed himself, and fired two shots into the floor, and, as deceased ran up, grappled with him and fired the fatal shot. *Clifford v. State*, 58 Wis. 477, 17 N. W. 304.

Where deceased, in a dispute with defendant, threatened to kick the former's head off, and defendant immediately drew a revolver and shot deceased. *Perugi v. State*, supra.

Where defendant shot deceased as the latter was approaching him in a threatening attitude, immediately after a fancied provocation. *Daughdrill v. State*, 113 Ala. 7, 21 So. 378.

Where deceased, a storekeeper, having declined to give defendant any change until he found certain missing money which he charged defendant with having taken, the defendant insisted upon having his change, and deceased refused to give it, but finally stated that he would go upstairs and get a bill changed in order to stop the fuss, and, as he started toward the door, the defendant began quarreling again, and finally, stepping between the deceased and the door, shot him. *Bailey v. State*, 70 Ga. 617.

Where defendant, being ordered by a policeman to move on, entered a saloon and secured a pistol, immediately returned, and engaged in a fight with deceased, during which he shot him. *Carter v. State*, 22 Fla. 553.

the reception of such evidence defendant's constitutional right to be secure in his possessions and effects against unreasonable searches and seizures was violated.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *United States v. Wong Quong Wong*, 94 Fed. 832; *State v. Slamon*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097; *Blum v. State*, 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26; *State v. Sheridan*, 121 Iowa, 164, 96 N. W. 730; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Re Pacific R. Commission*, 32 Fed. 241; *Hoover v. McChesney*, 81 Fed. 472; *Com. v. Gaming Implements*, 119 Mass. 332; *Com. v. Dana*, 2 Met. 329; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910.

Handwriting used as a standard for comparison must be proved genuine by clear and undoubted evidence, and nothing short of evidence of a person who saw the party write the paper, or the latter's admission of its genuineness, is sufficient for that purpose.

Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317; *Richardson v. Newcomb*, 21 Pick. 315; *Com. v. Eastman*, 1 Cush. 189, 48 Dec. 596; *Martin v. Maguire*, 7 Gray, 177; *Bacon v. Williams*, 13 Gray, 525; *McKeone v. Barnes*, 108 Mass. 344; *Nunes v. Perry*, 113 Mass. 274; *Com. v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698; *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077; *Rogers, Expert Testimony*, 2d ed. p. 331; *Cook v. First Nat. Bank* (Tex. Civ. App.) 33 S. W. 998; *Desbrow v. Farrow*, 3 Rich. L. 382.

In those jurisdictions in which free comparison of specimens "proved" genuine is admitted, the genuineness is to be determined by the court.

3 Wigmore, Ev. § 2020; *Com. v. Coe*, supra; *Costello v. Crowell*, 133 Mass. 352; *Costello v. Crowell*, supra; *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540; *State v. Ward*, 39 Vt. 235; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853.

The court erred in defining the meaning of "deliberately premeditated malice aforethought."

Craft v. State, 3 Kan. 450; *Simmerman v. State*, 14 Neb. 568, 17 N. W. 115; *Atkinson v. State*, 20 Tex. 522; *Nye v. People*, 35 Mich. 16; *Farrer v. State*, 42 Tex. 271; *State v. Henderson*, 24 Or. 100, 32 Pac. 1030; *State v. Wood*, 53 Vt. 560; *State v. Taylor*, 171 Mo. 465, 71 S. W. 1005; *State v. Harper*, 149 Mo. 514, 51 S. W. 89; *State v. Talbott*, 73 Mo. 347; *State v. Ellis*, 74 Mo. 207; *State v. Privitt*, 175 Mo. 207, 75 S. W. 457; *State v. Greenleaf*, 71 N. H. 613, 54 Atl. 38; *State v. Bonofiglio*, 7 L.R.A. (N.S.)

67 N. J. L. 240, 91 Am. St. Rep. 423, 52 Atl. 712; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30.

Messrs. Herbert Parker, Attorney General, George A. Sanderson, and Frederic B. Greenhalge, for the Commonwealth:

The so-called "sales slips," alleged to have been in the handwriting of the defendant, were properly admitted as standards for comparison.

Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317; *Richardson v. Newcomb*, 21 Pick. 315; *Bacon v. Williams*, 13 Gray, 525; *Martin v. Maguire*, 7 Gray, 177.

A witness whose testimony has been impeached by evidence of prior inconsistent statements may not be supported by evidence of other and consistent declarations made by him.

Com. v. Jenkins, 10 Gray, 485; *Com. v. Wilson*, 1 Gray, 337; *Com. v. James*, 99 Mass. 438; *Com. v. Piper*, 120 Mass. 185; *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223.

The definition of "deliberately premeditated malice aforethought" was proper.

Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; *Com. v. Gardner*, 11 Gray, 438; *Green v. Com.* 12 Allen, 155; *Com. v. Pemberton*, 118 Mass. 36; *Mitchell v. State*, 60 Ala. 26; *Ernest v. State*, 20 Fla. 383; *State v. Grant*, 152 Mo. 57, 53 S. W. 432; 21 Am. & Eng. Enc. Law, p. 159.

No length of time is fixed for the existence of premeditated design.

Aszman v. State, 123 Ind. 347, 8 L.R.A. 33, 24 N. E. 123; *People v. Hunt*, 59 Cal. 430; *Com. v. Quinn*, 150 Mass. 401, 23 N. E. 54.

Hammond, J., delivered the opinion of the court:

We have not found it necessary to consider whether the indictment should have been quashed for the reasons set forth in the special plea and the motion to quash, because we are of opinion that that question is not before us for decision. The defendant, having entered a plea of not guilty, was not entitled, as a matter of right, to retract his plea and plead anew. He could do this only by the permission of the court (1 Chitty, Crim. Law, 436; *Com. v. Lake*, 12 Allen, 188; *Com. v. Lannan*, 13 Allen, 563), and whether that permission should be granted rested with the sound discretion of that court. Acting under that discretion, the court declined to allow the defendant to retract his general plea, overruled the motion, and therefore, because not filed in time, the plea. No error in law is shown in this decision. It was final, and cannot be revised by this court.

2. The only objection to Hubbard, who was summoned as a jurymen, was that the constable to whom the venire was sent for service had not given a bond to serve civil process. This was not ground for a challenge for cause. The statutes provide that "the venires shall be delivered to the sheriff of the county to be transmitted by him to a constable in each of the cities and towns to which they are respectively issued, who shall forthwith serve them in cities on the board authorized to draw jurors and in towns on the selectman and town clerk." Rev. Laws, chap. 176, § 11. After the jurors are drawn, "the constable shall, four days at least before the time when the jurors are required to attend, summon each person who is drawn, . . . and shall make a return of the venire with his doings thereon to the clerk of the court, before the sitting of the court by which it was issued." § 24. It is plain that this is not a service of a writ or an execution in an action between two persons, but is simply a part of the process for the organization of the court. It is special and specific, and we are of opinion that the term "civil process," as used in Rev. Laws, chap. 25, § 88, does not include this specific work. The challenge for cause was rightly disallowed.

3. In the course of his opening address to the jury, the district attorney stated that "the family of the deceased searched the house after the murder, and only 36 cents were found in one pocketbook downstairs in the bureau; that when Amy Roberts, a servant in the family of the deceased, went away in the morning, there was at least a \$10 bill and two \$1 bills and other money in the deceased's pocketbook downstairs." He then proceeded as follows: "The rest of it [money] had disappeared. It also appears that, shortly before this time, the defendant was trying to raise money to go to St. Louis; that he sold a revolver, . . . several suits of clothes; that he pawned a watch." Here he was interrupted by the defendant's counsel, who contended that any such evidence would be incompetent, and therefore it was improper for the district attorney to speak to the jury about it, even in the opening. Thereupon a colloquy ensued between the court, district attorney, and defendant's counsel, in which the defendant's counsel conceded that it was "competent for them [the government] to show that money was missing from the house, and to argue, if it is possible, that the defendant had that money;" but his contention was that it was not proper to attempt to show that "the defendant was hard up, or that he was attempting to go to St. Louis, or anything which indicated his poverty;" that such ev-

idence does not establish any motive as matter of law. In response to an inquiry from the court, he further said that, if the intention of the district attorney was to show that the defendant was without money prior to the murder, but that afterwards he had money, he would not object. The district attorney then said that he intended to go as far as that. The counsel for the defendant still insisted that the district attorney ought to say "what he intends to prove," and that in the absence of any such further statement the opening remarks referred to were improper. At the end of the colloquy the court allowed the district attorney to finish what he had to say on the subject, "with the understanding that the court has not ruled on it yet, and it will be ruled on when the whole statement is made," and said that the court understood that the defendant had seasonably interrupted to save his rights. The subject was not again referred to by the defendant's counsel, and no further request for a ruling thereon was made. The district attorney then continued as follows: "It will appear, also, gentlemen of the jury, that within a few days after the murder he appeared at a certain place, and displayed money, a part of which was a \$10 bill; that he then explained the loss of other money by saying that it had been taken from him by a woman whom he had met at a theater, and afterwards went to a hotel with." During the trial the commonwealth offered evidence in support of this statement of the district attorney, and the court directed the jury to disregard entirely so much of the evidence as related to the defendant's statement that money had been taken from him by a woman.

Following out the purpose thus outlined in the opening, the commonwealth introduced evidence tending to show that upon various occasions within ten days prior to the murder the defendant sold or pawned various articles of personal property, mostly wearing apparel of small value, receiving in all \$17.50 in cash; that on April 8th, being a few days after the murder, he redeemed for \$5.75 two of the articles pawned before the murder. To the admission of all this evidence the defendant excepted. One Davis, a witness called by the commonwealth, after having testified without objection that on the 6th day of the same April the defendant was in a restaurant where the witness was working, and said that he had needed some money, and had pawned some things a short time before, further testified, subject to the exception of the defendant, that the defendant, upon the same occasion, said that "he had been out on a good time, and lost some money; that he had pawned

some . . . to raise money;" that in paying for his dinner, he handed the witness a \$10 bill "brown on one side," and that at the same time the witness saw in defendant's possession a \$5 and a \$2 and some other bills. There was no contention that the articles pawned and sold were not the defendant's property. It also appeared, upon the cross-examination of one of the witnesses called by the commonwealth, that, on the 6th day of the same April, the defendant pawned his own diamond ring, receiving therefor \$15.

It is argued by the defendant that before the law the rich and the poor stand alike, and that the poverty of the defendant is not admissible to show a motive in him to commit the crime with which he is charged. All this may be conceded to be true. As stated by Bigelow, Ch. J., in *Com. v. Jeffries*, 7 Allen, 548, 565, 566, 83 Am. Dec. 712: "It is doubtless true that in a large class of cases the poverty or pecuniary embarrassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. To render evidence of collateral facts competent there must be some natural, necessary, or logical connection between them and the inference or result which they are designed to establish. It does not follow, because a man is destitute, that he will steal, or that, when embarrassed with debt and incapable of meeting his engagements, he will commit forgery." Mere poverty, considered apart from all other facts tending to connect the accused with a crime, never can tend to show criminal intent or criminal motive. Upon this record, however, it is perfectly clear that the evidence, the substance of which we have recited, was offered and admitted upon an entirely different ground, namely, to show that at the time of the murder there was in the house in which the murder was committed a certain amount of money consisting mostly of bank bills, and that shortly after the murder this money was in the possession of the defendant; or, to use the language of the defendant's counsel, "to show that money was missing from the house, and to argue, if it is possible, that the defendant had that money."

Such evidence, unexplained, would tend to show that the defendant was in the house at the time of the murder. It was not necessary that the bills should be identified by earmarks. *Com. v. O'Neil*, 169 Mass. 394, 48 N. E. 134. One of the steps in such a

process might be to show that before the murder the defendant was short of money and after the murder he was not short; that is, to show a marked change in the amount of money in his possession. This the commonwealth undertook to do, and all the evidence which was admitted upon this branch of the case, including the defendant's statements as to his lack of money, his losses, his financial transactions both before and after the murder, and his possession of money, were admissible upon this step. It is true that all this evidence did not tend to connect the defendant with the crime with which he was charged, unless there was evidence tending to show that at the time of the murder money was taken from the house. The court was assured by the district attorney that he expected to show that such was the fact. Evidence must go in by piecemeal, and evidence having a tendency to prove a proposition is not inadmissible simply because it does not wholly prove the proposition. It is enough if, in connection with other evidence, it helps a little. The commonwealth in this part of its case sought to prove two things, namely, that, after the murder, the defendant had more money than before, and that he got some of it from the house. Subject to the direction of the court, the prosecuting officer could begin with either proposition he might see fit; and it was within the discretion of the court to permit him to introduce the evidence tending to prove the first before passing to the evidence tending to prove the second. Relying upon his assurance as to his ability to prove the second, the court permitted him to put in the evidence tending to prove the first.

It is argued by the defendant that, so far as appears from the bill of exceptions, there was no evidence whatever tending to prove the second proposition, namely, that any money was missing from the house; but we do not so interpret the bill of exceptions. Near the end of the bill is the statement that it presents all the testimony material to the questions raised by the bill, and that "no question was made, but that there was evidence for the jury on all the issues submitted to them." In the charge to the jury the court said: "The claim of the commonwealth is that he [the defendant] might well have been there; . . . that he carried from that house upon his knife and his clothing stains of the blood of his victim; that he stole money from her pocket-book. . . . On the other hand, it is claimed by the prisoner that he was not on that day in the Page house at all; . . . and all the circumstances claimed to incriminate him which I have mentioned are

denied, or claimed to have been fully accounted for, by him." It thus appears that one of the issues submitted to the jury was "whether he stole the money from her pocketbook;" and the fair interpretation of the bill is that on that issue there was evidence in support of the claim of the commonwealth. But whether or not there was such evidence is not material to the inquiry before us. Even if there was no such evidence upon the second proposition, or if it was insufficient, the most that can be said is that the evidence introduced to prove the first became thereby immaterial; and if, at the close of the whole evidence, the defendant had requested the court to exclude from the consideration of the jury the portion relating to the first, upon the ground that there was no sufficient evidence of the second, and the court had refused to grant the request, there would have been error. But no such action was taken, the defendant preferring, apparently, to stand upon his original exceptions. It is further suggested that at the time the district attorney made his opening he had no reason to suppose that he could show that money had been taken from the house; but there is nothing to show that the statement was not made in good faith, and the trial court, at any rate, committed no error in law in relying upon it. We are of opinion that no error was committed in the action of the court with reference to the opening of the district attorney, or in the admission of the evidence.

4. It was contended by the defendant that the broken pieces of knife found in his coat pocket were not admissible. The exception to their admission was taken in various forms, but, in substance, the ground of the exceptions was that the pieces were obtained by an abuse of legal process, and their admission, therefore, was an infringement of his constitutional rights, especially those under the 4th, 5th, and 14th Amendments to the Federal Constitution, and the 12th and 14th articles of the state Declaration of Rights. The question of the manner in which the articles were obtained was tried before the court in the absence of the jury at the request of the defendant. The evidence is given in great detail in the bill of exceptions. The finding of the court is as follows: "The court finds that one of the purposes of taking out the search warrant alluded to was to search for evidence to be used in this case against the prisoner if there should subsequently be a trial, but that this was not the sole purpose, and that the warrant was taken out in good faith, under an honest belief that the facts stated in the complaint were true, and that one

purpose was to search for the article therein mentioned, but that no service was made of this warrant, and that nothing was actually done under it; that officers went with it to the door of the house where Tucker resided, and stated to his mother, at the outside door of the house, that they had this search warrant to search for the article named therein, and offered to let her examine the warrant; that she declined to take it or examine it, and invited the officers to make all the search they desired, saying that she knew her son to be innocent, and thereupon the officers made search, not upon the warrant, but in consequence of her invitation, and in such search found the articles in question; that the warrant bears a return that no service thereof has been made, which we find to be the fact. The court is also of opinion, if this is material and competent, that, if the prisoner's mother had not invited the officers to make the search, they would still have made it under and by virtue of said warrant."

It is strongly argued by the defendant that this finding is not warranted by the evidence, and that the court should have found that, as far as respected the graphophone, the only article named in the warrant, the warrant was not taken out in good faith; and that in entering the house and in searching therein the officers acted solely under their warrant, without any invitation or consent on the part of the defendant's mother. We have carefully examined the evidence bearing upon this matter, and are of the opinion that it fully justifies the finding of the court. It also is to be noted in this connection that, while the court in the first instance had to pass upon these facts, still it recognized that the defendant had the right, also, to the decision of the jury upon them; but the defendant did not desire to go to the jury upon them. We think, therefore, that the finding that neither in entering the house, nor in making the search did the officers proceed under the search warrant, but in consequence of and under the invitation of the mother, must stand. It is therefore unnecessary to consider the argument of the defendant which is based upon the assumption that the articles were obtained by an abuse of legal process.

It is further argued that the defendant did not consent, and that his mother could not consent for him. But that is immaterial. The officers did not act under the warrant, but under the invitation of the mother; and even if, not acting under the warrant, they were trespassers as against the defendant, still this was no abuse of legal process, but simply an individual tres-

pass, and that is not sufficient to exclude the evidence. They might have been liable for the trespass, but the evidence thereby obtained was nevertheless admissible. *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Com. v. Hurley*, 158 Mass. 159, 33 N. E. 342; *Com. v. Byrnes*, 158 Mass. 172, 33 N. E. 343; *Com. v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *Com. v. Acton*, 165 Mass. 11, 42 N. E. 329; *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503.

5. Upon the question whether the written address, "J. L. Morton, Charleston, Mass.," which was found in the Page house shortly after the murder, was in the handwriting of the defendant, the commonwealth offered as standards for comparison certain "sales slips" which it contended were in the handwriting of the defendant. The defendant objected to the use of these slips as standards. As to the authenticity of these standards, the commonwealth made an offer of proof, and to expedite the trial it was agreed by both parties that "all statements of fact [therein] included, . . . together with the offered statements of witnesses therein referred to, were to be considered and taken as facts established by the evidence;" the "defendant contending that such facts were not competent to render the sales slips . . . admissible as standards of the defendant's handwriting." Upon hearing the offer of proof, "the court ruled as a preliminary matter that the agreed statement of facts contained in the . . . offer of proof made the sales slips competent as standards of comparison, but that the jury were to determine from the agreed statement of facts whether such slips were in the handwriting of the defendant." The defendant excepted. We understand the action of the court to be a finding by the court, as a preliminary question of fact, that, upon the agreed statement of facts contained in the offer, the slips were in the handwriting of the defendant, and might be used as standards; but that the question whether they were in the defendant's handwriting should be finally left to the jury.

The first objection of the defendant to this action is that the facts contained in the offer were not sufficient to justify the use of the slips as standards. The defendant contends that the handwriting of a standard must be proved by direct evidence of the signature, "or by some equivalent evidence;" and that the only way in which this can be done is either by the testimony of the witness who saw the defendant write it, or by the defendant's admission that he wrote it. Even if the defendant's contention were correct as to the method of proof, we are of opinion that, upon the facts con-

tained in the offer, the trial court may properly have found that the defendant had admitted the signature upon some of the slips at least to be his. The facts show that it was his duty as salesman, in the instance of every sale, to make a memorandum of the articles sold, their kind and price (using blank forms, called sales slips, furnished for that purpose), together with his name or initials, and to transmit these slips so filled out to a shipping clerk. Many of the slips were delivered to the shipping clerk by the defendant in person. All had upon them the name of "Tucker." As to those which were handed in personally by the defendant, the court might well have found that by that act unexplained the defendant admitted them to be his own handwriting. It was his duty to make them out as memoranda of his work, and to hand them in as such, and the handing in of such a memorandum with his own name upon it would justify a finding, in the absence of any evidence to the contrary, that he admitted the writing to be his. *Com. v. Coe*, 115 Mass. 481.

But we do not rest upon this narrow ground, for we are of opinion that the defendant's contention as to the method of proof is not correct. There is a considerable diversity in the various courts as to the use of standards of handwriting and the degree and kind of proof required to establish a piece of writing as a standard. See 15 Am. & Eng. Enc. Law, 2d ed. pp. 252 et seq., for a collection of the authorities. But, whatever may be the rule elsewhere, it has been said by this court that here the standard shall be proved by "direct proof of the signature, or other equivalent evidence;" and we understand that to be the true statement of our rule. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Martin v. Maguire*, 7 Gray, 177; *Bacon v. Williams*, 13 Gray, 525. An examination of the cases in which this language is used will show, however, that the distinction declared is between evidence based solely upon an inspection of the paper, as, for instance, that given by an expert or one acquainted with the handwriting of the party charged, and who testifies as to the genuineness solely by comparison with another standard or with an exemplar in his own mind, on the one hand, and, on the other hand, evidence of a different kind having a tendency, independent of any opinion as to handwriting, to show that the paper was written by the party charged. In other words, you cannot prove a standard by the opinion of witnesses as to the handwriting of the person charged, whether the opinion be based upon comparison with other writ-

ings, or upon a knowledge of the party's handwriting, obtained in any other way. The evidence to prove the standard must be entirely independent of opinion as to handwriting. The first kind of evidence is not sufficient, but the second may be, even if it contain no statement of a witness who saw the standard written, or any admission by the party charged. There is no reason why evidence which, independent of any opinion upon the handwriting as such, justifies a finding beyond a reasonable doubt that the proposed standard was written by the defendant, should not be regarded as the equivalent of evidence given by a witness who testifies that he saw the paper written. And that is so even if the evidence of the genuineness of the writing be partially, or even wholly, circumstantial. Indeed, it is only commonplace to remark that circumstantial evidence is frequently more satisfactory than direct. By reason of mistake, bias, or dishonesty, the testimony of a witness that he saw the standard written may be utterly unreliable, while a compacted mass of circumstantial evidence, the existence of each circumstance being satisfactorily proved, and the proof of each being confirmed by the proof of the other, and all, without an exception, leading by mutual support to but one conclusion, may be impregnable. In the case before us the facts contained in the offer of proof were sufficient to warrant a finding beyond a reasonable doubt that the sales slips were written by the defendant, and, if the writing of these slips had been a crime, and the defendant had been on trial for it, they would have amply justified his conviction of the offense. To say that such evidence is not the equivalent of the evidence of a witness who testifies that he saw the standard written is to fly in the face of common experience, and to ignore the basis upon which rest the leading principles of our system of evidence. The court made no error in admitting these slips as standards.

6. The court, having admitted the slips as standards, in its closing charge submitted to the jury the question whether they were written by the defendant, instructing them that, "unless the commonwealth shows by strong, undoubted proof,—that is, by proof beyond a reasonable doubt,—that the writing upon these slips was actually made by the defendant, and if [the jury] do not so find, they are not to be used at all; and the jury should wholly disregard them and all the great body of evidence which they have heard about them." No exception was taken by the defendant to these instructions; but it is objected by him that the decision of the court that the slips were

written by the defendant was final, and that the submission of that question to the jury was error. In support of this position the defendant has cited some authorities from other jurisdictions which seem to support his contention; but here, as in other branches of the law, as to the admission, proof, and use of standards, there is much conflict in the authorities (see, for instance, *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *State v. Hastings*, 53 N. H. 460), and it would serve no useful purpose to review them here.

The law with reference to the decision of preliminary questions concerning the admissibility of evidence, especially in criminal cases, has been quite recently considered by this court in *Com. v. Reagan*, 175 Mass. 335, 78 Am. St. Rep. 496, 56 N. E. 577, and we need only refer to that case and the cases therein cited to show what the practice is in this state. The practice as to confessions is thus stated by Morton, Ch. J., in *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494: "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice in this commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant." In *Com. v. Reagan*, *ubi supra*, the same doctrine was said to be applicable to the question of the competency of a witness to understand the nature of an oath. In these and similar questions the defendant has the right to the decision of the court upon the admissibility of the evidence, and, if the decision involves a finding of fact, he has a right to such finding. But if in a criminal case the decision is against the defendant, he has another chance before the jury, so far as it depends upon a question of fact. In passing upon the question of the authenticity of the proposed standards in the first instance, and then submitting any question of fact involved for the final determination of the jury, the court followed the uniform and long-continued practice of this commonwealth.

In addition to the authorities cited from other jurisdictions, the defendant, in support of his contention that the decision of the court is final in the sense that it cannot be submitted afterward to the jury, cites *Com. v. Coe*, 115 Mass. 481, 485; *Cos-*

telo v. Crowell, 139 Mass. 588, 590, 2 N. E. 098. But it is manifest that in each of those cases where the court says or implies that the decision of the court is final, unless error in law is shown, the meaning simply is that it is final so far as respects the power of this court to revise it on questions of fact, and the language has no reference to the powers or rights of the jury. In *Com. v. Coe*, Wells, J., uses the following language, which not only shows the sense in which the decision of the court is said to be final, but also hints at the practice of considering the decision of the court as only preliminary: "Upon the question whether a given writing or written word is sufficiently proved to have been written by the defendant to allow it to be submitted to the jury as a standard of comparison, the judge at the trial must pass in the first instance. So far as his decision is of a question of fact merely, it must be final if there is any proper evidence to support it. As in all questions of that nature, exceptions to the ruling at the trial will be sustained only when they show clearly that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency." In other words, the finding of the trial court, so far as respects facts, cannot be revised by this court provided the finding is justified by the evidence. These cases adjudicate nothing as to the power or duty of the trial court, after admitting the evidence, to submit the question to the jury under proper instructions. In dismissing this branch of the case, it may be remarked that, even if the court's decision was final in the sense urged by the defendant, it is difficult to see how the defendant in this case could be harmed by having another chance given to him by the submission of the question to the jury.

7. The exception to the refusal of the court to allow the defendant to interrogate Carvalho, an expert in handwriting, called as a witness by the government, as to certain mistakes which he had made in testifying in other cases, as well as the exception to the action of the court in permitting the same witnesses to use certain photographs as "chalks," must be overruled. These were matters within the discretion of the court. This is too clear to require further comment or the citation of authorities. No error therefore appears in these rulings.

8. It does not appear distinctly that the defendant took any exception to the admission of the addresses upon the postal card taken from the clothing of the defendant at

the time of his arrest. The bill of exceptions recites only that "they were introduced in evidence subject to the defendant's objection." As both parties, however, have argued the question upon the assumption that the defendant did except, we have assumed that the word "objection" inadvertently appears instead of "exception." The commonwealth contends that the written words, "Morton & Co." and "Charlestown," which there was testimony to show were written by the defendant, were competent, because of the inferences to be drawn from the close resemblance of the name and address to that which appeared upon the writing found near the body of the deceased and alleged to have been written shortly after the murder had been committed, and may have had a tendency to establish a connection through an association of ideas between the defendant and the J. L. Morton address. The bearing of the evidence, it is true, is very slight, but its weight was for the jury. We cannot say that its admission was erroneous.

9. As to the admission of the photograph of the corsets of the deceased, worn at the time of her death, and appearing to have been cut by a knife, it is sufficient to say that, so far as respects the questions whether the corsets were in the same condition at the time the photograph was taken as at the time of the murder, with the exception of the change naturally arising from handling, and whether such change would have any substantial or material effect upon the use of the photograph as evidence, were in the first instance for the court. *Blair v. Pelham*, 118 Mass. 420. The evidence justified a finding for the commonwealth upon both of these questions, and, the court having admitted the photograph, it is to be taken that it so found. And it was within the discretion of the court to admit the photograph to show the condition of the corsets at the time the photographs were taken, although at the time of the trial, which was nearly six months later, the corsets themselves were in court. The photograph was a representation of a part of the history of the condition of the corsets from the time of the murder to the time of the trial, and may have been of assistance to the jury in the consideration of questions relating to the substance and fabric of the material of which such corsets were made, and of the possibility of changes therein where the cut was made, as well as for the purpose of comparing the photograph with the corsets as the jury saw them.

10. There is nothing in the exception to the hypothetical question put to the witness Harris, an expert in surgery, called by the

government. "Where expert testimony is offered by way of answers to hypothetical questions, much must be left to the discretion of the presiding judge. The jury are instructed to disregard the answers, unless they find the facts as assumed in the questions; but, as it cannot be known in advance what may be the ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel, in framing a hypothetical question, to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and, in determining whether a hypothetical question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be." *Anderson v. Albertstamm*, 176 Mass. 87, 91, 57 N. E. 215. Under this rule of practice, the question was properly admitted.

11. The exception to the use by Dr. Harris of a photograph of the pieces of the broken knife blade put together is untenable. The sole objection of the defendant was that the original pieces were already in evidence, but this did not prevent the use of the photograph as a chalk. It might be so used just as the witness, in illustration of his testimony, might have drawn upon a blackboard a sketch of the pieces if in the opinion of the court such an illustration might be of assistance to the jury.

12. One of the questions claimed at the trial of the defendant to be material was whether the azygous vein of the victim was severed by the stab in the back, the commonwealth contending that it was and the defendant contending to the contrary; and, as is usual upon such occasions, the expert witnesses divided on that question, each taking the view favorable to the side by which he was called. Dr. Pease, a medical expert called by the defendant, on direct examination testified at first, in substance, that, while it was barely possible that the vein was thus severed, yet it was highly improbable, and finally said that to him it seemed impossible. He was then asked whether he had made any experiments for the purpose of "ascertaining that opinion," and in reply, he said that he had. To this question and answer no objection was made. The defendant then asked him what experiments he had made. Upon objection by the commonwealth, this question was excluded, and the defendant excepted. The following question was then put to him by the defendant: "Let me ask you, in order to make the matter clear, whether or not

you have made experiments upon a body, a human body approximating the size of the body of the victim in this case as described to you?" To which he answered, "I have." Whereupon the attorney general objected, because it was immaterial whether he had or not, to which the defendant's counsel replied: "I am simply trying, in order to save whatever rights we have, to make the facts conform as closely as they can to this case. I am not intending to ask him any further. I understand your Honors having ruled it out." The attorney general then said: "Well, it was ruled out, as I understand your Honors, because the experiment is absolutely immaterial and unconstructive, and therefore whether he has or not made an experiment is incompetent and immaterial;" and then the court ordered the evidence stricken out.

We have stated this matter in detail, because the defendant has argued that the witness was not allowed to testify that he had made an experiment upon a dead body approximating in size that of the deceased. But he was allowed, without exception, to show that he had made experiments, and it was only when he undertook to define the nature of the experiment in some detail that he was stopped. We understand the ruling of the court to be, in substance, that he could not show the nature of the experiment, not that he could not show that he had experimented. Whether the details of an experiment not otherwise material may be shown as having some bearing as substantive evidence upon a question on trial depends upon the nature of the question and that of the experiment. If, for instance, the question be with reference to the operation, chemical or otherwise, of some natural force which acts uniformly under any given conditions, and the conditions under which the experiment is made are shown to be so similar to those which existed in the case on trial that the court can see that the experiment may be really of assistance to the jury, the details of the experiment may be put in as independent evidence. The true ground of admitting the details and result of such an experiment is that it may be of assistance, but the question whether it may be or whether it may or may not lead to too many collateral questions is largely within the discretion of the court. It is manifest that, in view of the nature of the question in dispute, namely, whether the azygous vein was cut by the stab in the back, taken in connection with the difference necessarily existing between the conditions in the case on trial and those under which the experiment was performed, and the obvious difficulty, if not impossibility, of ascertaining

whether such difference had any material effect upon the result, the court was fully justified in excluding the experiment or any inquiry into its nature.

It is argued, however, that, inasmuch as an expert has the right to explain the reasons for his opinion, it was competent for the witness to state this experiment in detail to fortify his opinion. But it is settled in this commonwealth that the rule allowing an expert to give the reasons for his opinion has its limitations, and one of them is thus stated by W. Allen, J., in *Hunt v. Boston*, 152 Mass. 168, 25 N. E. 82: "A party cannot put in evidence incompetent facts under the guise of fortifying the opinion of his witness, even if the evidence might have been properly admitted on cross-examination to test the opinion of the expert." Accordingly, it was held in that case that an expert witness on the value of land could not include in the statement of his reasons his knowledge of certain sales in the neighborhood, the sales not being such as were competent evidence of the value of the petitioner's land. The experiment being incompetent as substantive evidence, the court properly excluded all evidence as to its nature, even whether made upon a dead or a living body, although offered under the guise of a reason for the opinion of the witness.

13. One Doyle, called by the defendant, testified that he saw the defendant pass his (the witness's) house between 12:15 P. M. and 12:30 P. M. on the day of the murder. On cross-examination he was questioned at considerable length as to whether he had not made previous statements inconsistent with this statement. The defendant then offered to show by a re-examination of this witness, and afterwards by one Hammond, called by the defendant, that the witness, about ten days after the murder, told Hammond that he saw "the defendant . . . passing by his [the witness's] house, on March 31, 1904, between 12:15 and 12:30, and that he [Doyle] said that he was sure it was" the defendant. This evidence was offered to show that the testimony of the witness Doyle as to this occurrence was "not a matter of recent contrivance." The evidence was excluded, and it is strongly argued by the defendant that the credibility of the witness having been attacked upon the cross-examination the evidence should have been admitted for the purpose for which it was offered. In the books there always has been a difference of opinion as to the admissibility of previous statements to corroborate a witness. In *Craig v. Craig*, 5 Rawle, 97, there is an instructive opinion by Gibson, Ch. J., on this subject, in which 7 L.R.A.(N.S.)

some of the leading authorities are mentioned, and the question is briefly, but forcibly, discussed. In our own state the leading case on this subject is *Com. v. Jenkins*, 10 Gray, 485. In that case, Graham, a witness called by the commonwealth, had previously testified in the same case in the police court. The defendant attempted to show by cross-examination of this and other witnesses that Graham, in testifying in the police court, gave a different account of the transaction from that given by him at this trial. The attorney of the commonwealth then, for the purpose of confirming and corroborating the testimony of Graham at this trial, was allowed to introduce evidence that Graham on another occasion, when not under oath and when the defendant was not present, before the examination in the police court, gave substantially the same account of the transaction as that given by him at this trial. It was held that this was error, and that the testimony should have been excluded. In the opinion it was said by Bigelow, J.: "The purpose of the government in offering these statements was to corroborate the testimony of the accomplice, which the defendant had sought to invalidate and discredit by proof that on the preliminary examination before the police court the witness had given a different account of his interviews and dealings with the defendant from that to which he had testified before the jury. Although there is some contrariety of opinion in the books on the question of the competency of such evidence, it seems to us that on principle it ought to be excluded. It has no legitimate or logical tendency to establish the corroboration for which it is offered. How did the case stand on the evidence of the accomplice, when the government offered the statements objected to? He had testified in behalf of the government to an account of his dealings with the defendant concerning the stolen property. The counsel for the defendant then called witnesses to show that at a previous time he had given under oath a different account of this same transaction. This evidence was offered, not for the purpose of proving the truth of such previous statements, but to show that he was unworthy of belief, inasmuch as he had given two inconsistent accounts of the same transaction, one of which was necessarily untrue. . . . It did not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. The discredit arising from the fact that he had made contradictory statements remained untouched. The contradiction was not disproved by such evi-

dence, and this was all that the prior statements were offered to establish. . . . Such a corroboration is altogether too slight and remote." After proceeding further to show why the general rule should be adopted, the opinion goes on to say that the decision in the case "is not to be understood as conflicting with a class of cases, in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias, or in such a situation as to put him under a moral duress to testify in a particular way. In such case, it is competent to rebut this ground of impeachment, and to support the credit of the witnesses by showing that, when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial. Another similar class of decisions . . . is also to be distinguished from the case at bar, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In such cases, it is competent to show that the witness, at an early day, . . . did declare the facts to which he has testified." It was held that the case was not within either of these exceptions, and accordingly that the evidence was improperly admitted.

At the time the evidence in the case at bar was excluded, there had been no attempt to impeach the credit of Doyle except by his cross-examination; and it therefore becomes necessary to examine that to see if there was any other impeachment of his credit than that which necessarily and ordinarily would arise from the fact that he had made contradictory statements. In his cross-examination, he stated that at the office of the attorney general, in the presence of a stenographer and several other persons whose faces he could not recall, he had made a statement of the case; that he had testified before the grand jury; that he could not tell how many times since then he had talked over the fact of the defendant's passing his house; that he had talked the matter over with one Ducey, an officer who was assisting in the preparation of the defense; that ever since he had talked with the state officers about the case, he had expected to testify; that he intended to tell the truth before the grand jury, and also at the office of the attorney general in Boston; and, that so far as he remembered, his present testimony was in accordance with that given by him before the grand jury; that he remembered that, before the

grand jury, he was asked whether he saw the defendant on the day of the murder; that he replied in the affirmative, and said that he saw him two different times, "once between 1:30 and 1:45," at the Metropolitan boathouse, in company with one Bourne, and next at 3 o'clock; that he did not remember that he was asked whether he had seen the defendant at any time "except that once, and with Bourne," but he would not say he was not asked that question; that he did not know whether he then said that he "couldn't say for sure" whether he saw him go down past his (the witness's) house; that he would not say he did not say that; and that he would not say whether he did not say that he could not tell whether the defendant went by the house or not. And, finally, this question was put to him: "Now didn't you say in my office and to other people that you couldn't tell who the man was that passed your house; that you couldn't describe his dress; that you couldn't tell whether he had a beard or not; and you couldn't tell which way he was going? Haven't you said all those things before you came on to the stand here to-day?" To this question, he said, in substance, that he did not know,—would not say whether he had or had not.

The first question is whether, in this examination, it appeared that the witness ever had made any statements inconsistent with his then present testimony about seeing the defendant going by the witness's house. As to his testimony before the grand jury, he said that, while testifying there, he intended to tell the truth, and that, so far as he could recall his testimony there, it was the same as here. So far there is no evidence of contradiction. Upon being further pressed, he finally said that he did not know whether he there said: "I can't say for sure whether I saw him [the defendant] go down past our house;" although he would not say that he did not then say so; that he did not remember that he said it. Here, too, there is no direct contradiction of his present testimony. If, however, it be assumed that, when a witness, upon being asked whether he formerly made a certain statement, replies that he does not know whether he did or not, but that he will not say he did not, this may be an admission by implication that he did say it, or that upon such evidence it may be legitimately inferred that he did say it, still we have at the utmost here evidence that before the grand jury the witness said that he could not say for sure whether he saw the defendant go past his house on the day of the murder. This was

a simple contradictory statement at the

most. The same remarks may be made about the effect of the answer of the witness to the general question above quoted in full, with reference to whether the witness had not said in the attorney general's office, and to other people, that he could not tell who the man was who passed his house, nor which way he was going, nor how he was dressed. If the answers of the witness that he did not know, but would not swear whether he had or not, are to be regarded as sufficient to warrant the inference that he had made such statements, still here, as in the matter of his testimony before the grand jury, the statements are simply contradictory of his testimony at the trial; and, within the doctrine laid down in *Com. v. Jenkins*, 10 Gray, 485, they do not justify the admission of the evidence offered by the defendant. It is argued, however, that the situation was such as to bring the offer within the exception to this general rule, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed facts to which he has now testified; or, in other words, where it may be contended that the testimony of the witness is a matter of recent contrivance. In a certain sense it is always true that every prior statement of a witness inconsistent with the one made by him at a trial has or may have a tendency to show that the latter is a matter of recent contrivance. It is certainly a recent statement and may be recently contrived. If the exception to the rule is to be so broad as to permit in every such case the introduction of previous consistent statements to prop up the credibility of the witness, the exception would very soon abolish the general rule. The general rule is founded upon sound policy. The corroborative evidence, even when admitted, can have, at most, only a very indirect bearing upon the credibility of the witness, while from its very nature it may be likely to influence the jury as substantive evidence of its own truthfulness. And, since the danger that the evidence will have such an illegitimate influence is so great, it is important that the general rule should be adhered to unless the case appears clearly within the exception.

It is to be noted that this is not a case in which the commonwealth attempted to impeach the credit of the witness by showing that he formerly withheld or concealed the fact that he had seen the defendant pass his house. The position of the commonwealth was that he had made contradictory statements about that, and the admissions of the witness (if admissions they may be called), were simply to that effect. 7 L.R.A. (N.S.)

It was not a case where he had failed in former statements to speak on the subject, but where, in speaking on the subject, he had made previous statements inconsistent with his testimony at the trial. In other words, it was a simple case of contradictory statements, and so far was within the general rule. Nor do we think that the admission of the witness that he had talked with the officer who assisted in the preparation of the case is sufficient to bring the case within the other exception arising out of a claim of strong bias or sort of moral duress, stated in *Com. v. Jenkins*, *ubi supra*. We think that these two exceptions, which were recently considered in *Griffin v. Boston*, 188 Mass. 475, 74 N. E. 687, should be construed with some strictness, so as not to nullify the general rule. Sometimes it will appear, from the nature of the evidence and the course of the cross-examinations, that the cross-examining counsel intends to argue against the truth of the testimony, because the witness is not shown to have spoken previously of the matter, when, if it were true, he would have been likely to speak of it. To meet such a contemplated argument, it may well be proved that he did speak of it. Or something of recent occurrence may appear, which would be likely to create a strong bias in the mind of the witness, and to put him under a kind of moral duress to testify as he does. To answer the argument from such a fact, it may be shown that he said the same thing before the occurrence. The admissibility of the testimony depends upon the previous introduction of such facts and the existence of such conditions. Whether the course of the trial has been such as to require a statement of what the witness had previously said, to meet an attack upon his testimony, founded on either of these peculiar conditions, is primarily a question of fact, to be decided by the presiding judge. His decision upon such a question ought not to be set aside by an appellate court unless it is plainly wrong. To use a common expression, the reason for which has just been stated, the admission or exclusion of such testimony rests largely in the discretion of the trial court.

The court had the right to infer from the cross-examination that this was the ordinary case of an attempt to impeach the credibility of a witness by showing that he had made previous statements inconsistent with his then present testimony, and that the general rule existing in this commonwealth should be applied. In applying the rule under this interpretation of the cross-examination, the court committed no error. It is contended by the defendant that the

attorney general, in his closing argument, went further, and made remarks inconsistent with this view of the cross-examination; but it does not appear that he pressed the argument against the witness to any greater extent than is allowable in the ordinary case of inconsistent statements of a witness. And in any event this could not affect the view which, at the time of the offer of the evidence, the court might rightfully take of the cross-examination.

14. The question to Thode, the photographer who had made the enlarged photograph, was rightfully excluded. The witness had already testified that he could not say whether the pin shown to him was or was not that which appeared in the photograph. It is sufficient to say that, both pins and the enlarged photograph being all before the jury, it does not appear that the witness could see any better than the jury which pin was shown in the photograph. It was not a matter for expert testimony.

15. So far as respects the refusal of the court to give the fourth, fifteenth, sixteenth, and seventeenth instructions requested, we have examined the charge with special reference to the subject-matter of these requests, and are of the opinion that, while the court did not give the rulings in the language requested, still it gave them in substance, and with great clearness and accuracy stated the principles of law applicable thereto. The court committed no error in the manner in which it dealt with these requests.

16. Upon the subject of deliberately premeditated malice aforethought, much was said in the charge. Very clearly and very emphatically the jury were told that, in order to convict the defendant of murder in the first degree, they must find beyond a reasonable doubt not only that he committed the homicide, but that he did it with deliberately premeditated malice aforethought. The court then proceeds as follows: "The words 'deliberately premeditated malice aforethought' mean simply thought upon, resolved upon beforehand, not a thing done suddenly, not a thing that comes into the mind of a sudden, and is done before there is time to think about it, but a thing thought of, or planned some time before, or, if not planned some time before, yet thought upon long enough before the act is done so that it can reasonably be said to have become a purpose of the mind. No particular length of time is necessary. If it is thought upon reasonably beforehand, that is enough to warrant you in finding the crime to be murder in the first degree. Accordingly, the chief justice of the highest court in our state 7 L.R.A.(N.S.)

said in one case, in language which I adopt and give to you: 'To premeditate is simply to meditate beforehand. It need not be for a long time. It merely requires time to form a clear intent. For example, a robber with a dirk or pistol turns a corner and meets a bank messenger with a roll of bills. In a moment he determines to get it. The next moment he shoots or stabs the messenger dead, takes the package and flees. His malice was deliberately premeditated though it occupied only a few seconds; for it was a cool act of the will, and is unlike the intent stimulated by a sudden act of quarrel, where one kills another suddenly, not having intended violence beforehand.' And to apply that principle, gentlemen, to this case, if you should find it shown with the requisite degree of certainty that this prisoner went to the Page house for the purpose of stealing something, or with any other unlawful purpose, but carried with him a deadly weapon for the purpose of taking human life, if that should be necessary to make his escape, or to remove a witness to his guilt, or to carry out his unlawful purpose; and if you should find that he did take the life of Mabel Page in pursuance of that purpose thus existing in his mind when he started upon the execution of his first or principal purpose,—then, gentlemen, you would be warranted in saying that he committed the crime with deliberately premeditated malice aforethought, and that it was shown that he had been guilty of murder in the first degree. To constitute deliberate premeditation, you see, there must be a design, or plan, actually formed and resolved upon before the act; and the murder must be committed pursuant to the design or plan which had been thus formed. And it must be shown that the murder was the result of a design or plan formed after the prisoner had thus made it the subject of deliberation or reflection, although, in view of the quickness with which the mind may act, this deliberation, or reflection, may have been measured by seconds, only by an appreciable interval. The act must have been deliberately thought upon, resolved upon, beforehand, long enough before the act was done to warrant the inference that it was so thought upon and resolved. If, accordingly, having first found that the prisoner is guilty of the crime of murder, you shall further find that he committed the murder with deliberately premeditated malice aforethought, then he is guilty of the crime of murder in the first degree, and you will say so by your verdict; if you do not find this further fact to be proved beyond a rea-

sonable doubt, then your verdict will be only guilty of murder in the second degree."

After the case had been submitted to the jury, the court, in reply to requests from them for more light, further instructed them as follows: "Answering your question, gentlemen, exactly as you put it, deliberately premeditated malice aforethought cannot take place instantly with the act, if by that is meant that the two come exactly together. To constitute deliberately premeditated malice aforethought the purpose must have been formed so that you can say that it did distinctly precede the act. It makes no difference whether the interval between them was long or short, if it can be said that the purpose did distinctly precede the act, so that it became a fixed purpose of the mind, and was then executed by the act in pursuance of that purpose. As in the illustration which you will remember that I gave to you—a robber with a dirk or a pistol turns a corner. He has no intention of committing crime when he turns the corner, but, as he turns the corner, he meets a bank messenger with a bundle of bills; a few seconds would suffice, perhaps one second would suffice, for the messenger to pass him in safety; but the minute that his eye lights upon that messenger with the roll of bills which the messenger is carrying, he conceives the purpose of robbery, and of taking the life of the messenger to obtain that money. He shoots or stabs the messenger to the heart, seizes the money, and flees. That was deliberately premeditated malice aforethought, although scarcely an appreciable interval of time separated the formation of the purpose from its execution. But it was deliberately premeditated malice, although the time was so brief because of the quickness with which the mind can work, and because the purpose was formed, was resolved upon, became a fixed purpose, before it was executed. It was the subject of resolution, of deliberation, although the resolution, the deliberation, were instantaneous,—almost, at any rate, instantaneous,—yet there was a real interval between them, because the act done in pursuance of the purpose could not have been carried into execution, could not have become an act, had it not been that the purpose was first formed; for that is the way in which I have stated the supposition. And so in this case, if this prisoner did unlawfully take the life of this woman with malice aforethought, and if he did so in pursuance of a plan, a purpose, a resolution which he formed to do so; if, for example, to make a supposition, he saw, or thought he saw, that to make his escape to avoid the danger of an accusation of

crime against him he must put her out of the way; and if he made up his mind, if he formed the purpose, the resolution, to put her out of the way for his protection; and, in pursuance of that resolution, or that deliberate purpose, formed with a resolution and with deliberation although quickly formed, he executed that purpose and wrongfully took her life,—you would be warranted in saying that it was done with deliberately premeditated malice aforethought, even though the fatal blows followed at once after the determination to inflict them, immediately after the formation of the purpose; provided, gentlemen (and I pray you to follow every word that I say); provided the purpose was distinctly formed and concluded upon, provided the plan was formed before it was acted upon, so that you could fairly say that it became a distinct resolution of the mind, a distinct purpose formed upon reflection, though upon the speediest reflection, formed upon deliberation, though upon the speediest deliberation. If those things, gentlemen, are found, deliberately premeditated malice aforethought is properly to be inferred. If those things are not found, although you shall have found that malice aforethought existed, you would not say that deliberately premeditated malice aforethought was to be properly found."

The defendant excepted "to that portion of the court's definition of murder in the first degree above recited;" also to the definition of the phrase "deliberately premeditated malice aforethought;" and especially to that part of the charge in which the illustration as to the bank messenger is given. The phrase first appears in Stat. 1858, chap. 154, p. 126. Before the passage of that statute the common-law definition of murder was the one in force in this commonwealth. Murder at common law was murder here. In the charge of Shaw, Ch. J., in *Com. v. Webster*, 5 Cush. 295 52 Am. Dec. 711, the trial of which took place in 1850, will be found a very clear exposition of this crime. There was only one degree, and it was punishable with death. Rev. Stat. 1836, chap. 125, § 1. By Stat. 1858, chap. 154, p. 126, now Rev. Laws, chap. 207, § 1, murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed "with extreme atrocity or cruelty," was declared to be murder in the first degree and punishable with death. Murder not appearing to be in the first degree was declared to be murder in the second degree, and punishable with imprisonment for life. Shortly after

the passage of the statute, it was held that it did not change the common-law definition of murder as recognized by our courts, but simply manifested the intention of the legislature to consider murder as a crime "the punishment of which may be more or less severe according to certain aggravating circumstances which may appear at the trial." *Com. v. Gardner*, 11 Gray, 438, 444; *Com. v. Desmarteau*, 16 Gray, 1. In the case at bar the only ground upon which it was contended by the commonwealth that this was murder in the first degree was that it was committed with deliberately premeditated malice aforethought. We are of opinion that, in defining that phrase, the court laid down the law as it has been held ever since the passage of the statute of 1858, and that both by reason and by authority it is sound. The reasons for such an interpretation of the phrase are so clearly stated in the language of the various judges who have had occasion to expound to jurors the law on this subject that it seems necessary to do little more than quote their language.

One of the earliest cases after the statute of which we have any accessible report is *Com. v. Andrews*. That case was tried in October, 1868, in this court, before Chapman, Ch. J., and Foster, Wells, and Colt, JJ., being four of the six justices of which this court was then composed, and sitting as a full court. In charging the jury, Chapman, Ch. J., speaking for all the judges present, after defining malice, proceeds to speak of the word "aforethought" as used in connection with malice, in the common-law definition of murder, and uses the following language: "The term 'aforethought' indicates simply what is thought of beforehand or premeditated. But, by the common law, malice aforethought was held to be sometimes implied when there was no premeditation. For example: If a man who was provoked to sudden anger by mere words took a deadly weapon and killed the offender, the law implied malice aforethought because words are no adequate provocation for such an act as this. There were other cases of the same character. This feature of the law was regarded too severe, and our legislature, several years ago, modified it by statute." He then quotes Stat. 1858, chap. 154, p. 126, then Gen. Stat. chap. 160, § 1. It is interesting in passing to note how nearly the illustration given corresponds with the one given by Shaw, Ch. J., in *Com. v. Webster*, 5 Cush. 295, 305, 52 Am. Dec. 711, *ad finem*, and how the statement of the reason for the passing of the statute is reinforced by the following language of Shaw, Ch. J., in 7 L.R.A. (N.S.)

Com. v. Gardner, 11 Gray, 438, 443: "This statute does not declare for the first time that murder in the first degree shall be punished with death. It declares it in almost the same words as before. It takes very nearly the same distinction which the common law took between murder by express, and that by implied, malice." Chapman, Ch. J., having given the reason for the passage of the statute as above stated, quotes the statute at length, and proceeds as follows to expound the meaning of the phrase "deliberately premeditated malice aforethought:" "To premeditate is merely to intend beforehand. It need not be a long time; it merely requires time to form a clear intent. For example, a robber with a pistol or dirk, walking in the street, turns a corner and meets a bank messenger with a roll of bills. In a moment he determines to get it; the next moment he shoots or stabs the messenger dead, takes the package, and flees. His malice was deliberately premeditated, though it occupied but a few seconds; for it was a cool act of the will, and is unlike the intent stimulated by a sudden fight or quarrel, where one kills another suddenly, not having intended violence beforehand. The malice and premeditation are actual, and are not merely inferred from the use of a deadly weapon." See Davis's report of *Com. v. Andrews* (printed by Hurd & Houghton) 246, 247.

Stat. 1872, chap. 232, p. 170, provided that a capital trial might be conducted by two justices of this court, instead of a quorum of the full court, and after the passage of that statute such trials were carried on before only two judges. In *Com. v. Sturtevant* (see Appendix in Wharton on Homicide, 743, 744; also MSS. report in 2 Suffolk Law Library, p. 6 of the charge), tried in 1874 before Wells and Ames, JJ., the former, in the charge to the jury, said: "It is the intent of the statute to make murder in the first degree only of those cases where the murder is of such a character as to show a deliberate purpose. But deliberation does not require any considerable length of time. The mind deliberates rapidly, sometimes instantaneously, going from its premises to its conclusions in an instant of time; so that a deliberately premeditated murder with malice aforethought may result from an intent to kill which the mind conceived the instant before the weapon was taken or the blow struck." In the same year, in *Com. v. Pomeroy* (see Appendix to Wharton on Homicide, 754, 755; also MSS. report in Suffolk Law Library, 255, 256), tried before Gray, Ch. J., and Morton, J., after-

ward Chief Justice, the former, in charging the jury, spoke as follows in defining the phrase in question: "If you hear that phrase now for the first time, perhaps it seems to be a heaping up of words having no meaning; but if you stop and think of it, you will see that the words 'deliberately premeditated malice aforethought' mean simply, thought upon, resolved upon beforehand, not done suddenly; not a thing that comes into the mind in a moment and is done before there is time to think about it, but a thing either thought of or planned some time before, or, if not planned long before, thought upon long enough before the act is done or the blow struck so that it can be said reasonably to have been purposed. No length of time is necessary. Sometimes long preparation is made, sometimes a firm determination is made, completed, and acted upon very shortly. The law does not prescribe any limit of time, does not attempt to define the quickness with which the human mind can act. If it is thought upon reasonably beforehand, that is sufficient to make it murder in the first degree." In *Com. v. Dwight* (see MSS. report in Suffolk Law Library), tried also in the same year before Gray, Ch. J., and Endicott, J., the same judge instructed the jury on substantially the same line, saying, among other things: "It is only necessary that it [the act of homicide] is thought upon and resolved upon beforehand. . . . It is not sufficient . . . that it should be the fruit of sudden impulse, without any reflection, deliberation, resolution, determination, or thinking it over. But, on the other hand, the law does not undertake to fix any time within which the human mind must act, or which may be necessary to form a resolution. The only question is: 'Was it thought upon, resolved upon, determined upon, beforehand?' " And in the case of *Com. v. Pemberton* (see MSS. report in Suffolk Law Library, p. 17 of the charge), tried in June, 1875, the same judge, sitting with Devens, J., charged as follows: "The law does not undertake to say how long it will take you to make up your mind on a given subject, so as to resolve and determine of set purpose to carry it out,—whether it will take days, or hours, or minutes, or seconds; but, in order to constitute 'deliberate premeditated malice aforethought,' the act must have been thought upon, resolved upon, determined upon, beforehand, no matter how long or short a time. It must not be committed as the result of a mere sudden impulse, but must be the offspring of a resolution of the mind."

Perhaps one of the most instructive charges upon the question is that given in the case of *Com. v. Frost* (see MSS. report in Suffolk Law Library, pp. 17, 18, 19 of the charge), which was tried at Worcester in October, 1875. The defendant admitted the homicide, and the only real question was whether it was murder in the first degree, as contended by the commonwealth, or only manslaughter, as admitted by the defendant. The attention of the court, therefore, was sharply drawn to the true definition of murder in the first degree. In his charge, Devens, J., after speaking of the phrase in question, and saying that, in order to constitute murder in the first degree, it "must be shown beyond a reasonable doubt that the murder was done in pursuance of a previously formed plan, which previously formed plan was completed by the act of killing," proceeded as follows: "It is necessary to show that the intent preceded the act by some definite and distinct period of time, so that we can say that the act was the consequence of that premeditation. But, it is unnecessary that any great length of time should precede. Length of time may be of importance in the consideration of a jury as to whether or not it is shown to have been a deliberately premeditated murder; but, if the length of time is brief; if there is a distinct period which does intervene between the premeditation and the act,—that is long enough. I take the illustration which was used by the attorney general [Train] in his argument, and which was an illustration occasionally used by the late chief justice of this court [Chapman] in illustrating this subject. If one sees another going along the street with a watch or a bundle of money in his pocket or in his hand, and, in order to get that money, he shoots him, with a view to possessing himself with that money, although he never saw the man before, so that there is no personal malice against the individual who carries the money, and, although he did not expect to meet him upon the street, and formed the design merely because he did meet him upon the street, and found himself armed, and thought he could accomplish his wicked purpose, the jury would be justified in finding, upon that evidence, that there was the 'deliberately premeditated malice aforethought,' contemplated by the law." Perhaps the most concise definition of this phrase is found in the charge in *Com. v. Piper* (see state ed. 920), tried in January, 1876, before Lord and Colt, JJ. The former, in speaking of the time, said to the jury: "What is necessary is that the person shall intend to kill, he shall unlawfully intend to kill, and he shall kill in pursuance of a

purpose which he has formed previously to his putting it into execution. Where the word and the blow come together it is not deliberately premeditated malice aforethought; but when the purpose is resolved upon and the mind determined to do it before the blow is struck, then it is, within the meaning of the law, deliberately premeditated malice aforethought."

We have thus reviewed to some extent the opinions of the various judges of this court as expressed by Chapman, Ch. J., in *Com. v. Andrews*, where a quorum of the court was present, and afterwards by the judges in their respective charges to the jury in other cases as to the meaning of the term in question. We are aware of no discordant note. The various extracts speak for themselves. In substance, the view expressed is that, while it must be shown that a plan to murder was formed after the matter had been made a subject of deliberation and reflection, yet, in view of the quickness with which the mind may act, the law cannot set any limit to the time. It may be a matter of days, hours, or even seconds. It is not so much a matter of time as of logical sequence. First the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution; and all this may occur in a few seconds. Since jurisdiction over capital offenses has been transferred from this court to the superior court, our attention has not been called to any case where the court has failed to adopt the same view, while it appears from such examination as we have made of the charges in that court that this view has been uniformly followed. See, for instance, *Com. v. Borden* (see typewritten report in Superior Court Lobby, vol. 2, p. 1889), tried in Bristol; *Com. v. Trefethen* (state ed. 218, 381), tried twice in Middlesex; and *Com. v. O'Neil* (state ed. 704, 705), tried in Franklin.

Eminent counsel, determined, if possible, to free their clients, and fertile in resources in that direction, frequently have acted for the defense in capital cases; and yet our attention has not been called to any case, either in this court or the superior court, and we are not aware of any, where this definition of the phrase in question has been challenged, except in the case before us. Upon this subject, we have been referred by the defendant to cases in other states; but, upon the construction of our own statute, they are of little assistance, and it is not necessary to discuss them. So far as they are incon-

sistent with the doctrine above laid down, we cannot follow them. For more than a generation this view of the meaning of the phrase in question has been adopted in the courts of this state, and men whose right to life hinged upon its accuracy have been tried, convicted, and sent to death. The legislature, in the light of this uniform and long-continued construction of the statute, has made no change. The interpretation of the phrase given in the case at bar is in accordance with the law as previously laid down with great clearness and uniformity by justices in charging juries, is suggested by the hardship in the old law set forth by Chapman, Ch. J., as hereinbefore recited, is in accordance with the rapidity of mental action, and is founded upon sound sense as applied to the subject; and we are satisfied that it is correct. The charge of the court, including the illustration of which the defendant complains, furnishes the defendant no ground for a valid exception.

17. We have noticed all the exceptions argued upon the defendant's brief. There are one or two which he has not argued. In view of the nature of the case, and of the statement made by his counsel that nothing is waived, it is sufficient to say that, considering them as not waived, we have examined them, and see nothing in them.

18. After a verdict of guilty of murder in the first degree, the defendant made a motion for a new trial. One of the reasons assigned for the motion was that one of the jurymen during the trial took notes or memoranda of the testimony of the witnesses, "in violation of law and this defendant's rights." As to this matter it may be said, in the first place, that it is difficult to see how the counsel for the defense could help seeing that the juror was taking notes of some kind. The juror used sheets of paper "about 6 by 4 inches in dimensions, with a lead pencil, resting upon his hand and knee, as the case might have been, and so wrote memoranda" of the testimony as it was going in. "This was done openly, frequently, while the counsel for the defendant were in front of him, and in his plain view, either while examining witnesses or exhibits." The trial of the case lasted three weeks, and these notes were taken daily, "with the possible exception of the first day or two." The juror was seated on the second row of jury seats, at the end nearest the bench and witness stand. It is very difficult for anyone familiar with the arrangement of our court rooms to conceive how so conspicuous an act, so continuously

and openly performed by a juror seated so prominently within the view of all in the court room, especially of those within the bar, could have escaped the attention of the defendant and every one of his counsel. And, as stated by the commonwealth in its brief, there is nothing in the affidavit of the defendant or of his counsel which is inconsistent with the theory that they each saw the act of the juror and that he was writing. They simply say that they did not know he was taking notes of the evidence. In a certain sense that may be true; and yet, if they saw the juror writing while the evidence was going in, they should be held to reasonable diligence in ascertaining what he was doing. In the mind of a person seeing a juror continuously writing while testimony is going in, the most reasonable inference would be that the juror was taking notes of the testimony. But, however that may be, we are of opinion that while, as a rule, the taking of notes of testimony by a juror may not be a commendable practice, yet, by the great weight of authority, it is not illegal; and, as matter of law, it does not require the setting aside of the verdict. The question, therefore, was left to the discretion of the court. The court having heard the motion upon the evidence, in which the juror made affidavit that he took the notes "in aid of memory," filed a written statement of its decision, and the grounds thereof, the last part of which is as follows: "We rule that the evidence does not require us, as matter of law, to set aside the verdict on this ground. We do not find that any of the prisoner's rights have been at all affected by the taking of notes, or that the action of the juror has in any way worked to his prejudice; and we are satisfied that no injustice to him has resulted from this circumstance. We therefore, in the exercise of our judicial discretion, for the furtherance of justice, decline to set aside the verdict upon this ground." The evidence justified their conclusions as to the facts, and upon these conclusions no error of law is shown in declining to set aside the verdict.

Exceptions taken at the trial, and those taken on the motion for a new trial, overruled.

Petition for rehearing denied January 1, 1906.

Petition for writ of error denied by Supreme Court of the United States March 9, 1906.

7 L.R.A. (N.S.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

DENNIS FOLEY

v.

BOSTON & MAINE RAILROAD.

(— Mass. —, 79 N. E. 765.)

Carrier—jolt—negligence—burden of proof.

1. To hold a carrier liable for injury to a passenger by reason of a jolt of the vehicle, plaintiff must show that it was caused by the carrier's negligence.

Same—care of passenger.

2. A passenger is not exercising due care in standing near an open door without supporting himself by his hands while the car is passing over a cross-over switch of which he knows, and which is necessary because of repairs in progress on the track.

(January 1, 1907.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. Sustained.

The plaintiff was injured by being thrown from a moving train while it was passing over a cross-over switch at a point where repairs were in progress on the railroad. He testified that he boarded the smoking car; that he walked two or three seats up the aisle looking for a seat, but saw none vacant; that he then walked back to the rear of the car and took his position just

Case Note.—*Res ipsa loquitur* doctrine as applied to jolts or jerks causing injury to passengers on vehicles:—It is generally held that a passenger makes out a *prima facie* case, or raises a presumption of negligence, against the carrier, by showing that, while riding in the vehicle, he was injured by its unusual or violent jerking, jolting, or stopping. *Georgia R. & Electric Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610 (under statute); *Lavis v. Wisconsin C. R. Co.* 54 Ill. App. 636; *North Chicago Street R. Co. v. Schwartz*, 82 Ill. App. 493; *Chicago City R. Co. v. Morse*, 98 Ill. App. 662. Affirmed in 197 Ill. 327, 64 N. E. 304; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Cincinnati, I. & W. R. Co. v. Bravard* (Ind. App.) 76 N. E. 899; *Evansville & T. H. R. Co. v. Mills* (Ind. App.) 77 N. E. 608; *Harris v. Hannibal & St. J. R. Co.* 89 Mo. 233, 58 Am. Rep. 111, 1 S. W. 325; *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 106 Am. St. Rep. 558, 84 S. W. 26.

While the courts, in some of the cases, in laying down the rule, may not have employed the words "unusual or violent," it is believed that, as expressed above, the rule is the correct one; and that in every case

inside the open door, leaning against the door jamb; that the speed of the train was very swift and continued to be so until it struck the cross-over switch, the jar from which he described as "awful," "terrible," which caused him to lose his support, and a fellow passenger lurched against him throwing him out of the car and off the platform.

Further facts appear in the opinion.

Messrs. Henry F. Hurlburt and Damon E. Hall, for defendant:

It is contributory negligence *per se* for a passenger unnecessarily to stand in an exposed position upon a car of a moving train.

Hickey v. Boston & L. R. Co. 14 Allen, 429; Torrey v. Boston & A. R. Co. 147 Mass. 412, 18 N. E. 213; Stewart v. Boston & P. R. Co. 146 Mass. 605, 16 N. E. 466; Fletcher v. Boston & M. R. Co. 187 Mass. 463, 105

Am. St. Rep. 414, 73 N. E. 552; Weinschenk v. New York, N. H. & H. R. Co. 190 Mass. 250, 76 N. E. 662; Mayo v. Boston & M. R. Co. 104 Mass. 137, 6 Am. Rep. 202; Files v. Boston & A. R. Co. 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311.

Plaintiff must be held to have assumed the risk of the accident which happened.

Dewire v. Boston & M. R. Co. 148 Mass. 343, 2 L.R.A. 166, 19 N. E. 523; Byron v. Lynn & B. R. Co. 177 Mass. 303, 58 N. E. 1015; Burns v. Boston Elev. R. Co. 183 Mass. 96, 66 N. E. 418; Moody v. Springfield Street R. Co. 182 Mass. 158, 65 N. E. 29; Spooner v. Old Colony Street R. Co. 190 Mass. 132, 76 N. E. 660; Pike v. Boston Elev. R. Co. 192 Mass. 426, 78 N. E. 497.

There was no evidence of the negligence of the defendant, its agents and servants.

Byron v. Lynn & B. R. Co. *supra*; Francis-

where it has been applied the evidence showed that the jolt, jerk, or stop was unusual or violent. In Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 618, and Hite v. Metropolitan Street R. Co. 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33, it was held that it must have been such a jerk or jar as, under ordinary circumstances, would not have happened if those who had the management of the car or train had used proper care.

Some of the cases expressly hold that, before any presumption of negligence will arise, it must appear that the jolt or jerk which caused the injury was unusual in degree. Adams v. Washington & G. R. Co. 9 App. D. C. 26; Chicago City R. Co. v. Morse, *supra*; Pryor v. Metropolitan Street R. Co. 85 Mo. App. 367; Bartley v. Metropolitan Street R. Co. 148 Mo. 124, 49 S. W. 840; Johnson v. Interurban Street R. Co. 88 N. Y. Supp. 866.

In Byron v. Lynn & B. R. Co. 177 Mass. 303, 58 N. E. 1015, it was said that, unless such jolts or jerks are "unusual in degree," and "caused by some defect in the car or in the track, or by some unusual or dangerous rate of speed, they furnish no evidence of negligence on the part of the carrier." In Chicago City R. Co. v. Morse, *supra*, the court said that the rule as laid down in the Byron Case would be without objection if the word "or" had been used instead of "and." This statement of the rule, with "or" substituted for "and," was also approved in Adams v. Washington & G. R. Co. and Bartley v. Metropolitan Street R. Co. *supra*.

In Saunders v. Chicago & N. W. R. Co. 6 S. D. 40, 60 N. W. 148, it was held that the presumption of negligence does not arise against the carrier where the evidence merely shows that there was a shock which injured the passenger, with nothing to show or suggest the cause or nature of the shock, or whether it affected the train or car in which he was riding, or simply his person.

In Hoffman v. Third Ave. R. Co. 45 App. Div. 586, 61 N. Y. Supp. 590, it was held 7 L.R.A. (N.S.)

that there was no presumption of negligence where a street car, proceeding along a crowded street at a rate of 2 or 3 miles an hour, was suddenly stopped, and it affirmatively appeared that the gripman who controlled the car had nothing to do with stopping it.

In Jacksonville Street R. Co. v. Chappell, 21 Fla. 175, it was held that the mere fact that the street car suddenly started, throwing the passenger to the floor and injuring him just as he was turning to seat himself, did not prove negligence on the part of the carrier. But, upon a similar state of facts, it was held in Dougherty v. Missouri P. R. Co. 9 Mo. App. 478, Affirmed in 81 Mo. 325, 51 Am. Rep. 239, that, if it appeared that the car was started with an unusual jerk, and, by the proper use of the reins and brake, it could have been started without a jerk, a *prima facie* case of negligence was made out against the carrier.

In Herstine v. Lehigh Valley R. Co. 151 Pa. 244, 25 Atl. 104, it was held that no presumption of negligence was raised against the carrier by evidence showing that the passenger was injured by a severe shock caused by violently coupling a car to the car in which he was seated.

But in Clow v. Pittsburgh Traction Co. 158 Pa. 410, 27 Atl. 1004, where it appeared that the car, while in motion, was suddenly and violently stopped, thus causing injury to the passenger, it was held that a presumption of negligence was raised against the carrier.

And, so it was held in Dixey v. Philadelphia Traction Co. 180 Pa. 401, 36 Atl. 924, where the evidence showed that the injury was the result of an unusual and sudden jar or plunge of the car, which affected all the passengers.

In Norfolk & W. R. Co. v. Ferguson, 79 Va. 241, where plaintiff testified that he did not know whether the engine was reversed or not, but that the cars ran together so hard as to cause him to be thrown out of the caboose in which he was riding, the court

co v. Troy & L. R. Co. 78 Hun, 13, 29 N. Y. Supp. 247; Spooner v. Old Colony Street R. Co. supra.

Messrs. D. W. Quill and William H. Pew, Jr., for plaintiff.

Rugg, J., delivered the opinion of the court:

It is at least difficult to see how, upon this testimony, there was any negligence on the part of the defendant. Timms v. Old Colony Street R. Co. 183 Mass. 193, 66 N. E. 797. It is a matter of common knowledge that tracks of steam railroads must be repaired and bridges replaced from time to time, and that, in the performance of this work, it may be necessary to use cross-overs from one main track to another. It is also common knowledge that, in the performance of the duty resting upon steam railroads of rapid and prompt transportation, even in the exercise of the high degree of care required of them, there may be jolts and lurches in the management of trains. Weinschenk v. New York, N. H. & H. R. Co. 190 Mass. 250, 76 N. E. 662; Byron v. Lynn & B. R. Co. 177 Mass. 303, 58 N. E. 1015. There

is nothing to show that the jar in question resulted from any negligent act on the part of the defendant, either as to speed or construction of car or track. It is true that the speed was described as "swift," and the jar or lurch as "quite violent," "terrible," "awful," "very severe," and "unexpected." Mere expletive or declamatory words or phrases as descriptive of speed, or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real character of the fact respecting which they are used.

Passing to the other branch of the plaintiff's case, there are greater difficulties in his way. He knew of the existence of the cross-over, and that it had been there for several days, and that all trains going to Beverly from Salem were obliged to use it, and that the going upon the cross-over

said that, no negligence being proved on the part of the railroad company, or by any of its agents or employees, the law would not impute it.

The passenger who seeks to recover on this presumption alone must show that he was not only a passenger, but also that at the time of the accident he was in a place where he had a right to be; or, at least, that the place where he was, if he was not in the right place, did not affect the result. Tuley v. Chicago, B. & Q. R. Co. 41 Mo. App. 432.

Where a passenger proves that, on the stoppage of the train, he at once walked out on the platform to get off, and, while in the act of alighting, the train was suddenly started with a jerk, which caused him to fall, whereby he was injured, he establishes a prima facie case of negligence in the management of the train. Barringer v. St. Louis, I. M. & S. R. Co. 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; Kefauver v. Philadelphia & R. R. Co. 122 Fed. 966.

And this is the rule where a passenger on a street car is injured while in the act of alighting. Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; Griffin v. Pacific Electric R. Co. 1 Cal. App. 678, 82 Pac. 1084; Renfro v. Fresno City R. Co. 2 Cal. App. 317, 84 Pac. 357.

An injury so occurring is said to justify an inference of a breach of duty, and falls within the maxim, *Res ipsa loquitur*. Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132; Scott v. Bergen County Traction Co. 63 N. J. L. 407, 43 Atl. 1060. Affirmed in 64 N. J. L. 362, 48 Atl. 1118; Paul v. Salt Lake City R. Co. 30 Utah, 41, 83 Pac. 563.

But in Flynn v. Interborough Rapid Tran- 7 L.R.A. (N.S.)

sit Co. 48 Misc. 529, 96 N. Y. Supp. 259, it was held that in such a case there was no ground for invoking the doctrine of *res ipsa loquitur*.

Still another way of stating the general rule is that the burden of proof is on the carrier to show that an unusual jerk, jolt, or stoppage of the vehicle, injuring a passenger riding therein or thereon, was unavoidable, or caused by agencies beyond its control. Crine v. East Tennessee, V. & G. R. Co. 84 Ga. 651, 11 S. E. 555; West Chicago Street R. Co. v. Kennelly, 66 Ill. App. 244; Coudy v. St. Louis, I. M. & S. R. Co. 85 Mo. 79; Hite v. Metropolitan Street R. Co. 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262; 32 S. W. 33; Burr v. Pennsylvania R. Co. 64 N. J. L. 30, 44 Atl. 845; Murphy v. Coney Island & B. R. Co. 36 Hun. 199; Bartlett v. New York & S. B. Ferry & Steam Transp. Co. 25 Jones & S. 348, 8 N. Y. Supp. 309; Martin v. Second Ave. R. Co. 3 App. Div. 448, 38 N. Y. Supp. 220.

This form of stating the rule, however, is objectionable for the reason that it disregards the distinction between the effect of a given fact to raise a prima facie presumption of negligence and its effect to shift the burden of proof.

The distinction between the rule *res ipsa loquitur* and the rule as to circumstantial evidence is pointed out in the note in 6 L.R.A. (N.S.) 337.

As to a freight-train passenger's assumption of risk of injury from jolts and jerks, see note in 19 L.R.A. 310.

Starting a car before a passenger is seated is the subject of a note in 42 L.R.A. 293.

Injuries in getting on and off railroad trains are treated in 21 L.R.A. 354.

would cause more or less jar to the train. He also testified that, if he had supported himself by his hands, he would not have been thrown off his balance. He took his position within, at farthest, 3 inches from the open door of the car, although he might have stood farther in the car in a place of perfect safety, and he failed to investigate whether there were vacant seats in other cars of the train than the one in which he was standing. It is manifest that no injury would have been sustained by him if he had been seated. It has been said that one who elects to stand in a steam train, when there are vacant seats, cannot recover for an accident which he would not have suffered except for his standing position. *Farnon v. Boston & A. R. Co.* 180 Mass. 212, 62 N. E. 254. To be either upon the platform of a car, or just within its threshold, on the way to and in search of a permanent place of safety within a car, is quite different from voluntarily taking one's stand for the journey barely inside an open door, with the knowledge that, by reason of construction repairs, reasonably and necessarily prosecuted so far as appears, the train must pass over a switch under such circumstances as almost necessarily to cause some disturbance to the train. It is true the plaintiff testified that he intended to go back into other cars of the train; but, without any disclosed reason for so doing, he stood in this position of danger while the train passed a distance of $\frac{1}{4}$ of a mile. Under the particular circumstances of this case, with the plaintiff's special knowledge of conditions, he cannot be said to have been in the exercise of such care as ordinary prudence requires.

Exceptions sustained.

NEBRASKA SUPREME COURT.

NICHOLAS V. HALTER et al., Plffs. in Err.,
v.

STATE OF NEBRASKA.

(— Neb. —, 105 N. W. 298.)

Flag—desecration of.

1. The power to prohibit the use of the national flag does not belong exclusively to

Headnotes by ALBERT, C.

Case Note.—Statutes against desecration of flag:—The first case in which any statute for the protection of the national flag against mutilation, desecration, or degrading use of any kind was brought under judicial consideration was that of *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41. This case was 7 L.R.A. (N.S.)

the Federal Congress, but may be exercised by the several states.

Same—constitutional legislation.

2. Chapter 139, p. 644, Laws 1903 (Cobbe's Anno. Stat. 1903, §§. 2375g et seq.), entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States," is not obnoxious to the 14th Amendment to the Constitution of the United States, nor to the provisions of the state constitution against depriving any person of his property without due process of law, and against special or class legislation.

Same—police power.

3. Notwithstanding the 14th Amendment to the Federal Constitution, the state, in the exercise of the police power, may enact such laws as are calculated to promote the health, comfort, safety, and welfare of society, although such laws operate to restrict the liberty of citizens of the United States.

Same—judicial question.

4. But whether legislation thus operating is in fact calculated to promote such ends is a legitimate subject of inquiry by the court, when the constitutionality of the act is assailed.

Same—effect of statute.

5. An act which is calculated to foster sentiments of patriotism is not vulnerable to the objection that it is not calculated to promote the welfare of society.

(October 19, 1905.)

ERROR to the District Court for Douglas County to review a judgment convicting defendants of violating a statute providing for the punishment of the desecration of the flag of the United States. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Sylvester R. Rush, for plaintiffs in error:

The flag is solely a creation of the Federal law, and no state has a right to prescribe the use that may be made of it by citizens of the United States.

The *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122; *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; *Prigg v. Pennsylvania*, 16 Pet. 539, 618, 10 L. ed. 1060, 1089; *Easton v. Iowa*, 188 U. S. 236, 237, 47 L. ed. 458, 459, 3 Sup. Ct. Rep. 288.

Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulation indicates its will

one of a prosecution for using the flag as an advertisement by a firm of wholesale and retail cigar dealers. Pictures of the flag were used upon cigar-box labels as an advertisement. The statute prohibiting such use was held unconstitutional: First, on the ground that it was an interference with the constitutional privileges and immunities of

that the subject shall be left free from any restrictions or impositions.

Robbins v. Taxing District, 120 U. S. 493, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, Reversing 13 Lea, 303; *Western U. Teleg. Co. v. James*, 162 U. S. 655, 40 L. ed. 1106, 16 Sup. Ct. Rep. 934; *United States v. E. C. Knight Co.* 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 588, 39 L. ed. 544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Re Rahrer* (Wilkerson v. Rahrer) 140 U. S. 555, 35 L. ed. 574, 11 Sup. Ct. Rep. 865, Reversing 10 L.R.A. 444, 43 Fed. 556; *Leisy v. Hardin*, 135 U. S. 110, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, Reversing 78 Iowa, 286, 43 N. W. 188; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 336, 30 L. ed. 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Walling v. Michigan*, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 687, 27 L. ed. 446, 2 Sup. Ct. Rep. 185, Affirming 12 Fed. 777; *Welton v. Mis-*

souri, 91 U. S. 282, 23 L. ed. 350, Reversing 55 Mo. 288; *Rhea v. Newport News & M. Valley R. Co.* 50 Fed. 22; *Pacific Coast S. S. Co. v. Railroad Comrs.* 9 Sawy. 253, 18 Fed. 11; *The Chusan*, 2 Story. 455, Fed. Cas. No. 2,717; *Southern Exp. Co. v. Goldberg*, 101 Va. 621, 62 L.R.A. 669, 44 S. E. 893.

The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E.

citizens of the United States; second, that it was not within the range of the police power of the state, because it did not tend to elevate the morals or promote the welfare of the public, and, as it attempted to regulate a useful business, the legislature was not the exclusive judge as to what was a reasonable restraint upon the constitutional right of the citizen; third, that the statute was void for discrimination in prohibiting the use of the flag for advertising purposes generally, while permitting it for public or private exhibitions of art. This decision was followed, in substance, by the appellate division of the supreme court of New York in the case of *People ex rel. McPike v. Van De Carr*, 91 App. Div. 20, 86 N. Y. Supp. 644, which held that, while the legislature might lawfully prohibit the mutilation of the flag, and perhaps, on this ground, might prohibit the printing of an advertisement on the flag itself, it could not prohibit constitutionally the use of a picture or representation of the flag in connection with an advertisement of merchandise or with trademarks or trade labels, because this would infringe upon the personal liberty of the citizen; and also held that prohibiting such use generally, while permitting publishers, stationers, and jewelers to use the symbol in their business, would amount to a denial of the equal protection of the law.

These cases were considerably criticized at the time they were rendered, as taking too narrow a view of the police power of the legislature. The New York case was taken to the court of appeals, which affirmed the decision of the appellate division (178 N. Y. 428, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965) only so far as it applied to the use of the flag in case of articles which were manufactured and in existence when the

statute was passed. As to these, the court held that the statute destroyed existing property rights. This left undecided the broader question of the police power of the legislature to prevent the use of the flag for advertising purposes generally.

A case quite close to this question by way of analogy is that of *Com. v. R. I. Sherman Mfg. Co.* 189 Mass. 76, 75 N. E. 71, in which a Massachusetts statute making it unlawful to use the arms or the Great Seal of the commonwealth, or any representations thereof, for any advertising or commercial purpose, was held constitutional. The principle of this decision obviously applies with equal force to statutes for the protection of the flag, unless the power of the state is restricted in respect to the flag on the ground that it is exclusively under the protection of the national government. But in the above case of *HALTER v. STATE* the supreme court of Nebraska squarely repudiates this contention, and refuses to follow the precedents of the Illinois and New York cases. It decides that the state has power to protect the flag against desecration or use for advertising purposes; that this does not infringe the constitutional guaranties of due process of law, or constitute special or class legislation, but that it is a legitimate exercise of the police power. This decision has recently received the sanction of the Supreme Court of the United States. *Halter v. Nebraska*, 205 U. S. 34, 51 L. ed. —, 27 Sup. Ct. Rep. 419. It is therefore now established that state laws of this character do not violate the Federal Constitution. With respect to the question of police power, the court says: "It would be going very far to say that the statute in question had no reasonable connection with the common good, and was not promotive of the peace, order, and well-being of the people."

1126; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

Included in "the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it."

Black, Const. Law, p. 412; *People ex rel. McPike v. Van De Carr*, 91 App. Div. 20, 86 N. Y. Supp. 644; *Lochner v. New York*, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539.

The legislature cannot, under the guise of police regulation, arbitrarily invade personal rights or private property.

People ex rel. McPike v. Van De Carr, supra; *Smiley v. MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; *Young v. Com.* 101 Va. 859, 45 S. E. 327; *State v. Dalton*, 22 R. I. 79, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983; *Ex parte Hutchinson*, 137 Fed. 950; *Hewin v. Atlanta*, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193; *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 82 N. E. 215; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

The flag law is void for the reason that it attempts to destroy existing property rights.

People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 966; *Re Marshall*, 102 Fed. 323; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 705, 41 L. ed. 1172, 17 Sup. Ct. Rep. 693.

Messrs. Cooper & Dunn also for plaintiffs in error.

Mr. Norris Brown, Attorney General, for the State.

Albert, C., filed the following opinion:

The defendant was convicted of a violation of the statute entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States." Chapter 139, p. 644, Laws 1903 (Cobbey's Anno. Stat. 1903, §§ 2375g et seq.).

It is conclusively established that the defendants were engaged in selling intoxicat-

ing liquors at retail, and sold and offered for sale beer contained in bottles, to which was attached a label on which there was printed a representation of the flag of the United States, and that such label was so used to advertise the beer and distinguish it from other products of a like nature. It is admitted that the beer was sold to the defendants by a brewing company in the bottles thus labeled, and that the representations of the flag thereon is a part of the registered trademark of the brewing company. It is now claimed that the statute under which the defendant was convicted is unconstitutional, and consequently that the judgment of conviction must be reversed. The statute is as follows: "Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America; or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed; or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon, any such flag, standard, color, or ensign,—shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding \$100, or by imprisonment for not more than thirty days, or both, in the discretion of the court. The words 'flag, color, ensign,' as used in this act, shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture, or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, standard, or ensign, of the United States of Amer-

ica. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations; nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed said flag, disconnected from any advertisement."

The defendants take the position that the act contravenes § 1 of the 14th Amendment to the Federal Constitution, which prohibits the states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of life, liberty, or property, without due process of law, and the provisions of the state Constitution against special or class legislation. This position is supported by two cases,—*Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, and *People ex rel. McPike v. Van De Carr*, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965. In each of these cases a statute substantially like the one under consideration was held unconstitutional. The Illinois case rests on three propositions, which, for convenience, we shall consider out of the order in which they are there discussed.

As to the first, namely, that the act is unconstitutional "as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted to him by the Federal Constitution." little need be said. The right to advertise whisky, beer, tobacco, and other articles of merchandise by the use of the national flag is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the Federal Constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our Criminal Code is largely waste paper. A moment's reflection would seem sufficient to show that the proposition is utterly unsound. Nor can we agree with counsel that the Federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and Federal governments. Counterfeiting furnishes an apt illustration. The power "to provide for the punishment of

counterfeiting the securities and current coin of the United States" is expressly given to Congress, but the offense is also punishable under the laws of the several states, the validity of which was upheld in *Fox v. Ohio*, 5 How. 416, 12 L. ed. 215.

The second proposition to be noticed is "that the act is also unduly discriminating and partial in its character." This proposition is based on the exceptions to the general provisions of the act. The exceptions enumerated in the Illinois act are fewer than in our own; but we do not think it can fairly be said that in either case they render the act unduly discriminating or partial. Neither act is aimed against any individual or class of individuals, but against certain acts. If it were competent for the legislature to deal with the subject, it was clearly competent for it to define the crime of desecration, and to specify the acts constituting the offense. Every use of the flag not included in such definition or specification would be impliedly excepted from the operation of the act, and it would seem wholly immaterial that the legislature saw fit to make some acts the subject of an express exception, instead of narrowing the definition of the crime or the specification of the acts constituting it in such a way to exclude the acts included in such exception. Besides, there is nothing in the state or Federal Constitution which forbids the classification of subjects for legislation, so long as the classification is not arbitrary. *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, and cases cited. There this court held that the statute providing for the taxing of an attorney's fee against a defeated insurance company was valid legislation. See also *Rosenbloom v. State*, 64 Neb. 344, 57 L.R.A. 922, 89 N. W. 1053; *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *Ex parte Thornton (C. C.)* 4 Hughes, 220, 12 Fed. 538; *Davis v. State*, 51 Neb. 302, 70 N. W. 984. In this instance the classification does not appear to be an arbitrary, but a most natural, one. It is a matter of common knowledge that the use of the flag for advertising purposes offends the sensibilities of a large portion of our people. The statute is directed against the use of the flag for that purpose, but excepts from its provisions certain uses to which the most sensitive could not object. Without such exception, either express or implied, the statute would be oppressive, if not absurd.

We come now to the remaining proposition on which the Illinois case rests, namely, that "the statute is an infringement upon the personal liberty guaranteed by the state and Federal Constitutions." The court in that case recognizes the right of the state, in the exercise of its police power, to enact

such laws as are calculated to promote the health, comfort, safety, and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote those objects, or some of them; otherwise, they are an arbitrary restraint on the citizen, and unconstitutional. Such is the generally accepted doctrine. *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, contains a discussion of the police power of the states and an examination of many cases bearing on the subject. After a somewhat lengthy discussion of the doctrine just referred to, the court, in *Ruhstrat v. People*, supra, held that the statute was not calculated to promote any of the objects just enumerated, and was therefore unconstitutional and void. Again we find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight. Patriotism has ever been regarded as the highest civic virtue, and whatever tends to foster that virtue certainly makes for the common good. That familiarity breeds contempt has the force of a maxim. That contempt or disrespect for an emblem begets a like state of mind toward that for which it stands is a psychological law which underlies the canons against profanation which abound in every system of religious instruction. Such inhibitions against the irreverent use of sacred things are not mere arbitrary fulminations, but are grounded on sound practical considerations and the conviction that such use of the sacred emblems of religion is inimical to the cause of religion itself. The legislation under consideration may be justified under the same principle. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands,—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future; and it is not fitting that it should become associated in his mind with anything less exalted, nor that it should be put to any mean or ignoble use.

Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The state has the undoubted right to legislate in the interests of the public peace. As was said in *Updegraph v. Com.* 11 Serg. & R. 406; "An offense against the public peace may consist either of an actual breach of the peace, or doing that which tends to provoke and excite others to do it. Within the latter description fall all acts and all at-

tempts to produce disorder, by written, printed, or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual." The doctrine announced in that case seems peculiarly applicable to the case in hand, and to justify the act in question as a valid exercise of the police power of the state. In *People ex rel. McPike v. Van De Carr*, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 905, the act was not held wholly void, but only in so far as it applies to articles manufactured and in existence when the act went into effect. To that extent it was held unconstitutional as in contravention of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. If the statute is vulnerable to that objection, it would seem that a large number of our penal statutes, commonly regarded as valid, must fall by the same rule. When our act against taking fish with a seine went into effect, there were doubtless many seines manufactured and in existence. The same may be said of swivel guns, when the act making it unlawful to kill certain wild waterfowl with such guns became a law. But to our knowledge it has never been seriously claimed that either of such acts is unconstitutional and void to the extent that it applies to "articles manufactured and in existence when the act went into effect." By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas, and property whose chief value consisted in its use in connection with the manufacture and sale of such liquors was rendered practically valueless. The validity of this legislation was assailed on the ground that it operated to deprive those engaged in the traffic in intoxicating liquors of their property without due process of law. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. Considering that feature of the case, the court said: "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

Nor does the fact that the flag was a part of the trademark of the brewing company place the defendants in any more favorable position. To the extent that the said trade-

mark is property, it comes within what has already been said. A patent or trademark puts no restraint upon the state in the exercise of its police power beyond the restraint imposed with respect to property generally. *Patterson v. Kentucky*, 97 U. S. 507, 24 L. ed. 1117.

We have gone over the act in the light of excellent briefs on either side, and have reached the conclusion that it is not only a valid piece of legislation, but one well calculated to promote the common weal.

It is therefore recommended that the judgment of the district court be affirmed.

Duffie and Jackson, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Affirmed by Supreme Court of United States March 4, 1907.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE, FOR USE OF
FENTRESS COUNTY,

v.

JAMES B. REED et al., Appts.

(116 Tenn. 110, 95 S. W. 809.)

Public fund—deposit in bank—liability of official.

1. Mere inquiry of the general public, or of the business men of the community where a bank does business, as to its solvency and the integrity of its officers, will not absolve a public official from liability for loss of public funds deposited in the institution through its insolvency.

Same—want of capacity.

2. Want of business capacity or familiarity and experience with business affairs

Case Note.—Case required in selecting bank for deposit of public funds:—Owing to the fact that most of the cases hold an officer having charge of public funds to be an insurer of their safety and liable for their loss, except when occasioned by inevitable accident, or by act of a public enemy, the question as to what constitutes due care in selecting a depository for public funds has seldom arisen. This question arises only, if at all, in those cases which impose a less stringent obligation on the officer, and protect him from responsibility for loss due to the failure of the bank, assuming that he exercised due care in selecting the same. Thus, in *Wilson v. People*, 19 Colo. 199, 22 L.R.A. 449, 41 Am. St. Rep. 243, 34 Pac. 944, the court held that the liability of a clerk of court, for loss of public funds deposited in a bank of reputed

and banks will not absolve a public official from liability for loss of public funds deposited in an insolvent bank because thereof. **Same—bank director.**

3. A public official who is also a director of the bank is bound, before depositing public funds therein, to utilize the opportunities given him by his position as director to ascertain the condition of the bank.

(August 1, 1906.)

A PPEAL by defendants from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Fentress County in plaintiff's favor in a proceeding to hold the official bond of a county trustee liable for loss of public funds committed to his custody. Affirmed.

The facts are stated in the opinion.

Mr. A. H. Roberts, for appellants:

. A deposit of public funds in a bank of undoubted standing and reputation is not negligence or want of proper business prudence or caution on the part of a public officer whose duty it is to preserve them.

State use of Overton County v. Copeland, 96 Tenn. 296, 31 L.R.A. 844, 54 Am. St. Rep. 840, 34 S. W. 427.

Messrs. Smith & Cooper also for appellants.

Messrs. Conatser & Case for appellee.

Shields, J., delivered the opinion of the court:

The bill in this case is brought by the state of Tennessee, for the use of Fentress county, against James B. Reed, county trustee of that county, and others, his sureties upon his official bonds, to recover \$2,853.336, on account of county revenues collected, but not accounted for, as required by law, by said Reed.

The defendants, answering, admit the election of Reed as trustee, the execution of the bonds sued on, and the collection of the money which he has not paid over; but they

solvency, is governed by the ordinary law of bailment, and that the degree of care to be exercised by such an officer in the selection of a depository is the same which an ordinarily prudent man would exercise in the conduct of his own business. This case was relied on in *Gartley v. People*, 28 Colo. 227, 64 Pac. 208, in which a similar decision was rendered. See also *State use of Overton County v. Copeland*, 96 Tenn. 296, 31 L.R.A. 844, 54 Am. St. Rep. 840, 34 S. W. 427, which is sufficiently set out in the above opinion.

On the subject of liability on official bond for loss of money by theft or bank failure, see exhaustive note in 22 L.R.A. 449.

As to liability of executor or administrator for loss of bank deposit, see case note to *Knapp v. Jessup*, ante, 617.

deny that the county is entitled to a decree against them for it. Their defense is that the defendant Reed deposited the county revenues, as collected by him, to his credit as trustee in the Fentress County Savings Bank, a banking concern then doing business in Jamestown, the county seat of Fentress county, and of good reputation for solvency in that community, in good faith believing, after careful and diligent inquiry and investigation, that the bank was solvent and the county's money safe in its hands; and that while it was so deposited, without fault or negligence upon his part, the bank failed, and a portion of the money, amounting to the sum sued for, became uncollectible, and was lost. They insist that upon these facts the defendant Reed was not liable for the money thus lost, and that they should not be held to account for it.

The court of chancery appeals, upon the hearing before it, found that the defendant Reed did deposit the county revenues collected by him as trustee to his credit as trustee in the Fentress County Savings Bank; that these funds were kept separate from his private or individual money; and that he received no compensation from the bank for keeping his account with it; that the bank and its officers, at the time he opened his account and deposited the money lost, sustained good reputation for solvency and integrity with the business men and citizens of Fentress county, but that the bank, while the defendant had deposited therein to his credit as trustee \$3,491.17, failed and assigned, and in this way, after crediting the *pro rata* paid by the assets of the bank, \$2,853.36 of the county's revenue was lost.

That court further finds that the defendant Reed lived in the country about 8 miles from Jamestown; that he had no safe place there to keep and deposit the public money collected by him; and that he was advised by his bondsmen and by business men of the county to deposit it in the Fentress County Savings Bank, which was the only banking institution in the county, and that he did so, in good faith believing the bank solvent and responsible; that said Reed was a man of integrity, but of limited business capacity and experience; that, while not a stockholder, he was one of the directors of the bank, and had access to its books and the right to examine them, and in this way the opportunity to learn its true condition, certainly whether or not it was a safe and proper place for the deposit of the public funds in his hands; but that he made no effort, as director or otherwise, to personally investigate the affairs of the bank and ascertain for himself its solvency or insolvency, and, in fact, gave them no attention and

knew nothing about them. It is also found that, for want of capacity and familiarity with such matters, he could not have ascertained the condition of the bank had he attempted a personal examination of its books.

That court, upon this finding of facts, held that the defendant Reed did not exercise that diligence, caution, and prudence which public officers are required to do in the selection of a depository for public funds in their hands, and that, in depositing the money in the Fentress County Savings Bank, he was guilty of negligence, and he and his sureties should be held for such loss, and decreed accordingly. The defendants have appealed, and assigned as error this conclusion, insisting that it is in conflict with the holding of this court in the case of *State use of Overton County v. Copeland*, 96 Tenn. 296, 31 L.R.A. 844, 54 Am. St. Rep. 840, 34 S. W. 427.

This court did hold in that case that a public officer holds the funds that come into his hands in the discharge of the duties of his office as trustee, to be disposed of as provided by law; that he is not an insurer of the safety of such funds, but is bound only for the exercise of good faith, proper diligence, caution, and prudence in their management and safekeeping. It is further held that it is not negligence or want of proper business prudence and caution to deposit the funds in a bank of undoubted standing and reputation for solvency; and, in case of loss by failure of the bank, the officer would not be held to make it good.

But the facts in this case are widely variant from those found by the court in that, and fall far short of bringing it within the rule there announced and applied. The defendant Reed wholly failed to exercise the diligence, caution, and prudence which the law, as announced in that case, required him to do in selecting a safe and solvent bank in which to deposit the trust funds in his hands, if he desired to make that disposition of them, for it was entirely optional with him; and he was also guilty of culpable negligence in failing to avail himself of all the opportunities and facilities at his command for investigating and ascertaining the condition of the depository selected. Mere inquiry of the general public, or of the business men of the community where the bank does business, who may or may not be interested in it, of the solvency of the institution and the integrity and business qualifications of its officers, is not the diligence and caution required in such cases. There must be an active exercise of the diligence and caution which a prudent man, reasonably conversant with such affairs, brings to bear in the conduct of his own

business, to ascertain the true condition and determine whether or not it is a safe place in which to deposit money. The duty to make a thorough investigation of the solvency or insolvency of the bank is an active one, and the officer must use all means reasonably available for such purpose. There must be no perfunctory discharge of this duty, and it must be continued so long as the deposits remain in the bank. Good faith alone is not sufficient to exonerate an officer from a loss sustained in this way. The want of business capacity, or familiarity and experience with business affairs, and with banks, is also unavailing. A public officer and his official sureties not only contract for the integrity and good faith of the officer, but for his capacity and ability to properly discharge the duties incumbent upon him. It is negligence for one to undertake to discharge duties which he knows, or ought to know, he cannot perform for the want of the necessary capacity, ability, and experience.

The defendant Reed, as a director of the Fentress County Savings Bank, had access to its books, and, with ordinary capacity and the exercise of ordinary intelligence, could have ascertained that it was insolvent and an unsafe place for the deposit of the trust funds in his hands. Good faith and a proper exercise of the duties of his trust required him to take advantage of these opportunities, and his failure to do so was negligence.

He has failed to make out a case for exoneration from the results of his own misconduct, and must bear the consequent loss.

Affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

COMMONWEALTH OF VIRGINIA EX REL. WILLIAM A. ANDERSON, Attorney General, Appt.,

ATLANTIC COAST LINE RAILROAD COMPANY.

(— Va. —, 55 S. E. 572.)

Carrier—rate regulation—mileage books.

A statutory provision requiring railroad companies to sell mileage books at less

than the rates regularly charged for transportation is class legislation, and not for the benefit of the whole people, and is therefore void as depriving the corporation of its property without due process of law, and of the equal protection of the laws.

(November 22, 1906.)

APPEAL by relator from a judgment of the State Corporation Commission dismissing a petition to compel defendant to comply with the statute requiring the sale of mileage books. **Affirmed.**

The facts are stated in the opinion.

Mr. William A. Anderson, Attorney General, for appellant:

The right and power of a state government to prescribe the rates and charges which shall be made by public-service corporations is a primary, fundamental, and essential attribute and prerogative of government.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Ruggles v. Illinois*, 108 U. S. 531, 27 L. ed. 815, 2 Sup. Ct. Rep. 832; *Illinois C. R. Co. v. Illinois*, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 839; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 1 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Budd v. New York*, 143 U. S. 538, 36 L. ed. 253, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 338, 1191; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 398, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 658, 39 L. ed. 570, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 523, 42 L. ed. 840, 18

Case Note.—Validity of statutes requiring issuance of mileage books at reduced rates:—The decision of the United States Supreme Court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, against the validity of a statute requiring the issuance of 1,000-mile tickets at reduced rates, having been based upon the fundamental provision 7 L.R.A. (N.S.)

of the Federal Constitution which forbids the taking of property without due process of law, and requires the equal protection of the laws, is, of course, binding upon the state courts, and leaves but little opportunity for distinctions based upon the terms of a particular statute. At the same time the decision was rendered by a divided court, the chief justice and Justices Gray and McKen-

Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 84, 46 L. ed. 99, 22 Sup. Ct. Rep. 30; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 261, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900.

Mr. William B. McIlwaine, for appellee: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, has been practically overruled.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 461, 33 L. ed. 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Barker v. Coffin*, 31 Barb. 559; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95; *Com. v. Maxwell*, 27 Pa. 444;

Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215.

The power of making bargains for individuals has not been delegated to any branch of the government.

Taylor v. Porter, 4 Hill, 143, 40 Am. Dec. 274.

Due process of law means more than a special act passed for the very purpose of deprivation.

Clark v. Mitchell, 64 Mo. 564; *Re Ziebold*, 23 Fed. 791; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

Cardwell, J., delivered the opinion of the court:

This is an appeal from a judgment of the State Corporation Commission denying the

na dissenting, and has met with considerable criticism, and, in some instances, has been followed with evident reluctance.

In view of the position taken in this case, the earlier case of *Atty. Gen. v. Boston & A. R. Co.* 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252, is perhaps not of much value upon the general question as to the validity of statutes requiring the issuance of mileage tickets. But it is interesting to note that, while the court passed upon a number of constitutional objections to the statutes there involved, and the majority of the court held it unconstitutional for the reason that it required railroads to receive mileage tickets issued by other companies without providing any fund for their redemption, or making them a lien on any tangible property of the issuing company, or putting any limit on the number of those that might be issued or the time within which they must be used, it does not seem to have occurred to either the majority or the minority (including Mr. Justice Holmes, now of the United States Supreme Court) that, even without that feature, the statute would be contrary to the 14th Amendment.

One of the arguments advanced in the *Smith Case* in support of the validity of the provision requiring the issuance of 1,000-mile tickets at reduced rates was that it would have been within the power of the legislature to reduce the maximum rates for all to the same rate as that prescribed for those who purchased 1,000-mile tickets; and that therefore a partial reduction by means of the discrimination in favor of purchasers of 1,000-mile tickets was also valid. In reply to this argument, the opinion calls attention to the fact that a general maximum rate was fixed by the statute, and suggests that that fact, if it did not create a presumption that a lower rate would be unreasonable, at least tended to repel any inference that a lower rate would be reasonable. The court, however, does not seem to have laid sufficient stress upon this fact to jus-

tify the view that it is to be regarded as a limitation of its decision.

The New York court of appeals, in *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488, in obedience to the decision in the last case, held the New York statute of 1895, requiring the issuance of mileage books, unconstitutional as to corporations existing at the time of its enactment. The majority opinion simply declares the binding effect of the Federal Supreme Court decision, without expressing its approval or disapproval thereof. Vann, J., however, who concurred in the result, took occasion to say that, while he was compelled to yield to the power of the Supreme Court, he did not yield assent to its reasoning.

In *Watson v. Delaware, L. & W. R. Co.* 32 Misc. 311, 66 N. Y. Supp. 798, upon the authority of the last case, the mileage-book act was held unconstitutional as applied to a corporation in existence prior to the enactment of the statute, and whose charter authorized a maximum charge of 3 cents a mile.

In *Purdy v. Erie R. Co.* 162 N. Y. 42, 48 L.R.A. 669, 56 N. E. 508, however, the court, while strongly intimating that defendant's objections and exceptions were not sufficient to raise the question that the act was in violation of the due-process-of-law provision, nevertheless discussed the question, and declared that the statute of 1895, requiring the issuance of 1,000-mile tickets at reduced rates, was not in violation of due process of law as applied to a railroad company incorporated after the enactment of the statute; there being nothing in the record then presented to show that defendant had succeeded to the rights and franchises of any company antedating the enactment of the statute. The court, after referring to the decision of the United States Supreme Court in the *Smith Case*, and impliedly recognizing that it would be binding so far as a railroad company organized before the

prayer of a petition filed on behalf of the commonwealth by the attorney general against the Atlantic Coast Line Railroad Company, the object of which was to compel the defendant railroad company to comply with the act of the general assembly, approved March 15, 1906 (Acts 1906, chap. 256, p. 451), requiring all railroads operating in this state to keep on sale at all times mileage books of 500 miles and over at a charge of not more than 2 cents a mile.

The State Corporation Commission has, in a written opinion made a part of the record, after stating how the case arose, set forth in a very satisfactory manner the reasons why the relief asked on behalf of the commonwealth could not be granted, and we therefore adopt its opinion as a part of the opinion of this court.

"The petition states that the regular maximum rate of the defendant company is 3 cents per mile. The company was summoned by the commission to show cause why it should not be required to comply with the said statute, and have penalties imposed upon it for its failure to perform its public duty in this respect. In its defense the company alleges that the act in question is unconstitutional. Several grounds are assigned by the defendant upon which its assertion

of the unconstitutionality of the law is based. The two main contentions are:

"(1) That the statute in question is in contravention of the provisions of the 14th Amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation, and also denies to the defendant the equal protection of the laws.

"(2) That the general assembly of the state, under the provisions of the organic law of the state, has no authority by legislation to prescribe or fix rates for transportation, but that authority to exercise the legislative functions of the state in that respect is conferred exclusively upon the State Corporation Commission.

"The learned attorney general, as the highest law officer of the commonwealth, urged upon the commission that, in this proceeding, it was invested with all the powers, and had imposed upon it all the responsibility, of a court of record. He earnestly contended that the commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the attorney general was not combatted by the learned counsel for

passage of the enactment of the mileage act was concerned, said: "We know of no reason, however, why a railroad company may not agree, upon sufficient consideration, to surrender or transfer any specific pecuniary right. The right to contract as to property is one of the inherent rights of a citizen, of which he cannot be deprived except as to that class of contracts which are condemned in the exercise of the police power, such as usury and the like. *People v. Gillion*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343. The same liberty of contract exists in the grant of charters by the legislature. Therefore, a regulation as to the price of transportation, which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract. The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare; equally, it may require that certain classes of passengers be transported at a particular rate of fare, or that any passenger, under certain circumstances and on compliance with certain requirements, be transported at such rate." It appeared that the corporation involved in this case was organized after the passage of the mileage-book act of 1895, but before its amendment 7 L.R.A. (N.S.)

by the statute of 1896; and the court said that, if the latter statute had increased the burden imposed upon the defendant by the act of 1895, it would, as to such additional burden, have been invalid. The court, however, pointed out that a comparison of the two acts showed that all the modifications effected by the later statute were favorable to the railroad company, and concluded that the later enactment was constitutional and valid in the same cases where the statute of 1895 would be upheld. The doctrine declared in this case was followed in *Horton v. Erie R. Co.* 65 App. Div. 587, 72 N. Y. Supp. 1018.

Upon a writ of error to review the judgment in the Purdy Case, the United States Supreme Court (*Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605) refused to pass upon the question whether the statute, as applied to the corporation in question, violated the provisions of the 14th Amendment, upon the theory that the court of appeals, applying a rule of local practice, had declined to pass upon the question for the reason that it had not been properly raised in the trial court.

The doctrine and distinction declared in the Purdy Case were adhered to in the subsequent case of *Minor v. Erie R. Co.* 171 N. Y. 566, 64 N. E. 454, and it was held in the latter case that the mileage-book act of 1895 was constitutional as to a corporation originally organized prior to the passage of that act, but reorganized and incorporated thereafter under the provisions of the stock-cor-

the defendant company, but was conceded to be correct. Indeed, it is no longer open to question. 'In this commonwealth the State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public-service corporations. For these purposes, it has been clothed with legislative, judicial, and executive powers,'—was held by the court of appeals of this state in the case of *Norfolk & P. R. Co. v. Com.* 103 Va. 289, 49 S. E. 39, which went up to that court on appeal from the commission. The Constitution of Virginia, in § 156 (c) [Va. Code 1904, p. CCLII.] provides, as to the commission, that 'in all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record,' etc. This section gives the commission, in the exercise of its judicial functions, authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments; and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters, 'within the jurisdiction of the commission,' says the Constitution, employing the word 'jurisdiction' which is ap-

propriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The commission, by § 156 (b), has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the state government. But, in the exercise of this legislative power, it cannot make its rates effective, or put its regulations into force, until it has summoned the company or companies to be affected before it. This is done by a notice which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the commission the force and effect of a judgment of a judicial tribunal.

"Passing upon the reasonableness of rates and classifications to be prescribed by it, and of regulations, orders, and requirements to be promulgated by it,—in the exercise of its legislative authority,—constitute the principal matters 'within the jurisdiction' of the commission (as a judicial tribunal) as outlined in the Constitution. The general assembly has brought many additional matters within the jurisdiction of the commission.

"In this proceeding the attorney general

poration law for the reorganization of corporations upon the sale of corporate property and franchises, notwithstanding that the old company enjoyed the right to charge a specified fare, and that, by the terms of the stock-corporation act, the new corporation was vested with and entitled to all the rights, privileges, and franchises belonging to the original corporation, "subject to all the provisions, duties, and liabilities imposed by law on such corporations." The majority of the court took the view that the legislature intended to impose upon such new corporation, created for the purpose of taking over the property rights and franchises of an old corporation as a condition of its creation, that it should be subject to the general provisions of law applicable to other corporations of like character. Cullen and Gray, JJ., dissented upon the ground that the intent of the phrase quoted was to subject the reorganized company to all duties and liabilities which the legislature might lawfully impose on corporations as a class, but not to require of it a loss of the property and franchises of the old corporation.

The opinion of the United States Supreme Court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, lends but little, if any, support to the distinction made by the New York court of appeals between corporations organized before and those organized after the enactment of the statute in question. It will be observed that the former court passed over

the objection to the statute based upon the constitutional provision forbidding the impairment of the obligations of contracts, and put its decision squarely upon the provision of the 14th Amendment, already referred to. There is nothing in the opinion or statement of facts which suggests any limitation of the doctrine there laid down to cases in which the corporation affected was incorporated prior to the enactment of the statute in question, nor to except corporations subsequently organized therefrom.

In *Purdy v. Erie R. Co.* supra, the court, in answer to the objection that the mileage-book statutes were regulations of interstate commerce, and for that reason in conflict with the constitutional provision, held that the statutes must be construed as applying to transportation wholly within the state, and, as so construed, did not infringe the commerce clause. The same position on this point had been previously taken in *Dillon v. Erie R. Co.* 19 Misc. 116, 43 N. Y. Supp. 320, and *Beardsley v. New York, L. E. & W. R. Co.* 15 App. Div. 251, 44 N. Y. Supp. 175.

Upon a writ of error in the *Purdy* Case the United States Supreme Court (*Erie R. Co. v. Purdy*, supra) held that no Federal question was presented by the decision that the statute did not conflict with the commerce clause, in view of the fact that that decision proceeded on the theory that the statute applied only to domestic transportation.

invokes the jurisdiction of the commission under §§ 16 and 19 of the act approved April 15, 1903 (Laws 1902-1904, pp. 141, 142), and carried into the Code of 1904, at page 714, as § 1313 (a). By that statute the commission is authorized to compel all corporations to perform any public duty or requirement, and to impose fines upon them for failing to do so. This brings within the judicial jurisdiction of the commission the enforcement of all statutes imposing public duties upon public-service corporations. The commission cannot impose a fine upon a corporation without summoning the company before it, hearing what it has to say in its defense, and passing judgment thereon judicially; in other words, giving the company a fair trial as in any other court. To proceed otherwise under this statute would be repugnant to fundamental principles, and would make the statute itself in violation of the Constitution, both of the state and the United States. The jurisdiction of the commission is further enlarged by clause 19 of § 1294 (b) of the Code of 1887 [Va. Code 1904, p. 660], being § 19, chapter 2, page 974, of the act concerning public-service corporations. The commission is there given jurisdiction to entertain a petition filed before it complaining of violation of any of the provisions of that act. 'If the grievance complained of be established,' says the legislature in this act, 'the State Corporation Commission, sitting as a court of record, shall have jurisdiction by injunction, etc.' The commission awarded an injunction under this statute against the Virginia Passenger & Power Company restraining it from increasing its rates by discontinuing transfers. See report of State Corporation Commission of 1904, part 1, page 94.

"The commission having summoned the defendant company before it to show cause why a penalty should not be imposed upon it, the commission must hear fairly and pass judicially upon any issues properly raised. It matters not that one of the issues is the unconstitutionality of the act which the commission seeks to enforce. If the act is void, it is a just reason why the company cannot be compelled to comply with it, or be fined for violating it.

"In support of its argument that the act in question here contravenes the 14th Amendment of the Constitution of the United States, the company relies chiefly upon the authority of the case of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. The Supreme Court of the United States, in that case, held unconstitutional a statute of Michigan requiring railroad companies to keep on sale 1,000-mile books or tickets. The opinion 7 L.R.A. (N.S.)

delivered by Mr. Justice Peckham declares that legislation of this character violates the constitutional rights of the railroad companies to due process of law and the equal protection of the laws. The statute provided that the tickets might be required to be issued in the name of the purchaser and his wife and children; the ticket to be valid for two years, and the unused portion then to be redeemed. The court says: 'We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature, having established such maximum as a general law, now assumes to interfere with the management of the company while conducting its affairs pursuant to, and obeying, the statute regulating rates and charges, and, notwithstanding such rates, it assumes to provide for a discrimination, an exception in favor of those who may desire, and are able to purchase, tickets at what might be called wholesale rates,—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid, and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute; and to that extent it would seem that the statute takes the property of the company without due process of law.'

"The learned judge reasons at length along the same lines. The opinion establishes that the state may prescribe a maximum scale of rates, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. The reasoning of the learned judge is not entirely and clearly convincing, nor is the conclusion reached by him very satisfactory; and three of the judges dissented. But we are bound by this decision, as it

emanates from the highest tribunal in the country. The case has been referred to in several subsequent cases in the Supreme Court of the United States, without criticism or doubt cast upon it. It has also been followed in New York. In that state a statute somewhat similar to the Michigan and Virginia statutes was assailed as unconstitutional in the case of *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488. The court of appeals of New York refers to the opinion of Justice Peckham on the Michigan statute, and is not disposed to agree with all of its reasoning. But the court, in a brief opinion, concludes that it is bound by this opinion of the Supreme Court of the United States on a question arising under the Federal Constitution, and held the New York statute to be unconstitutional.

"In referring to the case in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, the attorney general says in his written brief: 'I frankly concede that, unless this case can be distinguished from the Michigan Case, or unless it can be shown that this case is overruled by some other decision or decisions of the United States Supreme Court, the decision of the United States Supreme Court in the Michigan Case must be considered as conclusive of this case, and the Churchman act must, in that event, be held to be unconstitutional.' It is sought to distinguish the Virginia statute from the Michigan statute by pointing out that, in the latter law, the right to purchase the mileage tickets seemed to be confined to married men, and that the law itself was a portion of a general statute by which the legislature had fixed a maximum scale of passenger rates. These differences are incidental, and we do not think that they affect the reasoning by which the conclusion is reached by the Supreme Court of the United States.

"The court says: 'The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions; and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over those corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.'

"We conclude that the statute before us 7 L.R.A. (N.S.)

is in conflict with the Constitution of the United States, and is therefore void, and we have no authority to punish the defendant company for failure to comply with its terms. We are greatly strengthened in this conclusion by a convincing opinion delivered several days ago upon this question by the learned judge of the corporation court of Staunton, in which he reaches a similar result.

"As the conclusion already reached forces us to take no further proceedings in this matter, and so disposes of the whole case, it is unnecessary for us to pass upon the other question raised by the defendant company. The entire lawmaking power of the people of Virginia is vested in their representatives constituting our general assembly, subject only to such limitation as may be placed upon it by the Constitution of the state. Whether the provisions of the Constitution relative to the powers and authority of this commission and vesting in the commission the legislative power to make rates are so worded as to exclude the general assembly from exercising its legislative power in that respect is a question which it is needless for the commission to pass upon, unless it is so presented as to render its adjudication absolutely essential to the decision of the case."

It will be observed that the commission considered that the controlling question in the case is whether or not the act of the general assembly under review, and which we will for convenience refer to as the "Virginia mileage act," is violative of the provisions of the 14th Amendment of the Constitution of the United States, by depriving the appellee company of its property or liberty without due process of law, or by depriving it of the equal protection of the laws. The learned attorney general concedes that the case of *Lake Shore & M. S. R. Co. v. Smith*, supra, which we shall speak of for convenience as the "Michigan Case," must be considered as conclusive of this case, unless they can be distinguished, or it can be shown that the Michigan Case is overruled by some other decision or decisions of the United States Supreme Court. Therefore there is but little for us to add to what has been said in the opinion of the State Corporation Commission, supra.

The leading case relied on for the commonwealth is *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, which announced the broad doctrine that a state government has the inherent right to regulate and control railroad companies and other public-service corporations, and to prescribe the rates and charges that they should be allowed to make. In that case, the power of the legislature of Illinois to fix by law the maximum

of charges for storage of grain in warehouses in Chicago, and other places in the state, was the question at issue, and, upon the ground that when private property is devoted to public uses it is subject to public regulation, it was held that, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, the legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the state. A lengthy dissenting opinion was filed by Mr. Justice Field, concurred in by Mr. Justice Strong, taking the ground that the ruling of the majority was subversive of the rights of private property theretofore believed to be protected by constitutional guaranties against legislative interference, and in conflict with the authorities cited in its support; and that the decision of the court gave unrestrained license to legislative will.

By subsequent decisions of the same court, the doctrine laid down in *Munn v. Illinois* has been frequently and materially modified. Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

With the modifications engrafted upon the rule referred to, the rule itself has been approved in a number of cases down to and including *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; and in those cases decided after the Michigan Case we are unable to find anything that can be construed as overruling that case, or discrediting it in any degree, the fact being that the case was not referred to because the circumstances in those cases, on the one hand, and the Michigan Case on the other, were different, and therefore the language of the decisions different. In the cases modifying the doctrine of *Munn v. Illinois*, the trend of judicial thought, it may be safely said, is more in harmony with the views expressed in the dissenting opinion of Mr. Justice Field than with the view of the case taken by the majority of the court.

The most important and pertinent modification to be considered in connection with the case under review appears in the Railroad Commission Cases, *supra*, where the opinion by Chief Justice Waite (who also wrote the opinion in *Munn v. Illinois*), after reviewing the ruling in *Munn v. Illinois*, says: "From what has thus been said it is not to be inferred that this power of limi-

tation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which, in law, amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, the rule in *Munn v. Illinois* appears to have been approved by a majority of the court and another very important modification of the rule ingrafted thereon, to the effect that, where a state created a commission and clothed that commission with authority to prescribe rates and charges to be made by railroad companies, the power thus delegated to the commission should not be exercised arbitrarily without giving the railroad companies affected a day in court and opportunity to be heard, and to appear and show the effect of the schedule of rates and charges prescribed by the commission upon them; and that to do this was depriving them of their property without due process of law, and depriving them of the equal protection of the laws.

The other important modifications of the rule are not relevant to the issue in this case, and were announced in a number of cases in which the rule was variously formulated, many of which are exhaustively reviewed by Mr. Justice Harlan in *Smyth v. Ames*, *supra*, where that learned judge states the doctrine, as established by the adjudications of the court, as follows: "(1) A railroad corporation is a person within the meaning of the 14th Amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the 14th Amendment of the Constitution of the United States. (3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without

due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

We are wholly unable to perceive the antagonism claimed, on behalf of the commonwealth, to exist between the cases we have mentioned and a number of others, not necessary to be adverted to, recognizing the rule in *Munn v. Illinois* with its modifications, and the principle announced in the *Michigan Case*. The fact is that the last-named case refers to *Munn v. Illinois* and the cases modifying the rule announced therein, and recognizes the existence of the rule as modified; but, while recognizing the power of the legislature to prescribe maximum charges which may be made by public-service corporations, held that the *Michigan* mileage statute did not belong to that class of legislation enacted in the exercise of this admitted power, but was a taking of the property of the company without due process of law,—legislation which is prohibited by the 14th Amendment,—and therefore violated the constitutional rights of railroad companies to due process of law, and the equal protection of the laws. It was contended in that case, as in the case here, that, as the legislature would have the power to reduce the maximum charges to the same rate at which the *Michigan* statute provided for the purchase of 1,000-mile tickets, the railroad company could not be harmed nor its property taken without due process of law when the legislature only reduced the rate in favor of a few citizens instead of all; but the opinion denied the right of the legislature to make such an alteration, upon the ground that to do so might involve a reduction of rates to an amount insufficient to give the remuneration to which the railroad company was legally entitled under the decisions of the court.

It will be observed that, while the *Michigan* statute required 1,000-mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and made them valid for two years after the date of purchase, the *Virginia* mileage act requires the companies at all times, day and night, at all stations, regular and flag, to keep on sale books of 500 miles and over, and that "it shall be unlawful for any transportation company or corporation operated by steam to charge or collect a greater sum than 2 cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year

from the date of same." As it appears to us, the provisions of the two statutes are practically the same, and fall within the purview of the *Michigan Case*, as the reasoning for holding the one violative of the provisions of the 14th Amendment of the Constitution of the United States applies as well to the other. As stated in the opinion of the State Corporation Commission above, the incident that the *Michigan* statute had fixed a maximum scale of passenger rates is mentioned in the *Michigan Case*, but the conclusion reached was in no way rested upon that incident. On the contrary, the opinion says: "The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community, and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not a reasonable regulation." And again: "Regulations for maximum rates for present transportation of persons, or property, bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing the maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company." Clearly the dominant idea running through the whole opinion is that this is class legislation, and is not for the equal benefit of the whole people; therefore the conclusion is irresistible that the same judgment would have been rendered by the court had the legislature of *Michigan* not fixed a maximum scale of passenger rates.

It is true that the *Michigan Case* was decided by a divided court, as was the case of *Munn v. Illinois* and nearly all of the cases sanctioning the doctrine of that case; but, instead of the *Michigan Case* being discredited by any subsequent decision of the court, in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 288, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, in referring to the power of a state to regulate, etc., railroad companies, the *Michigan Case* is cited as authority for the proposition of law, that, "while this power of regulation exists, it is also to be remembered that the legislature cannot, under the guise of regulation, interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation." And the court adds: "The distinction between this case and that of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, is plain,

There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason."

We have, then, in *Wisconsin, M. & P. R. Co. v. Jacobson*, the court's own construction of its decision in *Lake Shore & M. S. R. Co. v. Smith* (the Michigan Case).

In *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488, holding a New York statute, similar to the Michigan and the Virginia mileage statutes, in conflict with the 14th Amendment of the Constitution of the United States, the opinion, while indicating that the court was not disposed to agree with all its reasoning, says: "The Supreme Court of the United States, in *Lake Shore & M. S. R. Co. v. Smith*, . . . has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us."

We fully recognize, as did the court in *Beardsley v. New York, L. E. & W. R. Co.* supra, that the decision in the Michigan Case is conclusive upon us on the question of the constitutionality of the statute under consideration, and therefore the judgment of the State Corporation Commission complained of must be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PETER ANDERSON, Plff. in Err.,
v.

ROSEWELL MESSINGER.

(77 C. C. A. 179, 146 Fed. 929.)

Mortgage—assignee—foreclosure—title.

1. The bidding in of the property, by one who has taken an assignment of a mort-

gage as collateral security, at his own foreclosure sale, gives him a good title to the property, and transfers the trust in favor of his debtor to the proceeds, although such assignor, because not within the jurisdiction, was not made a party to the proceedings; where, in a contract after the sale, assignor and assignee contracted for a settlement, one element of which was that the foreclosure proceedings should not be disturbed.

Will—remainder.

2. A life estate with remainder in succession to the lineal descendants of testator's sons, the surviving son, and testator's brothers and sisters, and not a fee in the sons with executory devises, is created by will giving a moiety of testator's estate to each of his two sons, and continuing: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one half both of the decedent's original portion, as well as one half of the portion taken by survivorship, shall go to" one of testator's brothers, and the other half to his surviving brothers and sisters.

Life estate—power of disposal—enlargement.

3. A life estate in real estate is not enlarged by a power to dispose of the property by will upon reaching twenty-one years of age.

Testamentary trustee—termination of power—quitclaim.

4. A testamentary trustee who is instructed to turn the property over to testator's son upon his reaching majority has no authority, after that event, to release property of the testator held by absolute title, to a debtor of the estate who claims that the property was held merely as security for the debt.

Same—equity of grantee.

5. No equity is created in favor of the assignor of a mortgage, as collateral security for his debt, by his inducing testamentary trustees of the creditor, after their authority has expired, to quitclaim to him the property which the testator had bought in under foreclosure of the mortgage, on the theory that he held the property in trust to secure the debt; although the debtor, in consequence of the agreement for such deed, continues his payments on the original debt, which payments, however, do not much, if any, exceed the amount remaining due after crediting him with the amount of the bid.

Life tenant—prejudice of remainder-man.

6. Life tenants cannot, by their own acts or admissions, defeat or prejudice the rights of the remainder-man.

(June 5, 1906.)

Case Note.—Does assignee of mortgage as collateral security, who forecloses the same and purchases the property, hold the title subject to a trust in favor of the assignor:—Apart from the effect that 7 L.R.A. (N.S.)

the contract between the parties may have had upon the question, and upon the assumption upon which the case was decided, that the assignor of the mortgage was not served with process in the foreclosure suit,

ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment in favor of defendant in an action brought to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. R. P. Carey and C. H. Trimble for plaintiff in error.

Messrs. Clayton W. Everett and Oliver B. Snider, for defendant in error:

As the failure of issue, and limitation over, provided for in Anderson's will, must have occurred, if at all, at the death of his surviving son, no estate tail was created.

Pells v. Brown, Cro. Jac. 590; Hart v. Thompson, 3 B. Mon. 487; Daniel v. Thom-

son, 14 B. Mon. 663; Abbott v. Essex Co. 18 How. 202, 15 L. ed. 352; Anderson v. Jackson, 16 Johns. 382, 8 Am. Dec. 330; Jordan v. Roach, 32 Miss. 481.

William and James Anderson took, under their father's will, each a fee simple of his original one half; but the share of the one who first died without issue passed over to the surviving brother by way of executory devise.

Abbott v. Essex Co. supra; Smith v. Berry, 8 Ohio, 367; Thompson v. Hoop, 6 Ohio St. 480; Waterfield v. Rice, 49 C. C. A. 504, 111 Fed. 628; Parish v. Ferris, 6 Ohio St. 563; Niles v. Gray, 12 Ohio St. 320; Taylor v. Foster, 17 Ohio St. 166; Piatt v. Sinton, 37 Ohio St. 353; Collins v. Collins, 40 Ohio St. 353; Durfee v. Mac-

the decision in the foregoing case, that the trust was transferred to the proceeds, and that the assignee held the title to the land itself absolutely and subject to no trust in favor of the assignor, seems to be against the weight of authority. The foreclosure in *Slee v. Manhattan Co.* 1 Paige, 48, however, was by advertisement under a power of sale, and the case is therefore distinguishable from *ANDERSON v. MESSINGER*. The court in the former case, however, said that the result would have been the same if the foreclosure had been by suit in equity to which the assignor was not a party. And the doctrine of that case was applied in *Hoyt v. Martense*, 16 N. Y. 231, holding that, where the assignor and assignee of a mortgage as collateral security joined in a suit to foreclose the same, and the assignee became the purchaser of the mortgaged property at the foreclosure sale, he held the property in trust for the assignor, and subject to the latter's right to redeem the same by the payment of the debt for which the mortgage was pledged. The court said that the object of the action was solely to foreclose the mortgagor's equity of redemption, and had no reference whatever to the right of the assignor to redeem the mortgage by the payment of the principal debt; and that such right of redemption was wholly unaffected by the foreclosure and sale.

The doctrine of these cases was also followed in *Dalton v. Smith*, 86 N. Y. 176, where the assignee bought at the foreclosure sale, the assignor not being a party. It seems that in this case the assignee, as a part of the contract under which the mortgage was assigned to him, expressly agreed that he would, upon payment of the mortgage, pay the borrower the excess of the principal over and above the amount of the principal loan; but it is not apparent how this agreement could affect the question, since that would be his implied obligation in any event.

So, in *Re Gilbert*, 104 N. Y. 200, 10 N. E. 148, the court, in applying the doctrine of these cases, held that, where the assignee of a mortgage as collateral security purchased

the property under foreclosure in a suit to which the pledgor was not made a party, the land is substituted for the mortgage, and the assignee holds it as security merely, subject to the assignor's right to redeem.

As pointed out in the opinion in the case last cited, the case of *Bloomer v. Sturges*, 58 N. Y. 168, holding that the title acquired by an assignee as collateral security at a sale of the property under a foreclosure was not subject to a trust in favor of the assignor, is not opposed to the doctrine of these cases, since the decision was upon the ground that the pledgor was made a party, and that his rights were extinguished by the foreclosure decree, which, by its terms, adjudged that the defendants and each of them be forever barred and foreclosed of all right, title, interest, and equity of redemption in the premises.

The opinion in the last case expressed a doubt whether, upon the assumption that an equity does remain in the assignor after the purchase of the property by the assignee, such equity extends to the land itself, or constitutes merely a lien for the definite sum of the debt originally secured by the mortgage. That doubt, however, was dispelled by the opinion in *Re Gilbert*, supra, expressly holding that the equity extends to the land itself, and that the land is substituted for the mortgage as the subject of the trust in favor of the assignor.

The doctrine that an assignee as collateral security, who forecloses the mortgage and obtains the title, holds the same subject to a trust in favor of the assignor, is also declared in *Brown v. Tyler*, 8 Gray, 135, 69 Am. Dec. 239; *Montague v. Boston & A. R. Co.* 124 Mass. 242; and *Stevens v. Dedham Inst. for Savings*, 129 Mass. 547. In these cases, however, the foreclosure was not by suit, the assignee having obtained the title by seisin and possession under execution; and they are therefore distinguishable from *ANDERSON v. MESSINGER*.

The court, in *Ross v. Barker*, 58 Neb. 402, 78 N. W. 730, seems to assume that generally the assignor of a mortgage as collateral security, if not made a party to the fore-

Neil, 58 Ohio St. 238, 50 N. E. 721; Carter v. Reddish, 32 Ohio St. 13; Darlington v. Compton, 20 Ohio C. C. 242; Woodliff v. Duckwall, 19 Ohio C. C. 566.

A devise to James Anderson for life or fee simple, with the remainder over if he should die without children, does not create a gift by implication to his children.

29 Am. & Eng. Enc. Law, p. 386; Jarman, Wills, 6th ed. p. 555; Page, Wills, § 468, p. 554; Scale v. Rawlins [1892] A. C. 342; Re Rawlins, L. R. 45 Ch. Div. 299; Sparks v. Restal, 24 Beav. 218; Woodliff v. Duckwall, *supra*; Carter v. Reddish, 32 Ohio St. 1; Piatt v. Sinton; Collins v. Collins; and Durfee v. MacNeil,—*supra*.

Anderson was a trustee for Butler.

Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 43 L.R.A. 737, 42 N. E. 995; Canfield v. Minneapolis Agri. & Mechanical Assn. 4 McCrary, 646, 14 Fed. 801; Blood v. Shepard, 69 Kan. 752, 77 Pac. 565; Smith v. Cremer, 71 Ill. 185; Seymour v. Freer, 8 Wall. 202, 19 L. ed. 306.

The foreclosure proceedings to which Butler was not a party did not extinguish his equity of redemption in the collateral mortgage.

Hoyt v. Martense, 16 N. Y. 231; Slee v. Manhattan Co. 1 Paige, 48; Dalton v.

Smith, 86 N. Y. 176; Bard v. Poole, 12 N. Y. 495; Johnson v. Hart, 3 Johns. Cas. 322.

Mr. H. E. King also for defendant in error.

Severens, Circuit Judge, delivered the opinion of the court:

This is an action of ejectment brought by Anderson, the plaintiff in error, to recover the possession of certain lots in the city of Toledo, Ohio, described in his petition, of which he claims the legal title, and the possession of which, he says, is wrongfully withheld by the defendant. The answer denies the alleged title of the plaintiff, and denies the plaintiff's right to the possession. A stipulation was filed waiving a trial by jury, and consenting to a trial by the court. Upon the trial, proof of all the material facts was made by mutual stipulations which are incorporated in the bill of exceptions. The court rendered judgment for the defendant, the entry reciting that the court "does find the issues of the cause with the defendant." As the facts material to the judgment were agreed, this must mean that the court found the issues of law for the defendant. Wayne County v. Kennicott, 103 U. S. 554, 26 L. ed. 486; Hulitt v. Ohio Valley Nat. Bank, 69 C. C. A. 609, 137 Fed. 461, 465. When

closure suit, may elect to regard the title acquired by the assignee at the foreclosure sale as held in trust for him, though in that case, it appearing that the intention was that the assignee should acquire the complete title, it was held that the assignor might affirm the sale and demand credit on the principal debt for the amount bid, less cost and the expenses of the foreclosure, and, if such sum exceeded the aggregate of the principal debt, might recover that excess. The court said that it was unnecessary to decide whether the election by the assignor to affirm the sale would exist in a similar case, where nothing appeared, except the fact of the bid and sale to the assignee,—there being no other circumstances or evidential matters,—to disclose any particular intention.

In Plucker v. Teller, 174 Pa. 529, 52 Am. St. Rep. 825, 34 Atl. 208, the pledgee, who, by the terms of the pledge, was not authorized to foreclose the mortgage, at the request of the pledgeor, and a few days before the principal debt was due, brought suit to foreclose the mortgage, and eventually purchased the property at the sale thereunder, having previously notified the pledgeor that he intended only to bid enough to protect the principal loan, and that, if the pledgeor desired to bid anything above that amount, it would be necessary for him to be on hand himself. The court said that the circumstances relieved the pledgee from any trust in favor of the pledgeor, and put him in a position of an ordinary purchaser at a

mortgage sale, and that this feature clearly distinguished the case from *Re Gilbert*, *supra*, and other New York cases above cited, and made it more analogous to *Bloomer v. Sturges*, *supra*.

In *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65, the court declared that it was well established that, where a mortgage of real estate has been assigned as collateral security for a debt other than the mortgage debt, and the holder of the collateral forecloses the mortgage without making the assignor a party, and becomes the purchaser under the decree, the sale extinguishes the mortgagor's right of redemption only, and does not otherwise affect the relations of assignor and assignee of the collateral. The court applied this doctrine to an analogous case by holding that, where a pledgee of mortgage bonds assigned them as collateral security for a debt of his own, and the assignee foreclosed against the original pledgeor without joining the original pledgeor, and purchased the bonds himself, he was bound to account to the pledgeor for the bonds or their value, and not merely for the amount bid at the sale.

The court, in *Smith v. Bunting*, 86 Pa. 116, did not pass upon the question discussed in this note, but merely declared that, upon the assumption that the property was held subject to a trust, the pledgee would be entitled to a judgment for the entire amount of the principal debt since, upon that assumption, the collateral had

the facts are agreed, they are the equivalent of facts found by the court; and the question of the propriety of the judgment is, in each case, the same. *Wayne County v. Kennicott*, supra; *Lehnen v. Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485. Some other matters hereafter to be referred to were received in evidence over objections which were incompetent to disturb or affect the ultimate material facts, and could not, therefore, affect the judgment. The case is properly here for review to determine whether the judgment is the one which the facts agreed required.

Each of the parties derives his title from Edward Bissell, a former resident of Toledo. On May 19, 1838, Bissell, claiming to be the owner of the premises, gave his bond to Charles Butler, of New York, for the sum of \$21,500, payable one year from that date, with interest at 7 per cent, and, to secure the payment thereof, gave, with his wife, to said Butler, a mortgage on the premises in question. This bond and the mortgage were assigned by Butler, on September 23, 1841, to Henry Anderson, a resident of Holly Springs, Mississippi, to secure the payment of his note to Anderson for the sum of \$20,000 and interest there-

on; and, for further security, Butler assigned to said Anderson 546 shares of the Erie & Kalamazoo Railroad Company of the par value of \$50 per share. Butler having defaulted in the payment of his note, Anderson, on September 19, 1843, filed his bill in chancery in the court of common pleas for Lucas county, Ohio, to foreclose the Bissell mortgage, making Bissell and his wife, Butler, and other parties, defendants. These parties, other than Butler, were served with process. Butler was not served and did not appear. That suit was pursued to a decree which was rendered April 1, 1844, for the sum of \$29,139.01. A sale was ordered and a master appointed to conduct it. The mortgaged lands were bid off by Henry Anderson at the price of \$6,910. The sale was duly confirmed, and the master was ordered to make the proper deed to the purchaser. At this stage of the proceedings, and on October 4, 1844, an agreement was entered into between Butler and Anderson, which, after reciting the giving of the bond and mortgage by Bissell, the assignment thereof by Butler to Anderson, and the assignment of the 546 shares of railroad stock to secure Butler's note, and the above-stated proceeding for the foreclosure of the mortgage, proceeded as follows:

not been realized, but had only been changed from a mortgage to the premises formerly bound thereby.

The decision in *Rice v. Dillingham*, 73 Me. 59, is merely to the effect that the pledgeor cannot maintain trover for the mortgage and notes assigned after the mortgage has been foreclosed; and that whatever remedy he has is in equity. The court did not undertake to say whether he did have a remedy in equity.

In *Anderson v. Olin*, 145 Ill. 168, 34 N. E. 55, the pledgeor's right to redeem after the time allowed by the decree of foreclosure under which the pledgee purchased the land was denied. But in this case the pledgeor was a party to the foreclosure suit, and was served with process, and a decree *pro confesso* rendered against him by default, providing that, if the premises sold should not be redeemed within a specified time, the defendants should be forever barred and foreclosed of all right and equity of redemption. The court made a special point of the fact that the pledgeor was a party to the foreclosure suit; and it is apparent that the decision rests upon the same ground as that in *Bloomer v. Sturges*, supra, which is cited in the opinion, and is distinguishable from the other New York cases above cited, holding that the pledgee's title is subject to a trust in favor of the pledgeor where the latter was not a party to the foreclosure suit.

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is, however, sustained by *Kelly v. Matlock*, 85 Cal. 122, 24 Pac. 642, and *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068, declaring, in general terms, that a pledgee who purchases at his own foreclosure sale, in the absence of fraud, takes a free and absolute title unencumbered by a trust in favor of the pledgeor, and is required to account to the latter only for the proceeds realized on the foreclosure sale. This was apparently upon the assumption even that the pledgeor was not a party to the foreclosure suit. In the former case, however, the doctrine was not applied, for the reason that the pledgee did not proceed with the foreclosure to a judgment, but took a deed from the mortgagor in satisfaction of the claim, and satisfied the mortgage of record.

The doctrine of these cases was also recognized in *Hoult v. Ramsbottom*, 127 Cal. 171, 59 Pac. 587. In that case, however, the court held, for the purpose of protecting the pledgee against liability to account to the pledgeor for the full amount of the bid made by him at the foreclosure sale, that the trust in favor of the pledgeor was transferred to the land, it appearing that the parties had agreed that the foreclosure proceedings should be conducted in the pledgeor's interest, and that the pledgee's agent should bid the amount of the mortgage which was largely in excess of the principal debt for which the mortgage was pledged.

"And, whereas, the said Henry Anderson, at the instance and request of the said Charles Butler, and in consideration of the covenant of the said Charles Butler hereinafter contained, is willing to relinquish and surrender to the said Charles Butler the collateral securities, so assigned as aforesaid, for the payment of said note of \$20,000, so far as the same may be done without prejudice or injury to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler to the said Henry Anderson on the principal debt.

"Now, therefore, these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, and said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand, or liability, whatsoever, for or on account of the said bond and mortgage, but without prejudice to the proceedings which have been or may be adopted to effect the sale of the said mortgaged premises; and that the said Henry Anderson has also, by instrument in writing, released and transferred to the said Charles Butler the said 546 shares of Erie & Kalamazoo Railroad Company stock.

"And the said Charles Butler, in consideration of the surrender and relinquishment of the securities, hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to affect or impair the liability of him, the said Butler, on the said note for \$20,000; and the said Charles Butler also covenants and agrees to and with said Henry Anderson that he, the said Butler, will well and faithfully apply and pay over to the said Henry Anderson on account of the said note, all sums of money or other valuable consideration which he, the said Butler, may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him the said Henry Anderson.

"In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

"[Signed]

Henry Anderson.

"Charles Butler."

Thereafter, on November 18, 1844, the master, in pursuance of the above-mentioned

decree and of the sale and the order of confirmation thereof, executed and delivered his deed of conveyance to Anderson, his heirs and assigns, of the premises here in question, and which, as above stated, had been bid off by him. Prior to the date of this last-mentioned agreement between Butler and Anderson, Butler had, on February 22, 1843, obtained a quitclaim deed of these premises from Bissell and wife. But this deed was not recorded until after Anderson's death, nor until October 13, 1849; and it does not appear that the latter ever had notice of it. After the contract of October 4, 1844, Butler made no further payment on his debt to Anderson during the lifetime of the latter, nor to his representatives until October, 1849.

The first question in the case is, What, as the consequence of these proceedings for foreclosure, the sale of the property to Henry Anderson under the decree, and the agreement of October 4, 1844 between him and Butler, was the nature of the title conveyed to Anderson by the master's deed? The contention for the plaintiff is that it conveyed to him the title to the property freed from the encumbrance of the mortgage; and that the price which he paid was properly applicable to the payment *pro tanto* of Butler's note. For the defendant, it is contended that Anderson, being assignee of the mortgage, and having bid off the property and taken the master's deed to himself, acquired only Bissell's equity of redemption, and held the property thereafter as trustee for Butler and as a continuing security for the payment of the latter's note. It is a well-settled rule of law that, when the owner of securities pledges them to secure the payment of his own debt, he impliedly transfers the right to the remedies which will make the securities available for the payment of his debt in case of his own default. *Schleman v. Bowlin*, 36 Minn. 198, 30 N. W. 879; *Slee v. Manhattan Co.* 1 Paige, 48, 78. And there necessarily goes with this power to make the securities available, the incidental power to transfer the assignor's interest in the securities; otherwise the purchaser does not get the property pledged by the securities, but an indefinite interest depending on contingencies over which he has a remote, if any, control, a circumstance which would greatly depreciate the value of the pledge.

There is also another rule of general application, which is that a pledgee, who is a trustee, cannot become the purchaser at his own sale of the pledge. But this rule is not applicable to a judicial sale conducted by an officer appointed by law. Nor, indeed, is such a purchase absolutely void in all circumstances, when the sale is a private

sale and the purchaser has an interest to protect. In either of the last-stated instances, the sale would be voidable if the purchaser were guilty of any fraud or other wrongful practice in the transaction; in the first instance, by a refusal of the court to confirm the sale, or by some judicial proceeding to impeach it; and in the latter instance, by such appropriate action, private or judicial, as he should elect to make his objection defective. *Richards v. Holmes*, 18 How. 143, 15 L. ed. 304; *Smith v. Black*, 115 U. S. 308, 29 L. ed. 398, 6 Sup. Ct. Rep. 50; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

In *Richards v. Holmes*, supra, a deed of trust had been given to secure the payment of a note, which, at the time of the sale under the trust, was held by Harper. The latter authorized the auctioneer to make a bid for him, and, that being the best price offered, the property was struck off to him. Upon a bill filed by a subsequent encumbrancer to redeem, it was contended that the sale under the trust deed was void upon the ground that the beneficiary of the trust could not bid at the trustee's sale, and that the first mortgage continued subject to redemption. But the court, by Mr. Justice Curtis, observing that in fraud appeared, said: "It was for the advantage of these complainants, as subsequent encumbrancers, that this property should sell for the best price which could be obtained. Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by them. It is only some practice to prevent bidding, or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. We have no doubt the creditor, for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but, whether he had or not, his doing so could not be injurious to the complainants." It would have made no difference in that case if the bid had been in the trustee's name, for his act would have inured to his *cestui que trust*, who was the real party. And the learned justice further said: "And the same remark applies to the trustee. It was his duty to obtain for the property the best price he could by the use of due diligence in a fair sale. It would have been improper for him, in behalf of the creditor, to employ the auctioneer to buy at anything short of that best price. But there was no impropriety in his employing him to bid a particular sum for the creditor, to prevent a sacrifice of the property."

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But in any such case the pledgeor may, if he chooses, affirm the sale; and, if he does, the ground of objection is removed. *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 43 L.R.A. 737, 42 N. E. 995.

If, in the present case, the property had been sold to another party, there could be no doubt that the sale and deed would have carried to the purchaser the title which the mortgagor, Bissell, had when he made the mortgage, and would have transferred any interest which Butler had in the property to the proceeds of the sale. The trust would attach to them. And, to the extent of the sum due on Butler's debt, they would be a satisfaction of it. If there were a surplus, it would belong to Butler. Nor could it make any difference that Anderson bid off the property. The result would be the same. If he paid to the master the amount of his bid, it would be paid back to him on its being brought into court, a formality generally dispensed with by the master's taking the receipt of the creditor for so much of the proceeds as the decree adjudges to be due to him and bringing the balance into court to be paid over to the party entitled. If, as here, the party who might be so entitled was beyond the process of the court, he could come in by petition, and, on showing his right, obtain it. Butler, the assignor, was not served with process. He was a proper, but not an indispensable, party, and he was not within the jurisdiction of the court. The object in making him a party would be to enable him to make any objections which his interest might require and to preclude him from thereafter raising any. But his agreement shows that the debt remained unpaid, and that, knowing the proceedings were pending and without suggesting any objection to them, he stipulated for their completion. The reasons on which a party in interest is allowed to purchase at a judicial sale whereby he must become answerable for his bid are inconsistent with the notion that the proceedings have resulted in nothing more than a continuance of the trust for the same whole debt. We think the legitimate result of the foreclosure proceedings was to transfer the trust to the proceeds of the sale; for, by assigning the Bissell debt and mortgage, Butler must have contemplated that the consequence must be that, upon his default, this transmutation of his interest by foreclosure of the mortgage and the sale of the mortgaged property would be likely to ensue.

We are aware that in *Slee v. Manhattan Co.* 1 Paige, 48, it was held, in substance, by Chancellor Walworth that, in a case where the assignee of a mortgage becomes the purchaser of the premises at a sale made

under a power given by the mortgage, the assignee having become the purchaser at his own sale, there was no transmutation of the interest of the mortgagee; that his interest in the mortgage "remained untouched by that foreclosure," and that the purchaser had acquired thereby only the equity of redemption. The learned chancellor further indicated his opinion that the same consequence would ensue in the case of an assignee of a mortgage bidding in the property at a sale under a decree in a suit brought by him to foreclose the mortgage. This was *obiter*. But the case has been accepted by the courts of New York as authority for the application of the doctrine to judicial sales, as well as to sales under a power in the mortgage deed. The chancellor, in his opinion, admitted that the authority to execute the power was vested in the assignee "by the mere act of the assigning the legal interest in the mortgage," and that, if the assignee, in the fair execution of the power, had sold and conveyed the premises to a stranger for one half the amount of the debt, the assignor would have been bound to pay the balance of the debt, and would have had no claim to redeem the mortgaged premises from such purchaser; that "he must have understood that the defendants [the assignees] had a right to foreclose under the statute. The premises were advertised and sold with his full knowledge of the facts, and he made no objection that they were not authorized thus to proceed." And the chancellor further says that, if the assignee had foreclosed in chancery, "a stranger purchasing under the decree would unite the legal estate which is in the defendants [the assignors] with the equity of redemption of . . . [the mortgagors] sold under the decree, and thus acquire the whole estate which existed in the mortgagors previous to the giving of their mortgage." But, because the premises were bid off by the assignee (in that case they were sold to a person who was an agent of the assignee, who conveyed them to his principal), the chancellor held that the assignor's interest had not been cut off by the sale. This is opposed to the decision in *Richards v. Holmes*, *supra*. There might be good reason for holding in such a case that, if any injury had been done to the assignor in consequence of the assignee's bidding, the former could have elected to disaffirm the sale. But the *dictum* that the sale to the assignee under a decree would be ineffectual to pass the title of the assignor, and the distinction made between a purchase by the assignee and one made by a stranger, cannot be supported, when it has been admitted that the assignee may bid at the sale.

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In such a case the thing sold is not one thing if sold to a stranger, and another thing if sold to an assignee. They were not bidding for different things, and the deed of the master is for the thing sold.

Coming, then, to the agreement of October 4, 1844, it is apparent that Butler knew that Anderson had bid off the property, and he consented that the sale should go on to its consummation. It was not stated that the expected deed should be affected by a trust, and the insistence with which Anderson, by the stipulation of his contract, held on to the benefits of his purchase, is indicative of his understanding in making the agreement, and it was indicative to Butler of Anderson's expectation. The latter relinquished the control of his other securities, and gave Butler the power to discharge Bissell's liability upon his note. It seems singular that Anderson would have practically stripped himself of the control of everything else in the nature of a security to a slow debtor for so large a sum as \$29,000 unless he were to gain some substantial advantage under his purchase at the master's sale. And it is noteworthy that in the deeds which Butler obtained from the sons of Henry Anderson after the latter's death, and which deeds will hereafter be more particularly considered, they are moved to recite that Henry Anderson took the title to said lands as security for Butler's debt, and that he died without "having made or executed any declaration in writing of the purpose for which said property was held;" which seems to indicate that such a declaration was due and expected; and the inquiry is pertinent, why, if there was such an understanding, nothing was said about it in the agreement of October 4, 1844. Butler seems to have been very watchful for his own interests; and it seems unlikely that so important a matter should have then been overlooked and not taken care of until several years after Anderson's death, and only developed while the trustees were settling his estate. But the material circumstance, now to be regarded, is that there is no fact agreed, or finding by the court, which imports any qualification of the legal effect of the foreclosure proceedings, the agreement of Butler and Anderson made pending those proceedings, and the master's deed following thereon. We have given detailed exposition of special facts for the reason that it is proposed to fasten a trust upon the deed in question by proof of subsequent transactions, and thereby raise an equity which would entitle the defendant to the possession of the premises notwithstanding it should be held that the plaintiff has the legal title. We think it must be held that

at the time of Henry Anderson's death he held the legal title to the lands in question unaffected by any trust in favor of Butler.

On February 28, 1846, Henry Anderson made his will, and on the 3d day of April following he died, being then a resident of Mississippi. He was, at the date of his will and at the time of his death, a widower. He left two children only, William, born February 12, 1828, and James H., born June 25, 1831. The parts of this will which are now material are here set forth:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3d of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust, and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes: They shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation, and in all respects have the power of owners, but always as trustees. I have entire confidence in each of them, and therefore give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees, signed by their respective names, shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts other than what I may owe the American Land Company. I exclude the debts to the company because that is subject to an account with the company, and I do not wish my trustees to

make payments before that account is adjusted. The adjustment of that account and the direction and management of the affairs of the company, so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman, and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust,' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company. . . .

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifths parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so

dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof were thereafter duly filed in the probate court of Lucas county, Ohio, where the will was duly admitted to probate and record as a will from another state. The construction of this will of Henry Anderson is the next subject which engages our attention. The particular question is, What did the testator intend by the words of the will: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor die without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son."

The other language of the will is important only as it sheds light upon the testator's meaning by the use of the language quoted. The plaintiff, who is the lineal descendant of the testator's surviving son, James H. Anderson, claims that the testator intended to give to each of his sons a life estate in his moiety with a remainder over to the survivor of the one first dying, in the event of his dying without lineal descendants, and to the survivor a life estate in both moieties with remainder over to the lineal descendants if such should be living at his death, and if not, then to the testator's brother Peter one half and to his other brother and sisters one half, or, 7 L.R.A. (N.S.)

if Peter should not then be living, to Peter's children, if any, and if there be none, then to the surviving brother and sisters of the testator. If this is correct, the plaintiff took an estate in remainder in both moieties on the death of his father, James H. Anderson. The defendant claims that the testator intended that each of his sons should take a fee simple in one moiety, which would be defeated by his death without lineal descendants, in which event the surviving son should take a fee simple in that moiety which, with the fee simple in his own moiety, would be defeated by his dying without lineal descendants, in which event, the whole estate would go to the testator's brother Peter, etc.; in other words, that each of the two sons of the testator took an estate in fee simple, which would be defeated if the survivor died without lineal descendants, whereupon the testator's brother Peter and the other collateral relatives would take the estate by way of an executory devise.

The rule by which the court will be guided is stated by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 68, 75, 76, 8 L. ed. 322, 325, 326, as follows: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. *David v. Stevens*, 1 Dougl. K. B. 322; *Perrin v. Blake*, 1 W. Bl. 672 et seq."

And this statement has been repeated and confirmed in many subsequent cases. *Brant v. Virginia Coal & I. Co.* 93 U. S. 333, 23 L. ed. 927; *Blake v. Hawkins*, 98 U. S. 324, 25 L. ed. 141; *Giles v. Little*, 104 U. S. 296, 26 L. ed. 747; *Colton v. Colton*, 127 U. S. 309, 32 L. ed. 142, 8 Sup. Ct. Rep. 1164; *Hardenbergh v. Ray*, 161 U. S. 126, 38 L. ed. 97, 14 Sup. Ct. Rep. 305; *Home for Incurables v. Noble*, 172 U. S. 391, 43 L. ed. 489, 19 Sup. Ct. Rep. 226; *Adams v. Cowen*, 177 U. S. 475, 44 L. ed. 852, 20 Sup. Ct. Rep. 668; *Robbins v. Smith*, 72 Ohio St. 1, 17, 73 N. E. 1051. And, in order to "attain the general intent," said the court in *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. ed. 617, "words of limitation shall operate as words of purchase, and words of implication shall supply verbal omissions."

Another rule in the construction of wills is that we are to put ourselves in the place of the testator, and search all parts of the will in order to gather his meaning in the use of the words employed in the particular parts of it. If, by so doing, we become convinced in regard to his general purpose, we use that light in preference to arbitrary rules. But, if the testator's meaning cannot be clearly discerned, we are at liberty, and, generally for the sake

of certainty in the possession and transmission of estates, required, to apply such rules of construction as have by long usage been approved and used. It often happens that in wills in which the provisions are complex and elaborate, especially in such as are written by testators themselves, implications are seen where the testator has assumed as understood what he has not in terms expressed; and in such case if the implication is clear, it has equal effect as if the purpose had been expressed in words. The relevancy of these observations is found in undertaking to determine what consequences the testator intended when he said, "if either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor dies without lineal descendants, then" to his collateral relatives. Now, we cannot but think that to the common understanding this language would convey the meaning that in the other alternative—that is, if the sons should leave lineal descendants—it was intended that they should take, and that it was only in the event of their not leaving lineal descendants that the estate should go over to collateral relatives. The reason which gives force to the familiar rule of construction that, the inclusion of one alternative is the exclusion of the other, and *vice versa*, would tend to confirm the impression. Moreover, the whole paragraph shows beyond doubt that the testator intended to prefer his lineal descendants to the collateral branches of his family. After providing that his sons should take the estate by moieties, his mind went forward to the time of their death. The working of the natural instinct to keep the property in the family becomes evident. He does not say, if either of my sons shall die "without heirs," but without "lineal descendants." He evidently chose his words, and the distinction is clear. It would not comport with his idea that the lineal descendants should take as heirs. Nor did he intend so wide a class. He made a distinct blunder if he discarded the familiar term "heirs" and employed the selection of "lineal descendants" if he had in mind a succession by inheritance, and not by purchase. We are now considering this paragraph as if it stood unaffected by anything else in the will, and we cannot but be much impressed by the considerations which tend to the conclusion that the testator intended that, if the survivor of the sons should die leaving lineal descendants, they should take the remainder.

Then, if this were doubtful, there is a long-established rule of construction of devises in the law of real property, one of such as were referred to in the early part 7 L.R.A. (N.S.)

of our discussion of this subject, that, when a devise can, without doing violence to the language of the testator, be construed as creating a remainder, it shall not be construed as being an executory devise. 3 Comyns's Dig. 450, Devises, N. 17; Fearne, Contingent Remainders, 393; 6 Cruise's Dig. title 38, chap. 17, § 11; Purefoy v. Rogers, 2 Wms' Saund. 380; 2 Washb. Real Prop. 3d ed. 565; 4 Kent, Com. 263; Doe ex dem. Poor v. Considine, 6 Wall. 458, 475, 18 L. ed. 869, 875; Blanchard v. Blanchard, 1 Allen, 223; Moore v. Lyons, 25 Wend. 119, 126; Wolfe v. Van Nostrand, 2 N. Y. 436.

In Purefoy v. Rogers, *supra*, which has always been regarded as a leading case, the Lord Chief Justice Hale said: "Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only; and not otherwise." And in the note by Patterson and Williams to the sixth edition of Saunders, it is said that "this rule, so laid down by Lord Hale, has been uniformly adhered to ever since." And, upon the matter of construction, Washburn says (2d volume, 506, same edition), citing 2 Cruise's Dig. 203: "The term 'remainder,' it should be observed, is not one of art which it is necessary to employ in creating an estate in expectancy, such as has been described. Any form of expression indicating the intention of the grantor or devisor to do this would be sufficient."

Executory devises were the creation of the judges to effectuate the intention of testators where their purpose could not take effect as the creation of a remainder. A good illustration of this subject would be to suppose that in the present instance the testator had devised to each of his sons, "his heirs and assigns," the moiety, etc., and then in another place had devised the estate over upon the happening of some contingency. The estate going over could not take effect because there could be no remainder of an estate in fee simple. It is therefore construed to be an executory devise which will defeat the fee-simple estate. It is so done because the intent of the testator would be otherwise disappointed. The case of McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, is one where both species of estates were created by the will. The testator devised his property to trustees who were to hold it until his children were dead and until his youngest grandchild should be twenty-one years old, whereupon the trustees were to divide and turn it over to his several grandchildren in fee, and, if any of them should have died leaving children, then to the children of

such grandchild. As to the grandchildren living at the time of distribution, it was held they took an estate in remainder; but, as to the children of deceased grandchildren, it was held that they took by way of an executory devise. This last result followed because of the death of those grandchildren before the expiration of the precedent estate in the trustees, and therefore a gift to them could not be held to be a remainder. But, to give effect to the probable intention of the testator, it was construed as an executory devise.

The essential conditions on which there can be construed to be a remainder are that there must be a precedent estate which will necessarily terminate at some future time, and there must be nominated a person who will be *in esse* at the termination of the precedent estate, competent to take the remaining estate. Both estates must be created at the same time and by the same act or instrument; and the one must begin when the other ends. The order and succession of the estates was a requirement of the feudal system in order that there should at all times be someone to perform the obligations due to the sovereign, or his immediate feudatory, from the tenant on account of his tenure. Enough remains of this requirement to support, at least in technical contemplation, the rule as it formerly existed. Now, if these provisions of Anderson's will be held to convey a life estate to the sons with remainder to his lineal descendants, we have the most common form of an estate in remainder. It is not necessary that the remainder-man should be *in esse* at the time when the will is made or becomes effective by the death of the testator. It is enough if he is in being at the time when the estate vests in possession; that is, at the termination of the particular estate. If the remainder-man is *in esse* at the death of the testator, the right vests immediately; if not, the right is suspended, but exists, in consideration of law, until he comes into being, whereupon it vests; and in either case the estate will open to let in after-born remainder-men, if any such appear. *Doe ex dem. Comberbach v. Perryn*, 3 T. R. 484; 3 Comyns's Dig. Estates, B. 13; 4 Kent, Com. 206, note b; *McArthur v. Scott*, 113 U. S. 340, 380, 28 L. ed. 1015, 1027, 5 Sup. Ct. Rep. 652.

The contention of the defendant rests upon the assumption that the language of the will imports a devise of an estate in fee simple to the sons of the testator, and this assumption would probably be well taken if we looked only to that part of the will which devises the property to them. It is true there is no mention of heirs, but it

would in the case supposed be implied that the testator intended to devise the whole estate. But the implication is removed if, from other provisions in the will, it is seen that the testator did not intend to devise an unqualified estate. And it is to be observed that the defendant's contention proposes to cut down the fee simple which the earlier parts of the will are said to devise to the sons, by a condition that the sons shall leave lineal descendants. So, in either construction of the parties, the implication which would arise from the unqualified language of the devise to the sons cannot prevail. The generally accepted rule now is that an unqualified gift in wills to a devisee, without mention of heirs, imports a fee simple absolute; or, if the testator has not so great an interest therein, such an estate as he has. And this rule is incorporated in Ohio Rev. Stat. 1906, § 5970. But this cannot apply here, as we have shown; for, confessedly, the gift was not of a fee simple absolute. The conditions therefore exist for the application of the rule laid down by the lord chief justice, in *Purefoy v. Rogers*, supra.

The early rule in England was that such an implication as results from such language as is employed in this will would be sufficient to indicate that the testator meant that the lineal descendants of his sons should take an estate in remainder upon the death of the sons. In the early editions of Jarman on Wills, vol. 1, p. 465, the author, in treating of estates by implication in wills, said: "In the application of this principle, one chief topic of controversy has been how far a devise to any person, in the event of the nonexistence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person whose nonexistence is made the contingency on which the devise over is to fall into possession is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened if the devisee is the person on whom the law, in the absence of disposition, would cast the property." And there are several decisions of the courts in this country which have put the same construction upon such language. *Shaw v. Hoard*, 18 Ohio St. 228; *Wetter v. United Hydraulic Cotton Press Co.* 75 Ga. 540, where the foregoing passage from Jarman is quoted, *Carr v. Green*, 2 McCord, L. 75. And Washburn, in his treatise on the Law of Real Property, lays down the rule in accordance with these decisions. He says: "An instance of an estate tail by construction, where there is no direct limitation to

the heirs of the donee's body, would be an estate to A with a proviso that, if he shall die without heirs of his body, the estate shall revert to the donor, or go over to one in remainder. Here, it will be perceived, there was no direct limitation to the heirs of A, and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease, for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency." 1 Washb. Real Prop. 3d ed. 87, 6th ed. § 192.

The case of *Shaw v. Hoard*, supra, is much in point; so like the present that, if a rule of construction be also a rule of law in its application to grants and gifts of real property, and that case is the law in Ohio, we should feel bound to accept it as controlling this question in the present case, if, indeed, we did not agree with it. In that case, the will of the testator contained the following items:

"Item 2. I give and bequeath unto my said wife and daughter all the real estate of which I may be seised at the time of my death, to each one-half.

"Item 4. On the death of either my wife or daughter then the survivor shall have all the property left them by me; and if both die without leaving any heirs of their body, then and in that case, said property shall be given to my wife's brother, David Campbell."

The wife and daughter died leaving another daughter of the mother. It was held that the wife and daughter mentioned in the will took, each, a life estate and that, upon the death of the survivor, the remainder went by implication to the other daughter, the "heir of her body." But it is said that that case is overruled by subsequent decisions of the supreme court of that state. The principal cases which are relied upon in support of this contention are *Carter v. Reddish*, 32 Ohio St. 1; *Piatt v. Sinton*, 37 Ohio St. 353; *Collins v. Collins*, 40 Ohio St. 353; and *Durfee v. MacNeil*, 58 Ohio St. 238, 50 N. E. 721. In the first of these cases, the judge (Chief Justice Day) who had delivered the opinion of the court in *Shaw v. Hoard* was a member of the court. No intention to overrule the case of *Shaw v. Hoard* is indicated, nor is the case mentioned. But Judge Scott, who delivered the opinion, distinguishes a case involving the facts of *Shaw v. Hoard*. After referring to the cases of *Parish v. Ferris*, 6 Ohio St. 563, and *Niles v. Gray*, 12 Ohio St. 320, cases upon which the later decisions referred to rest, he says: "Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limita-

tation over to the nephews and nieces had been the dying of his children without issue, and without reference to the time when they should so die. But such is not the language of the will." The difference was that the case supposed was the case, in its facts, of *Shaw v. Hoard*, and of this case, while in the case in which the judge was giving the opinion the devise over was in the contingency of the first devisee's dying within age and without lawful issue. The distinction rests upon the fact that the contingency on which the life estate would terminate was uncertain, for the first devisee might attain the age of twenty-one and have children, in which event there would be no remainder, for both conditions would not happen. And, as we have said, a remainder must depend upon a contingency which must surely happen. Nor do the other cases mention the case of *Shaw v. Hoard*. It may well be that, its facts having been once distinguished, the court in the later cases thought it unnecessary to repeat the distinction, and decided the cases upon its view of the special facts. However that may be, that court has always adhered to the general rule that the intention of the testator is to be gathered from all parts of the will,—as well from what is expressed as from what is fairly implied. Referring to the other cases which are cited to establish that *Shaw v. Hoard* has been overruled, we observe that in *Piatt v. Sinton*, supra, the testator devised "all my property of every description" to Lucinda Piatt, . . . and, in case she should die without any legitimate heirs of her body, then the same property to go over to others named. The court construed "all my property" as "all my estate," and the heirs of the body of Lucinda Piatt were strangers to the blood of the testator. In *Collins v. Collins* the testator devised a life estate to his wife with remainder to his two sons and their heirs, but that, in the case of the death of either leaving no children, then to the survivor; but, in case of the death of both of the sons leaving no children, then to the testator's heirs. In that case the estate was granted by "clear and decisive words," and the rule laid down in *Thornhill v. Hall*, 2 Clark & F. 22, was applied, which is that "it is a rule of the courts in construing written instruments that when an interest is given, or an estate conveyed, in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause; not by inference therefrom, nor by any subsequent words that are not as clear

and decisive as the words of the clause giving that interest or estate."

Moreover, an estate in remainder cannot rest upon an estate in remainder when the latter is given to one and his heirs, for the whole estate is exhausted. In *Durfee v. MacNeil*, supra, the testator devised all my estate, after defraying expenses, etc., to three persons equally, one of whom was then unborn, and to their heirs forever; and, should the child not be born alive, or should either die without heirs, each one's share should go to the survivor; and in the event that the testator should be without heirs of his body, the legacies to his children should go to his wife. No question arose of the kind here involved. The facts in the case had little or no analogy to the present. There was a clear and decisive gift of an estate in fee simple, and the contingency was that either of the children should die without heirs capable of inheriting. The devise over was held to be an executory devise. Sometimes it is stated by the courts (we are not now referring specially to the Ohio courts) in terms that the implication must be a "necessary" implication; but by this is meant not absolutely necessary, but that it is reasonably necessary in order to carry out the intention of the testator. Inasmuch as the case of *Shaw v. Hoard* has never been expressly overruled, and its doctrine was in a later case confirmed, even if it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it.

Much reliance is placed by counsel for defendant upon the case of *Abbott v. Essex Co.* 18 How. 202, 15 L. ed. 352, which they claim "is parallel with and conclusive of this case." But this is a misconception. In that case the testator had given to his two sons John and Jacob "all my estate," to use his own words, in a certain described part of his property, real and personal, and then declared that, if either of his said sons should die without any lawful heirs of his own, it should go to the survivor and his heirs. And he charged the payment of certain debts and a legacy for the maintenance of a person named, upon the estates devised. After some preliminary observations, Mr. Justice Grier, who delivered the opinion of the court, said: "Our inquiry must be, therefore, from an examination of the whole context of this will: (1) Whether, independent of the second clause, by which the estate is limited over, the sons took an estate in fee simple, or only a life estate; and (2) whether he intended to give over the share of each son to the other on the contingency of his death without issue living at the time of his decease, or

upon an indefinite failure of issue." He then proceeds to state the reasons for thinking the testator intended to give a fee-simple estate to each of the sons. The first reason stated was that the testator, in the devise to the sons, had employed the words "my estate" in the property, which the learned justice said had "always been construed to describe not only the lands devised, but the whole interest of the testator in the subject of the devise." And, as to the legacy for maintenance, he points out that it would be defeated by the death of a tenant for life. He further observes that the will stated that the payment of these debts and legacies by the devisees was the consideration for the devises, and that the devisees, by acceptance of the devises, became personally liable to pay the debts and legacies charged upon them. "In such cases," he says, "it is well settled that the devisee takes a fee, without words of inheritance." "On this point, therefore," he says, "we are of opinion that John and Jacob each took a fee in their respective share, or moiety, of the estate delivered to them." None of the reasons on which the conclusion of the court was rested exist in the present case.

If, however, it should be held that the alternative phrases in the will already considered are not sufficient to show that the testator intended the lineal descendants should take a remainder, we should next consider the will upon that assumption. In the English courts the rule upon this subject has been changed by the modern decisions, and its present state is exhibited in the case of *Re Rawlins*, L. R. 45 Ch. Div. 299, and [1892] A. C. 342. In the court of appeals, Lord Justice Fry stated that the modern rule was inaugurated in *Green v. Ward*, 1 Russ. Ch. 262, a case decided by Lord Gifford, the master of the rolls, in 1826. That rule is this: That the mere fact that the testator has directed that the estate shall go over to other persons if the first takers shall die without surviving "heirs of his body," "lineal descendants," or other equivalent words, is not a sufficient implication to create a remainder in such "heirs of his body" or other person or class named; but that, if there be other language in the will which supports the implication, and upon the whole the court is satisfied that such was his purpose, it will give the devise effect accordingly. None of the decisions in Ohio or elsewhere have sanctioned a stricter rule than this. It may be observed, in passing, that one cannot help noticing that the English courts carry the practice of applying fixed rules to the construction of devises to an extent which is not generally adopted in this country. This may probably be explained

by what was said by Mr. Justice Grier in *Abbott v. Essex Co.* 18 How. 202, 213, 15 L. ed 352, 355: "If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant." But, pursuing the inquiry above suggested, we see that the testator emphasizes the alternative he had stated by adding: "I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son." It is observable that his explanation relates to the death of the surviving son. He plainly intends that the presence of lineal descendants at that time shall block the way to a devise over to the next preferred classes of relatives. And he repeats the designation of "lineal descendants" instead of "heirs." He certainly intended that if such persons were living the estate should go to them in some character, and he gives them a peculiar designation. Then, again, if a fee simple was intended to be vested in the sons, words of inheritance must be implied in the gift to them, as if the gift run to him, his heirs and assigns, in express terms. To be in harmony with this, the defeasance would naturally have been incident to his dying without heirs, and it would follow that the testator used the expression "lineal descendants" as a synonym for "heirs," which we must think an inadmissible proposition. The recent case of *Widows' Home v. Lippardt*, 70 Ohio St. 261, 71 N. E. 770, is pertinent to this discussion. In that case, the testator, as here, gave his estate to the first taker in general terms; later on he gave him a qualified power of disposition. And the court said: "The clear implication of such a bequest, taking all its parts together, is that B. [the first taker] is to possess a life estate. Here a life estate is implied, and is not expressly created."

The power to dispose of the property was not inconsistent with the gift of a fee simple. It was an incident of such an estate. But the court laid hold of it as an implication that the testator intended only a life estate in the first taker. It certainly was not an absolutely necessary one. It was necessary only for the purpose of giving effect to the apparent intention of the testator.

There is another consideration which 7 L.R.A. (N.S.)

must not be ignored. The authorities recognize a more significant purpose in an implication which tends to cut down a larger estate to a life estate where the remainder thereby passes to a person who is in the line of descent, than it would if it were to pass to a stranger. This results from the stronger motive which the testator would have to prefer the former to the latter class. The gift of the power to dispose of the property by will when the sons should reach the age of twenty-one does not enlarge a life estate. *Jones v. Shields*, 14 Ohio, 359; *Baxter v. Bowyer*, 19 Ohio St. 490; *Stableton v. Ellison*, 21 Ohio St. 527; *Huston v. Craighead*, 23 Ohio St. 198. We are therefore of opinion that the intention of the testator was that the lineal descendants of the surviving son should take an estate in remainder at his decease.

The persons named as trustees accepted their appointments, and they also qualified as executors. William Anderson became of age February 12, 1849, and on October 10th of that year Butler obtained from him an agreement in writing, declaring himself to be an heir at law of Henry Anderson, and that Henry Anderson "held and intended to hold" the premises in question in trust to secure the payment of Butler's note; that said Henry Anderson had died without declaring said trust in writing, and that, being desirous of carrying into effect his father's wishes and intentions, he had "consented to execute and deliver to the said Butler this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof." And Butler therein agreed to pay to the executors the sum due on his note of \$20,000 in instalments and at dates therein specified. William died intestate in January, 1850, unmarried and without issue. James Anderson became of age June 25, 1852. But before that time, and on September 16, 1851, Butler obtained from him a like declaration that Henry Anderson held the premises in trust, but that, he having died without having made or executed any declaration thereof, he, James, in order to carry out his father's wishes and intentions, was desirous of making the declaration. But it was therein stipulated that the lands should be held subject to the payment of the principal and interest of the debt due from Butler. On October 1, 1852, there was appended to this document a "memorandum" between Butler and James containing an agreement to change dates of payment of the note, and that the agreement should be taken as supplemental to the agreement to which it was appended. Thereafter, from time to time, Butler made payments to the executors and trustees upon his \$20,-

000 note, but the same had not been fully paid at the time when the executors and trustees settled their trust with James H. Anderson and turned over to him the property and effects coming to him under said will, which was some time prior to May 1, 1860. If any more payments were made on said note, they were made to James H. Anderson. The plaintiff is the only son and child of James H. Anderson, and, as has been stated, was born August 27, 1859.

About the 1st of May, 1860, Peter Anderson and Walter Goodman, styling themselves "executors and trustees of Henry Anderson's will," delivered a quitclaim deed of the premises in question to Butler, reciting therein the receipt "of \$1 (and other considerations)." The deed recited further that, it "being understood that the above-described premises were conveyed to Henry Anderson in fee, but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler, which fact after his death was duly acknowledged under seal of William Anderson and James H. Anderson, his only heirs at law," said first parties covenant, grant, etc. This deed purports to have been made October 1, 1855, and acknowledged October 9, 1855, but, as above stated, it was not delivered until about May 1, 1860. On April 17, 1860, Lucas, the other executor and trustee, but signing as executor, executed, and, on or about May 1, 1860, delivered to Butler, a deed of the same premises in the same form, for a like consideration, and with the same recitals as the deed from Goodman and Peter Anderson. On April 23, 1860, Butler gave a warranty deed of the lands in question to Calvin Bronson, who soon after entered upon the premises, and he and his grantees have since occupied and possessed the same under claim of title through that deed. The defendant holds the title conveyed by the Butler deed to Bronson.

The questions upon the facts occurring since the death of Henry Anderson are, first, whether, assuming the latter to have then had the legal and equitable estates in the land, the deeds from Peter Anderson, Sr., Goodman, and Lucas to Butler conveyed to the latter the legal title which had been in Henry Anderson; or, second, whether their transactions with Butler raised an equity in his favor which, having been transmitted to the defendant, entitles him to the possession of the premises as against the plaintiff. The first question, then, upon this part of the case is whether the trustees had authority under the will to declare the master's deed to Henry Anderson to be a mortgage, and to deed the lands to Butler at the time when this was done. Having regard to the language of the 7 L.R.A. (N.S.)

testator, there is room for doubt whether the power given to the trustees in respect to the alienation of real estate extended beyond an authority to sell or mortgage the lands of the testator for the purpose of paying debts; that specific power is expressly granted and the general language added might be thought to grant powers incidental to that main purpose. Besides, these deeds of the trustees were not made for the purpose of raising money to pay debts of the estate, but proposed a different object. But we do not decide how this may be. No doubt the rule is that, unless there is, by the terms of its creation, a limitation upon the duration of the trust, it will be held to endure so long as the purposes of the trust require. But when the duration of the trust is expressly limited, the authority of the trustee expires according to the limitation. 1 Perry, Tr. § 316. Says the author: "So, trustees may take only a chattel interest in real estate, although limited to them and their heirs, as when they are to hold in trust only for a short time to pay debts and legacies and to convey it to the *cestui que trust* when he comes of age, or at a certain time."

And see, among the cases there cited, Goodtitle ex dem. Hayward v. Whitby, 1 Burr. 228; Stanley v. Stanley, 16 Ves. Jr. 491; Pearce v. Savage, 45 Me. 90. And also Powell v. Glenn, 21 Ala. 458; and Smithwick v. Wintersmith, 12 Ky. L. Rep. 380, 14 S. W. 354.

Here the testator directed that the trustees should deliver a settlement of their trust to each of his sons on their reaching the age of twenty-one, respectively, and then put him in possession of one half of the property, except that there might be a reservation of a fraction of the moiety until the sons should respectively arrive at the age of twenty-five, when the remaining part should be turned over to them. James, the youngest of the sons, arrived at the age of twenty-five on June 25, 1856, nearly four years before the trustees deeded the lands to Butler. No account can be taken of the fact that the deeds were prepared in 1855. They had no effect until they were delivered in 1860. It is stated in the brief of counsel that they were in escrow in the meantime; but it is not one of the stipulated facts, nor found by the court; nor, indeed, was there any competent evidence tending to prove such fact. In these circumstances, we think the duration of time for the active duties of the trustees was limited to the time when they were required to make their settlement with the beneficiaries and turn over to them the trust property. This is admitted by counsel for defendants in error, who say in their brief: "The language of the will makes it entirely clear, we

think, that the testator contemplated that the trustees should in any event fully perform and discharge their trust by the time the youngest son had reached the age of twenty-five years, and that at this date, at latest, the title of the trustees should cease and determine."

It follows that the deeds to Butler, so far as they are regarded as deeds of the trustees, conveyed no title, for the trust had been extinguished several years before. No judicial act was required to terminate the trust, as would be necessary in the case of an executor. The testator had also appointed executors, whose powers would continue so long as the estate remained unsettled in the probate court, and the continuance of the term of the trust was not necessary. They were the same persons as those created trustees, but their relations to the estate were the same as if they had been different persons. It was not a case where the trust is imposed upon the executors as such. 1 *Levin*, Tr. § 206; *Herron v. Comstock*, 139 Fed. 370, 377, and the cases there cited. The distinction is also referred to by Mr. Justice Gray in *McArthur v. Scott*, 113 U. S. 340, 377, 28 L. ed. 1015, 1026, 5 Sup. Ct. Rep. 652. When the trust expired the legal title became vested in James H. Anderson. The executors might, in certain circumstances, sell and convey the lands of the testator, as, for instance, to pay debts. But this would require an order of the probate court upon notice to the parties interested.

The second question is whether the transactions between the trustees and Butler were such as to raise an equity in his favor, which, being transmitted to the defendant, entitles him to retain the possession of the land as against the plaintiff's legal title. For, if the defendant has an equity which thus entitles him, the plaintiff cannot recover. It was so held in *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. To the same effect is *Dickerson v. Colgrove*, 100 U. S. 582, 25 L. ed. 620. But we are unable to discover any grounds on which it could be claimed that any equity was created for Butler by his transactions with the trustees. It is unnecessary to say he was conscious of wrongdoing, for he may have conceived that the legal effect of the foreclosure proceeding left Henry Anderson in the position of a trustee for him in respect to the lands; but his course was taken entirely in his own interest, and was prejudicial to the estate. The trustees were induced by his representations to treat the master's deed to Henry Anderson as a mortgage, when in fact it was not. The sons were induced by appeals to filial sentiment to make admissions the truth of which was taken on trust, and these admissions were adopted by the trustees as the basis of their dealings with Butler. 7 L.R.A. (N.S.)

The money which he paid to them, as trustees, upon his note was not much, if any, more than was sufficient to pay it after crediting him with the proceeds of the master's sale. He based his action in making the sale of the property upon his supposed success in acquiring it. We desire to make no further comments upon the character of these transactions than the adjudication of the rights of these parties requires; but we cannot realize any basis on which to build up anything more than the strictly legal rights which Butler acquired therefrom. It remains to be observed that if, by Anderson's will, an estate in remainder after the death of his surviving son was given to his lineal descendants, it was beyond the power of the tenants for life to defeat or prejudice the remainder-man by their own acts or admissions. The only way in which the remainder could have been destroyed would have been by the valid exercise of the power given to the trustees by the will. The vigilance with which the court protects the estate in remainder for infants is illustrated by the case of *McArthur v. Scott*, above referred to, where the will which had created it had been vacated by a decree in a suit brought by an heir at law in which children contemplated by the will as sharers in the remainder, but yet unborn, were not represented, though all the living parties in interest having life estates were. It was held that the devise to those children was unaffected by the decree, and that their respective estates became vested upon the subsequent birth of each. The judgment must be reversed, with costs, and a new trial awarded.

IOWA SUPREME COURT.

H. D. KEPLER, Appt.,

v.

C. A. LARSON et al.

(— Iowa, —, 108 N. W. 1033.)

Deed—Shelley's Case.

1. A grant to one of a life estate, habendum to him during his natural life and to the heirs of his body and their assigns in fee simple, conveys to him a fee under

Case Note.—Effect upon rule in Shelley's Case of express prohibition against conveyance or encumbrance of property by life tenant:—In considering the foregoing question, as in all questions arising under the rule in Shelley's Case, it is necessary to bear in mind the variance in the views taken of such rule, which may here be briefly restated.

According to one view, it is to be regarded as a rule of law, applicable in all cases in which the word "heirs" is used in its

the rule in *Shelley's Case*, notwithstanding the deed also provides that the wife of the life tenant shall have merely the privilege of living on the premises during his life, and neither the life tenant nor his wife shall have any power to convey, or place encumbrances on, the property.

Statute de donis.

2. The statute *de donis*, being contrary to the spirit of its institutions, has never been in force in Iowa.

Deed—conditional fee—conveyance.

3. If a grant of a life estate to one, habendum to him for life and the heirs of his body and their assigns in fee simple, should not be regarded as vesting a fee in the first taker under the rule in *Shelley's Case*, it conveys a conditional fee which, in states where the statute *de donis* is not in

force, may, after the birth of a child to the life tenant, be conveyed by him in fee simple.

Same—destruction of remainder.

4. If a grant to one for his natural life, habendum to him for life and then to the heirs of his body and their assigns in fee, should be construed as vesting in him a life estate with remainder to the heirs of his body, after the birth of a child to him a conveyance by the reversioners would not destroy the remainder and vest a fee in the life tenant.

(September 21, 1906.)

APPEAL by plaintiff from a decree of the District Court for Chickasaw County in defendants' favor in a suit to compel spe-

technical sense, and this view is not inconsistent with the doctrine that resort may be had to other expressions in the deed or will for the purpose of determining whether the word was so used, or specific persons were intended; in the latter of which alternatives the rule would not be applicable. But some courts seem to have thought it necessary, in adhering to the view that the rule in *Shelley's Case* is one of law, to apply it in every instance where the word "heirs" is employed, irrespective of any intention to use the word in a nontechnical sense, which may be gathered from other expressions.

According to the other view, which has found considerable favor in the United States, the rule in *Shelley's Case* is one of construction, to be taken as interpretative of the meaning of the grantor or testator, in the absence of any expressions indicative of an intention that the first taker should have less than a fee.

The difference in result of these two views is simply this: Under the first view, effect is given to the general intention of the grantor or testator that the first taker shall be the root of succession, the *stirps* from which future takers shall spring, at the expense of the particular intention to give him merely an estate for life,—or, rather, if the operation of the rule be minutely observed, both intentions are given effect, but the estate for life merges in the greater estate of inheritance, which also vests in the first taker as the root of succession; while, under the second view, effect is given to the particular intention, the heirs taking as contingent remainder-men. In the first case, the inquiry is not, What estate is intended to be given to the ancestor? but, What is the nature of the limitation over? In the second case the inquiry is precisely the reverse. Under the first view, an express prohibition against conveyance or encumbrance by the first taker would be regarded as immaterial, provided the limitation over should be construed as to his heirs *qua* heirs, while, under the second view, such a prohibition would probably be determinative of the case.

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It may also be noted that, under any of the foregoing views except, of course, that which denies room for construction of the word "heirs," the question is affected by the nature of the instrument under consideration. While in deeds subsequent expressions are sometimes rejected as repugnant to the granting clause, in wills regard may be had to all parts for the purpose of determining the effect of a particular clause. Then, too, the presumption that the word "heirs" was used in its technical sense is much harder to overcome in the case of deeds than of wills, for the reason that, while conveyances are usually made with the aid of counsel, wills frequently are not.

In *Carradine v. Carradine*, 33 Miss. 698, it was held that, where a deed of slaves was made in trust for the donor's stepdaughter, to be held until she should arrive at the age of twenty-one years or should marry, when the possession thereof should be delivered to her, and upon the further trust that thereafter the said trustee "shall see that the said property, and the future increase of said slaves, shall not be sold or disposed of, but shall be preserved for the benefit of the heirs of the body of" the stepdaughter, the trust having become executed upon the delivery of the possession of the slaves to the stepdaughter, she became vested with the absolute title; and that the restriction upon alienation imposed by the trust deed could not prevail against the estate vested by the previous limitations of the deed; the court saying: "It is well settled that, if the import of the previous limitations be such as to vest the absolute estate in the first taker, subsequent restrictions, inconsistent with such an estate, would be void. Thus, it is settled that a limitation to the first taker for his life and no longer; or only for life; or for his life and no longer, and that it shall not be in his power to sell, dispose of, or make way with any part of the premises, and the like,—will not prevent the operation of the rule. 1 Preston, *Estates*, 365, 366; *Hayes ex dem. Foorde v. Foorde*, 2 W. Bl. 698; *Fearn v. Fearn*, *Contingent Remainders*, 174. Mr. Jarman says: 'Words, however positive and un-

sific performance of a contract to loan money. Reversed.

Statement by Deemer, J.:

Suit in equity for the specific performance of a contract to loan money. Interveners came into the case claiming an interest in the property upon which a mortgage was to be executed, and plaintiff then asked to have his title quieted against them. There was a decree for defendants, and plaintiff appeals.

Messrs. Smith & O'Connor and R. Feyerabend for appellant.

Mr. F. F. Swale, for appellees:

"Heirs of the body" must be used in a technical sense to vest a fee in plaintiff.

equivocal, expressly negating the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule; for this intention is as clearly indicated by the mere limitation of a life estate as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention.' 2 Jarman, Wills, 246."

But in *Hubbird v. Goin*, 70 C. C. A. 320, 137 Fed. 822, it was held that a deed from a father to his daughter "and children," in which it was provided, "It is expressly agreed by the grantee, in accepting this deed, that she shall not sell, convey, or encumber, or in any manner dispose of, the same, but to retain the same for the use of herself and her children forever,"—did not come within the rule in *Shelley's Case*, as the term "her children," thus employed, did not indicate inheritance, and were not words of limitation, but were descriptive of the beneficiaries *eo nomine* to take under the deed; and that, although the provision against alienation was void, it might yet be taken as indicative of the intention of the grantor that the grantee should have only a life estate.

The question under discussion has more frequently arisen in determining the effect of testamentary dispositions; and in *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814, it was held that a devise to testator's sons, of certain property; but said sons "shall neither of them sell or mortgage any of the lots last above mentioned, but the same shall go to their heirs after them,"—vested the fee in the devisees under the rule in *Shelley's Case*; the court declaring its adherence to the doctrine hereinbefore referred to, that the rule is operative where it appears that the testator used the word "heirs" as indicating the ordinary line of succession; saying: "Its application to the particular case depends not upon the quantity of estate intended to be given to the ancestor, but upon the estate devised to the heir. When the devise is to heirs generally, the rule applies, and is held to conclude L.R.A. (N.S.)

22 Am. & Eng. Enc. Law, p. 512.

The estate must be limited precisely as it would descend at law.

Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177:

These words were not so used in this deed, but were used to signify a class of persons less extensive than is meant by their technical use.

Kiene v. Gmehle, 85 Iowa, 312, 52 N. W. 232; *Slemmer v. Crampton*, 50 Iowa, 302; *Wescott v. Binford*, 104 Iowa, 645, 65 Am St. Rep. 530, 74 N. W. 18; 2 Washb. Real Prop. 5th ed. 653, ¶ 16; 20 Am. & Eng. Enc. Law, p. 865; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 593.

sively express the intention of the testator, and will necessarily govern and control in determining the estate devised, notwithstanding the expression of an intention on the part of the testator that the ancestor shall take a less estate than the fee."

In *Bond v. McNiff*, 6 Jones & S. 83 (Affirmed without opinion in 9 Jones & S. 543), it was held that, where a devise which, standing by itself, would have been taken as passing only a life estate, was followed by the statement, "and it is my will and desire that none of the above-mentioned property should be sold or disposed of in any way, but passed to the heirs of my children unencumbered," the latter clause, by force of the rule in *Shelley's Case*, enlarged the life estate into an absolute fee; nothing being said as to the effect to be given to the provision against sale and encumbrance.

In *Doebler's Appeal*, 64 Pa. 9, a devise to testator's son, followed by the clause, "but he shall in no wise sell or alienate any of the above-described property, as it is intended that he shall have a life estate only in the same, with remainder over to his heirs in fee," was held to give the son an absolute fee by force of the rule in *Shelley's Case*; the presumption that the word "heirs" was used in its proper technical sense not being overcome by the other expressions in the devise.

And in *McCann v. Barclay*, 204 Pa. 214, 53 Atl. 767, it was held that a devise to testator's son, as follows: "The two houses situated on Fourteenth street is a lifetime lease; it cannot be taken from you, nor you cannot spend it, but it is held to insure you something to live on during your lifetime; . . . and at your decease, if you have lawful heirs, then all will fall to them,"—was held to give the first taker a fee under the rule in *Shelley's Case*.

On the other hand, in *Roberts v. Ogbourne*, 37 Ala. 174, a bequest "to the heirs of the body of Sarah Bledsoe, . . . she, the said Sarah, to have the use and benefit thereof during her life, but not to sell or dispose thereof," was held not to fall within the rule in *Shelley's Case* for the reason

The children took a vested remainder as soon as *in esse*.

Shimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82; *Brown v. Brown*, 125 Iowa, 218, 67 L. R.A. 629, 101 N. W. 81; *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195; 2 Washb. Real Prop. 5th ed. 611, note 5, 603, ¶ 26; *Mercantile Bank v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 164; 1 *Cooley's Bl. Com.* bk. 2, 168, 169; *Taylor v. Taylor*, 118 Iowa, 407, 92 N. W. 71.

Children take here a vested remainder as soon as born.

Archer v. Jacobs; *Brown v. Brown*; and *Wescott v. Binford*,—*supra*.

Deemer, J., delivered the opinion of the court:

In a contract between plaintiff and defendant, defendant undertook to loan plaintiff a sum of money to be secured by mortgage upon a certain tract of land upon condition that plaintiff should furnish an abstract showing that he had fee-simple title to the property proposed to be mortgaged. Pursuant to this contract, plaintiff furnished an abstract of title, which defendant refused to accept, because of certain de-

fects therein, and because plaintiff did not in fact have a fee-simple title. He averred that certain parties, who are now interveners in the case, had an interest in the property, and that plaintiff had nothing but a life estate therein. Interveners, five in number, who are plaintiff's children, filed a petition in which they claimed to own a fee-simple title in the property subject to a life estate in their father. At the bottom of the controversy is a deed in plaintiff's chain of title, from Hugh Kepler and Mary, his wife, of date September 28, 1885, conveying, for an expressed consideration of \$5,600, the real property in dispute, the granting clause reading as follows: "Do hereby sell and convey unto the said H. D. Kepler, a life estate in and to the following described premises." The habendum clause contains the following: "To have and to hold the same, with the rights and appurtenances thereunto belonging, to said H. D. Kepler, during his natural life (his wife, if any he may have, to have no other privilege than that of living on the premises for his life, and no longer), and to the heirs of his body and their assigns in fee simple forever. The said H. D. Kepler or his wife,

that Sarah Bledsoe was not given the thing itself for life, but the use; and that, even though it should be conceded that she took a technical life estate, and not a mere usufructuary interest, still the rule would not apply; the court being of the opinion that the term "heirs of the body" was intended as descriptive of the children of said Sarah who might be living at the time appointed for the division of the property, it appearing that she had children living at the date of the will.

In *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, it was held that, where a testator devised property to his children for life, stating in the last paragraph of his will, "my said children are to have the use, rents, and profits of their portion of said lots . . . during the term of their natural lives. They are to have no power to convey or dispose of the same, their respective portions, for a longer period than during their natural lives respectively. At the death of my children aforesaid, their respective portions of said lots . . . descend to their heirs, respectively, said heirs to have absolute title to their respective portions,"—the rule in *Shelley's Case*, if in force in the state, would not be given such operation as to defeat the intent of the testator, as expressed by the language of his will, that the first takers should have only a life estate.

In *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, 99 N. W. 646, a devise to testator's son, "to have and to hold said land during the term of his natural life, and enjoy the use and proceeds thereof. The fee of the land to pass to his heirs at his death, or 7 L.R.A. (N.S.)

at any time before when he shall sell or encumber said land in any manner different than he shall receive it. The intention being to give him a life estate therein without the power to sell or dispose of it,"—was held not to fall within the rule in *Shelley's Case*. This decision is largely based upon the statute providing that, "in the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of, any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent [intent] of the parties so far as such intent . . . is consistent with the rules of law;" which was held to have the effect of leaving the rule in *Shelley's Case* in force only in a restricted and qualified form; in those instances in which it is not in conflict with the otherwise expressed intention of the instrument.

In *Foxwell v. Craddock*, 1 Patton & H. (Va.) 250, a devise to testator's son, "to be used by him for his own benefit during his natural life, and at his death, should he leave lawful heirs, to be vested in them in fee simple. But should he die without lawful issue," then over; the testator continuing: "I do hereby distinctly declare and publish that the right hereby given to my son John shall not be construed to vest in him any power to dispose of the property in any way, but that it is only loaned to him during his life, and after his death to be used in the manner above provided for,"—was held not to be within the rule in *Shelley's Case*, the word "heirs" being evidently used as equivalent to "children."

if any he may have, deriving no power to convey or place any encumbrances of any kind whatsoever on said premises, except the security for the payment thereof, of the same date as these presents." At the time this conveyance was made, H. D. Kepler was twenty-two years old, unmarried, and childless. He immediately took possession of the property under the deed, soon thereafter married, and as a result the five intervening children were born; the first on July 23, 1887. Thereafter plaintiff's wife died, and on March 2, 1889, Hugh Kepler and his wife made another deed to plaintiff of part of the property in dispute, purporting to convey the fee-simple title thereto to the grantee in the deed. Mary Kepler, the wife of Hugh, died, and Hugh thereafter remarried, and by his second wife had five children. Hugh died leaving his second wife and the five children surviving. The widow, by antenuptial contract, released any dower interest she might otherwise have had in her husband's property. From the children of his father by the second marriage, plaintiff has procured deeds to the property in dispute. After the birth of plaintiff's children, he conveyed the property by warranty deed, to one A. C. Pierce; and Pierce almost immediately reconveyed the property to plaintiff by special warranty deed. Plaintiff claims that, under the facts above recited, he held and now holds title absolutely and in fee simple to the real estate he offered as security, is entitled to have the same quieted in him as against interveners, and that he is entitled to a decree of specific performance of his contract for the loan of money by defendant. This contention is based upon two propositions: First, that, under the rule in Shelley's Case, he became the absolute owner in fee simple of the property in dispute in virtue of the deed from Hugh Kepler and Mary Kepler; and, second, that, even if this be not true, he became invested with that title under the conveyances hitherto mentioned,—the remainder being contingent and subject to destruction through conveyances from the owners of the reversion. The rule in Shelley's Case is in force in this state, and the legislature has not seen fit to abrogate it, even after being advised in the most positive terms that it is a part of the common law which came to us as a valuable heritage. The difficulty we shall have with it in the future is in its application to the facts of each individual case. The rule is announced in *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, to which reference is made. It is also settled that in construing deeds all parts thereof are to be taken into account, and granting clause and habendum read together in 7 L.R.A. (N.S.)

arriving at the proper interpretation of an instrument. *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81.

Going back now to the original deed under which plaintiff claims, we find that the conveyance was to him during his natural life, and to the heirs of his body and their assigns in fee simple forever. If this were all, there could be no doubt of the proposition that the rule in Shelley's Case should control. See *Doyle v. Andis*, supra; *Wilson v. Rusk* (Iowa) 103 N. W. 204. Appellees contend, however, that, by reason of the provision relative to the wife's privilege, and the provision in restraint of alienation, the rule does not apply. Where a grantor retains no reversionary interest, a provision in restraint of alienation is void. *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571. And this is especially true when applied to conveyances which fall within the rule in Shelley's Case. *Doebler's Appeal*, 64 Pa. 9; *Clarke v. Smith*, 49 Md. 106; *Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596; *Van Grutten v. Foxwell*, 66 L. J. Q. B. N. S. 745; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90; 2 Washb. Real Prop. p. 273; *Blackwell v. Blackwell*, 124 N. C. 269, 32 S. E. 676. This matter is fully discussed in volume 1, pp. 362, 363, of *Preston on Estates*, wherein he says that "neither the express declaration that the ancestor shall have an estate for his life, and no longer, nor that he shall have only an estate for life in the premises; and that after his death it shall go to his heirs of his body, and, in default of such heirs, vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of testator; nor that the ancestor shall be tenant for his life, and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises,—will change the word 'heirs,' into a word of purchase." *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814. These cases and others like them seem to hold that the controlling question is the nature of the estate conveyed to the heirs. If the estate is so given that it is to go to every person who can claim as heir of the body of the first-taker, the words "heirs of his body" must be considered words of limitation, notwithstanding any restraints which may have been attempted on the power of alienation by the first taker. The majority are of opinion, not only that the rule of Shelley's Case is in force in this state, but that the facts of this case bring it within that rule.

2. But, if wrong in this, and conceding

that the conveyance was to H. D. Kepler and to the heirs of his body and their assigns, the estate conveyed was a conditional fee, which, after the birth of a child, who was an heir of his body, if not before, was alienable by the grantee Kepler. *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90; *Moody v. Walker*, 3 Ark. 147; *Kirk v. Furguson*, 6 Coldw. 479; *Simmons v. Augustin*, 3 Port. (Ala.) 69; *Croxall v. Sherrerd* (Doe ex dem. Croxall v. Sherrerd) 5 Wall. 268, 18 L. ed. 572. The statute *de donis*, which was enacted to meet this situation and for the purpose of entailing estates, is contrary to the spirit of our institutions, and has never been in force in this state. *Pierson v. Lane*, supra. We have no estates tail in this jurisdiction. Instead, we have the conditional fees prevailing before the enactment of the statute *de donis*. Conceding, *arguendo*, that the rule in Shelley's Case does not apply, and that the conveyance in question is to Kepler and the heirs of his body, a conditional fee passed thereby, and, after the birth of direct issue, Kepler could convey absolute title, and, by the same token, could mortgage the land. We shall not go into the history of this abstruse subject. Suffice it to say that, as the statute *de donis* is not in force in this state, the conveyance was either of a fee-simple absolute under the rule in Shelley's Case, or of a conditional fee, if it should be construed as above indicated; and, in either event, Kepler could convey good and perfect title after the birth of a child. Indeed the conveyance was good as against everyone save his grantor, even before the birth of a child. *Izard v. Middleton*, Bail. Eq. 228. Interveners are in no position to challenge it. Upon this proposition we are all agreed.

3. Of course, if the rule in Shelley's Case does not apply, and it should be held that the conveyance was of but a life estate to Kepler, with remainder over to his children or to the heirs of his body, that remainder was a contingent one, dependent upon the birth of children. *Taylor v. Taylor*, 118 Iowa, 407, 92 N. W. 71; *Zuver v. Lyons*, 40 Iowa, 510. Upon the birth of a child or children, the remainder became vested, subject only to be opened by the birth of other children, and from that time forth could not be destroyed by any act of the tenant of the particular estate or of the reversion. Plaintiff did not acquire title from the reversioner until after the birth of his first child, and, if the rule in Shelley's Case does not apply, and the conveyance should be treated as passing a life estate to plaintiff, with remainder over to the heirs of his body, the conveyance to him by the reversioner did not give him a title in fee. Nothing said in *Archer v. Jacobs*, 125 Iowa, 467, 7 L.R.A. (N.S.)

101 N. W. 195, runs counter to these views. Indeed, much that is there expressed supports the rules here stated. But we need not speculate upon this aspect of the case. Plaintiff has either a fee-simple absolute under the rule in Shelley's Case, or a conditional fee, alienable because of the birth of issue; and the trial court should have granted him the relief asked, and quieted his title against the interveners. As supporting our conclusions on the whole case, see *Coots v. Yewell*, 95 Ky. 367, 25 S. W. 597, 26 S. W. 179; *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539; *Ross v. Adams*, 28 N. J. L. 160; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. ed. 869; 2 Washb. Real Prop. 223.

The decree must be reversed, and the cause remanded for one in harmony with this opinion.

KANSAS SUPREME COURT.

W. O. JOHNSON et al., Plffs. in Err.,
v.

NORTH BALTIMORE BOTTLE GLASS
COMPANY.

(— Kan. —, 88 Pac. 52.)

Sale—delay in delivery—acceptance—waiver of damages.

The mere acceptance of a purchased article after the agreed time of delivery does not constitute a waiver of damages for failure to deliver in time, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the buyer to waive such damages.

(December 8, 1906.)

Headnote by PORTER, J.

Case Note.—Effect of acceptance of goods as a waiver of damages for delay in delivery:—The earlier cases on this subject are collected in a note to *Redlands Orange Growers' Asso. v. Gorman*, 54 L.R.A. 718. As there shown, there is considerable conflict of opinion on the point. But the weight of authority is decidedly in favor of the doctrine laid down in *JOHNSON v. NORTH BALTIMORE BOTTLE GLASS CO.*, that the mere acceptance after the time stipulated for delivery does not amount to a waiver of damages for the failure to deliver in time, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the buyer to waive such damages. This doctrine is recognized and declared in many of the cases cited in the note already referred to, and has been followed in later cases. Thus, in *Beyer v. Henry Huber Co.* 100 N. Y. Supp. 1029, it was held that acceptance does not necessarily preclude a claim for damages

ERROR to the District Court for Cowley County to review a judgment in favor of defendant in an action brought to recover damages for alleged breach of contract. Reversed.

Statement by Porter, J.:

This is an action to recover damages for an alleged breach of contract. The plaintiffs in error were plaintiffs below, and will be referred to as plaintiffs here. They are engaged in the manufacture of soda water at Winfield, Kansas. The defendant is a corporation engaged in the manufacture of glass bottles at Terre Haute, Indiana. On November 30, 1901, through a traveling salesman of defendant, a contract was made by which plaintiffs purchased from defendant 150 gross of soda pop bottles and 900 city boxes, like sample, which were to be

delivered on April 1, 1902. The order for these goods was made upon a written blank furnished by defendant. The terms were sixty days, with 2 per cent discount in ten days, prices f. o. b. Winfield. It specified that plaintiffs were to furnish the manufacturers certain designs for the lettering of the bottles and boxes. The order was mailed to defendant by its salesman. Five days later defendant accepted the order in a letter to plaintiffs as follows: "We beg to acknowledge the receipt of your order, placed through our Mr. James, and same has been entered as per copy of order furnished you." On December 4th defendant wrote another letter to plaintiffs, in which it said: "We have your favor of the 4th inst., inclosing sketches for lettering bottles and cases, and we will duplicate these sketches as closely as possible." Matters

for delay in the delivery, as distinguished from a defense of an action for the contract price.

So, while acceptance waives defense to an action for the contract price on account of delay in delivery, it does not prevent a counterclaim for damages on account of such delay. Crocker-Wheeler Co. v. Varick Realty Co. 104 App. Div. 568, 94 N. Y. Supp. 23.

The vendee's acceptance after the expiration of the time merely waives his right to rescind, not his right to recoup his damages on account of the delay. Wall v. St. Joseph Artesian Ice & Cold Storage Co. 112 Mo. App. 659, 87 S. W. 574.

While acceptance is evidence from which, in connection with other circumstances, a waiver of a claim for damages may be found, yet, ordinarily speaking, the purchaser may accept the delayed delivery and recoup the damages, if any, in an action by the vendor for the purchase price. Medart Patent Pulley Co. v. Dubuque Turbine & Roller Mill Co. 121 Iowa, 244, 96 N. W. 770. In this case, however, it was held that the vendee had waived its right to avail itself of this rule by voluntarily paying the purchase price after the delay in the delivery, with knowledge of all the material facts bearing upon his right to damages.

In *Murmann v. Wissler*, 116 Mo. App. 397, 92 S. W. 355, it was declared that acceptance after the expiration of the time for delivery is but prima facie evidence of a waiver of the right to damages on account of delay, and that the question of waiver is therefore in general for the jury. The court, however, doubted whether, under the circumstances of the particular case, there was sufficient evidence to carry the question of waiver to the jury.

The court in *O. H. Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919, recognized the conflict of authority upon the general question as to the effect of acceptance as prima facie a waiver of default as to the time of delivery, but said that it was 7 L.R.A. (N.S.)

unnecessary to determine which of the two rules was based upon the better reason, or sustained by the weight of authority, as it was clear that, whether tested by one or the other, there was no waiver in the instant case for the reason that the correspondence and conduct of the parties not only failed to show any intention on the part of the vendee to waive the damages on account of the delay, but, on the contrary, showed that there was no such intention.

The general doctrine that mere acceptance of delivery after the time stipulated does not amount to a waiver of damages for delay is recognized in *Poland Paper Co. v. Foote & D. Co.* 118 Ga. 458, 45 S. E. 374; but the court also declared the doctrine that a new contract for the purchase and sale of the same article, when fully executed, may be a satisfaction of the original agreement; and applied the latter doctrine by holding that, where goods were shipped after the time stipulated, and the seller stopped the same *in transitu*, and refused to deliver unless paid in cash, less 4 per cent discount, instead of on the credit originally agreed; and the buyer assented, paid the new price and received the goods, without reserving the right to sue for damages for delay,—full performance and execution of the subsequent contract amounted to a waiver of damages for the delay in delivery.

In *E. T. Burrowes Co. v. Rapids Safety Filter Co.* 49 Misc. 539, 97 N. Y. Supp. 1048, it was declared generally that, the goods having been accepted long after the stipulated time without objection on the part of the vendee, the latter must be deemed to have waived all objection to the delay in their delivery; but the delay in this case was relied upon to defeat the action for the purchase price, and not by way of recoupment or counterclaim for damages. The decision in *Maness-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907, is also merely to the effect that the vendee cannot defeat an action for the purchase price where he accepts a delayed delivery.

then rested until April 5, 1902, when plaintiffs, not hearing anything further, wrote as follows:

Winfield, Kansas, April 5, 1902.
The North Baltimore Bottle Glass Co.,
Terre Haute, Ind.

Gentlemen:—

We wish to know if our bottles have been shipped April 1st, as contracted. We have had no notice to that effect or the contrary, and are becoming rather anxious. We are needing these bottles now, and, in the event you have not shipped them, please use every effort to get them out at once. Please advise us the situation by return mail and oblige,

Yours truly,
W. O. Johnson & Son.

Defendant answered as follows:

Terre Haute, Indiana, April 7th, 1902.
W. O. Johnson & Son, Prop.,
Winfield, Kan.

Gentlemen:—

We are in receipt of your favor of the 5th inst. in regard to the order for bottles placed with our Mr. E. C. James, and in reply would say that from such information as we have been able to procure the amount invested in your business is too small to warrant us in extending the terms of credit wanted. We will be glad to make up bottles, provided you will send us a remittance covering, say, 50 per cent of the order and when making shipment we will attach B/L to our draft for the balance on our account, allowing you the usual 2 per cent cash discount; or, if it is more agreeable to you, you can furnish us with a satisfactory guarantor or indorser of your account. We hope to have your early reply, and trust that you can arrange to give us instructions in accordance with suggestions above outlined.

Yours truly,
North Baltimore Bottle Glass Co.,
Per C. M. Jackson, Secy.

On April 9th plaintiffs sent the following telegram to defendant:

Winfield, Kansas, April 9th, '02.
Advise quick earliest possible date you can fill our order as per your letter seventh.
W. O. Johnson.

And the following day they wrote defendant:

Winfield, Kansas, April 10th, 1902.
The North Baltimore Bottle Glass Co.,
Terre Haute, Ind.

Gentlemen:—

We inclose you herewith draft for \$400
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as per the terms of your letter of April 7th, being 50 per cent or more of the cost of the goods less freight and cash discount. Would urge that you rush this order with all possible haste, as we are in need of these bottles at once. We are very much surprised at the manner in which you have treated this order. The terms of your letter would have been complied with at any time, had you have called our attention to it, and we were very much surprised when we received your letter of the 7th inst., stating that the order had not yet been shipped. We trust, therefore, that you will use every possible effort to get this shipment to us at the earliest possible moment, attaching draft for balance to bill of lading and sending the same to the Cowley County National Bank of Winfield, Kansas, where it will be promptly paid upon receipt of shipment.

Yours truly,
W. O. Johnson & Son.
Enc. N. Y. draft.

Defendant wrote plaintiffs in reply:

Terre Haute, Ind., April 10th, 1902.
W. O. Johnson & Son,
Winfield, Kans.

Gentlemen:—

We are in receipt of your message of the 10th inst. advising that you have sent draft in to-day's mail, and we will get your order out as quickly as possible. We are sending by mail to-day a sample bottle, our style No. 437, which we believe you will find to be the correct size and shape, as explained to our representative, Mr. James. We have your instructions in regard to the lettering wanted on the bottles and printing on the cases, and as soon as you receive our sample we will thank you to examine the same carefully for shape, size, capacity, etc., and wire us at our expense if you find this sample satisfactory. As soon as your reply is received, we will place your order for cases and get the car out as soon as possible.

Yours truly,
The North Baltimore Bottle Glass Co.,
Per C. M. Jackson, Secy.

And again as follows:

Terre Haute, Indiana, April 12th, 1902.
W. O. Johnson & Son,
Winfield, Kans.

Gentlemen:—

We are in receipt of your favor of the 10th inst. inclosing draft for \$400, which amount we have credited to your account and thank you for the remittance. We also have your message of the 12th inst., advis-

ing that the shape of our sample bottle is correct. As requested we will increase the length of the body of the bottle $\frac{1}{4}$ " and increase the capacity $\frac{1}{2}$ oz. To make this change will require a new mould, but we will commence work on this at once and will ship the bottles at the earliest possible moment.

Yours truly,
The North Baltimore Bottle Glass Co.,
Per C. M. Jackson, Secy.

This was followed by another letter from defendant, which reads as follows:

Terre Haute, Indiana, April 15th, 1902.
W. O. Johnson & Son,
Winfield, Kans.

Gentlemen:—

We have your favor of the 12th inst. confirming your message of same date, and will use your sample bottle as a guide for the length of our bottles. We believe we understand your instructions fully and will get the bottles out as quickly as possible.

Yours truly,
The North Baltimore Bottle Glass Co.,
Per C. M. Jackson, Secy.

Other correspondence passed between the parties with reference to shipment of a portion of the order by freight in order to accommodate plaintiffs, but the foregoing letters are all that have any bearing upon the contract. The bottles and cases were afterwards manufactured and shipped to plaintiffs, and received and accepted by them June 6th, at which time they paid the balance of the purchase price without protest. This action was then commenced to recover damages for failure to deliver the goods according to the contract, and plaintiffs alleged that, by reason of the failure to deliver the goods on April 1st, they had suffered damages. The case was tried by the court without a jury, and judgment was rendered in favor of defendant, to reverse which plaintiffs bring this proceeding in error.

Messrs. Hackney & Lafferty, for plaintiffs in error:

Where the evidence shows the violation or infringement of a legal right, the law will presume damages sufficient to sustain an action.

13 Cyc. Law & Proc. ¶ 2, p. 12.

Messrs. Roberts & Richardson, for defendant in error:

A vendee's acceptance of the property in fulfilment of an executory contract of sale is a waiver of the objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by 7 L.R.A. (N.S.)

the delay, of which no evidence was offered by the plaintiffs in this case.

Minneapolis Threshing Mach. Co. v. Hutchins, 65 Minn. 89, 87 N. W. 807; Bock v. Healy, 8 Daly, 156; Baldwin v. Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Baker v. Henderson, 24 Wis. 509; Fraser v. Ross, 1 Penn. (Del.) 348, 41 Atl. 204; Cummings Harvester Co. v. Sigerson, 63 Kan. 340, 65 Pac. 639.

Porter, J., delivered the opinion of the court:

It is the contention of plaintiffs that the facts disclosed establish, as a matter of law, that two contracts were entered into between the parties; that there was a breach of the first contract, causing damages to plaintiffs; that afterwards a second contract was made and carried out; and that plaintiffs, by entering into the second, in no manner waived their right to claim damages for the breach of the original contract. On the other hand, it is claimed that the undisputed facts establish, as a matter of law, that there was but one contract, the terms of which were modified by consent of the parties, and that plaintiffs, by consenting to this modification and their acceptance of the goods, thereby waived all claim for damages for failure to deliver under the terms of the original contract. It was the duty of plaintiffs, upon the breach of the contract, to use diligence to procure the goods somewhere, and thus to minimize any damages for which they expected to hold defendant liable. It was so held in Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. 444. In that case a mere acceptance of the lumber after the specified time for the delivery was said not to constitute a waiver of a claim for damages caused by the failure to deliver in accordance with the terms of the contract. It appeared that the lumber was of such character as could not be procured in the market at the place of delivery, and that the owners of the buildings for whom it was purchased were daily incurring expense by the failure of the vendor to provide the lumber at the time specified. The court said that, under such circumstances, it was the duty of the vendees to make the injury as light as possible by taking and using the lumber upon its arrival, and that to have returned the lumber would not have lessened the damage which had already accrued, but would have aggravated the injury and enhanced the vendor's liability. In Van Winkle v. Wilkins, 81 Ga. 93, 104, 12 Am. St. Rep. 299, 7 S. E. 644, which was an action to recover the contract price of machinery sold for a cotton-seed-oil mill, the court, in allowing damages resulting from its nondelivery in due

time by way of recoupment, notwithstanding the objection that receiving the machinery was a waiver of such damages, said: "As to the damages resulting from delay, these had already been sustained when the mill was received. Its reception, in so far as it affected them at all, could only hinder more from accruing. It certainly could not increase them. There was no inconsistency between reception of the machinery and retention of the claim for damages on account of delay to furnish it by the time stipulated. To hold that there was a waiver by implication would be very unreasonable." It was held error to charge the jury, in an action to recover the purchase price of building material in which defendant counterclaimed damages sustained by reason of nondelivery within the time agreed upon, that they had a right to consider whether the receipt of the goods was not a waiver of any claim for damages. *Gaylord v. Karst*, 43 N. Y. S. R. 531, 17 N. Y. Supp. 720. In that case the court said that the charge obviously had "no other purport than to instruct the jury that, if they found that defendant consented in April to accept future delivery of the building material which plaintiffs had originally agreed to deliver on the 4th of the previous month, they were at liberty to find further that defendant had thereby waived all claim for damages accruing to him from plaintiffs' default in delivery by the time first appointed; and, as this seems to be in direct conflict with the law as declared by the court of appeals in *Ruff v. Rinaldo*, 55 N. Y. 864, and *McMaster v. State*, 108 N. Y. 542, 553, 15 N. E. 417, it is impossible to escape from the conclusion that the charge was erroneous, and the exception thereto well taken. That the defendant was prejudiced by this error is a proposition the validity of which is apparent upon its mere assertion, as the error vitally affected the meritorious consideration by the jury of defendant's counterclaim." In *Hansen v. Kirtley*, 11 Iowa, 565, it is held that the acceptance of the goods after the time fixed for delivery may be considered by the jury as evidence of a waiver of the damages sustained by the delay, but that its weight must depend upon the circumstances of the case. In the case of *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25, which was an action to recover upon notes given for the purchase price of machinery, defendant sought to recoup damages occasioned by delay in the delivery, and for further delay resulting from defects in the machinery. It was held that the mere acceptance of the machinery by the vendee, without protest, after the time specified, and his appropriation of the same to his own use, and even the giving of

notes for the purchase price, did not constitute a waiver of his right to claim damages for the delay. It was said that circumstances often require a vendee to accept the goods after a specified time, or suffer irreparable loss, and that the acceptance in that case amounted to a compulsory one. In *McMaster v. State*, supra, the court says: "The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that, where one party to a contract breaks the same, the other party may stop and refuse further performance. But, instead of doing so, he may perform so far as he is permitted and then claim the damages he has suffered from the breach." In *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387, it is held that the acceptance, without protest, may furnish a strong presumption against a waiver. *Redlands Orange Growers' Assn. v. Gorman*, 76 Mo. App. 184, Affirmed in 161 Mo. 203, 54 L.R.A. 718, 61 S. W. 820.

We think the rule, as qualified by many of the cases, is correct, that the mere acceptance of the purchased article after the agreed time of delivery does not constitute a waiver of damages for the delay, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the purchaser to waive such damages. The intention of the parties controls. 24 Am. & Eng. Enc. Law, pp. 1074, 1162; *Ramsey v. Tully*, 12 Ill. App. 463; *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. 676. It is true that in none of the correspondence on the part of plaintiffs, following the refusal of defendant to deliver the goods, is there any intimation of an intention to hold defendant under the original terms of the contract. Nor, on the other hand, is there any intimation that they intended to waive a claim for damages caused by delay. It is also true that the defendant's letter of April 7th did not stop with a refusal to deliver, but contained an offer to go ahead, provided satisfactory terms were made for the payment of the purchase price. Plaintiffs adopted the suggestion, and arranged for satisfactory terms of payment. Whether we call this a modification of the original, or a new contract, is not very important. The time for delivery under the original contract had already expired. There had been a breach of the terms of the contract. All of the evidence which consists of the correspondence between the parties is before us, and we

have difficulty in arriving at the same conclusion reached by the trial court in finding for defendant. The court may have erroneously held that the acceptance of the goods was a waiver of any claim for damages for failure to deliver. There is nothing in the additional circumstances which, in view of all that occurred, warrants, in our opinion, the inference that the plaintiffs, by acceding to the demand for cash payment, intended to waive damages for the breach which had already taken place. Having accepted the order and permitted plaintiffs to rest for several months in the assurance that the goods would be delivered at a certain date, defendant, after the time expired, refused to deliver, placing the refusal upon the grounds which, under ordinary diligence in business, should have been discovered and made known to plaintiffs long before. These circumstances seem to make it unreasonable to hold plaintiffs to have waived any actual damages suffered because they consented to the change in the terms of payment and accepted the goods.

The judgment will be reversed, and the cause remanded for another trial.

All the Justices concur.

MARYLAND COURT OF APPEALS.

LUCRETIA E. DOAN et al., Appts.,
v.

THE VESTRY OF THE PARISH OF THE
ASCENSION OF CARROLL COUNTY
et al.

(103 Md. 662, 64 Atl. 314.)

Devise—corporation—misnomer.

1. A misnomer of a corporation will not defeat a devise or bequest to it if its identity is otherwise sufficiently certain.

Case Note.—Effect of provision directing the particular purposes to which property granted or devised to or for the benefit of a religious or charitable organization shall be devoted:—An expression in a deed or devise, as to the purpose to which the property granted or devised is to be put, is susceptible of various constructions. It may be taken as creating a trust, a condition, a covenant, or merely as indicating the motive for the devise or conveyance, according to the presumed intention of the deviser or grantor. The ascertainment of such intention is in a degree aided by the rule that, where it is doubtful whether a condition subsequent is created, the courts incline against such construction; and that the expression of a purpose for which it is intended the granted property shall be used will not be taken as creating a condition subsequent where such purpose will not in-
7 L.R.A. (N.S.)

Trust—identity of legal and beneficial interest.

2. A trust cannot exist where the same person possesses both the legal estate and the beneficial interest.

Same—devise to church.

3. A devise to the vestry of a parish, to be used for such church purposes as the rector of said church shall or may direct, creates no trust, but is for the corporate purposes of the vestry, and vests the absolute title in it.

Will—condition—repugnance.

4. A provision in a will devising property to the vestry of a parish, that it shall be used for such church purposes as shall be designated by the rector, is void for repugnance to the fee.

(June 16, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Carroll County in defendants' favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Stevenson A. Williams, James A. C. Bond, and Francis Neal Parke, for appellants:

If it is apparent from the whole will that a trust was intended to be established, then the uncertainty as to the objects or subjects of that trust will not indicate that there was no intention to raise a trust; but the uncertainty will avoid the trust attempted to be founded.

Pratt v. Sheppard & E. P. Hospital, 88 Md. 627, 42 Atl. 51.

From this confidence reposed in the vestry, that it would carry out the designation of the rector, arises an obligation upon the vestry, denominated a trust.

Church Extension of M. E. Church v. Smith, 56 Md. 396; Maught v. Getzendanner, 65 Md. 537, 57 Am. Rep. 352, 5 Atl. 471;

ure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. The following cases are grouped according to the construction given to the provision as to purpose:

In conveyance, as creating trust.

In Alden v. St. Peter's Parish, 158 Ill. 631, 30 L.R.A. 232, 42 N. E. 392, it was held that conveyances made to the rector, church wardens, and vestrymen of an unincorporated religious society, the one providing, "said premises to be used for church purposes only, and not sold or encumbered, and shall revert to the grantors, their heirs and assigns, whenever this condition is broken;" and the other providing, "This conveyance

Gambell v. Trippe, 75 Md. 254, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; Saylor v. Plaine, 31 Md. 158, 1 Am. Rep. 34; Sugden's Gilbert, Uses, 175.

The legal and equitable estates are not both given to The Vestry of the Parish of the Ascension.

Bartlett v. Hipkins, 76 Md. 25, 23 Atl. 1089, 24 Atl. 532.

The uses to which the "land and buildings thereon" shall be dedicated by the passing rectors may be within the scope of the corporate powers of the vestry; but it is equally possible that these uses chosen by the rector may not be.

Gambell v. Trippe, *supra*; Wheeler v. Smith, 9 How. 55, 13 L. ed. 44.

The control and discretion committed to

the rector are not repugnant and void conditions. The intention cannot be unconscionably obliterated from the will.

Dolan v. Baltimore, 4 Gill, 394; Trinity M. E. Church, South v. Baker, 91 Md. 574, 46 Atl. 1020.

The courts everywhere recognize the privilege of the settler to prescribe both the objects of the trusts and the manner of its administration.

1 Perry, Tr. §§ 413, 417, 504, 703; Ratcliffe v. Sangston, 18 Md. 383; Atty. Gen. v. Glegg, 2 Ambl. 584, note 2; Re Ilminster Free School, 2 De G. & J. 535; *Ex parte* Blackburne, 1 Jac. & W. 297; Atty. Gen. v. Cuming, 2 Younge & C. Ch. 139; Marsh v. Renton, 99 Mass. 132; Waldo v. Caley, 16 Ves. Jr. 206.

is made upon the express condition and trust that the rents, issues, and profits of the above-described land be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever, and for no other purpose; and this conveyance is accepted upon the express understanding and agreement that the title hereby conveyed shall immediately revert to and be vested in the party of the first part, his heirs, executors, and administrators, when the income from said land shall be diverted to any other purpose,"—constituted a valid gift in trust for a charitable use.

In Neely v. Hoskins, 84 Me. 386, 24 Atl. 882, a conveyance, for a not inadequate consideration, to a bishop "upon the condition that it shall be forever for the use of" a certain church, was held not to create a condition, but a trust for the benefit of the parish.

In Sohler v. Trinity Church, 109 Mass. 1, it was held that the words in the habendum clause of a deed, "in trust, nevertheless, and upon condition always, that the said edifice, . . . and the land aforesaid whereon it stands, . . . shall from henceforth and forever hereafter be . . . made use of for the public worship of God according to the rubric of the common prayer-book used by the Church of England . . . and for no other use or purpose whatsoever,"—created a trust, and not a condition subsequent; the deed having been given by the church trustees, who held title for the church, to the vestry and wardens and their successors.

And in White v. Rice, 112 Mich. 403, 70 N. W. 1024, a recital in a deed of property for the erection of a church, that said church, when on said site, shall, when not in use by the party of the second part, be open for use to certain other denominations, was held to create a valid trust in favor of the denominations named.

In Mills v. Davison, 54 N. J. Eq. 659, 35 L.R.A. 113, 55 Am. St. Rep. 594, 35 Atl. 1072, it was held that a conveyance, for a nominal consideration, of land on which an Episcopal church had been erected, to an incor-

porated religious society, and to their successors, "but not to their assigns," with an habendum in these words: "To have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation: That neither the said party of the second part, nor their successors, shall at any time sell, mortgage, or in any way convey, the said land and premises, or any part thereof, and that no building shall be kept, maintained, or erected thereon, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church,"—created, not a condition subsequent, but a trust for a charitable use; it plainly appearing that the conditions and limitations inserted in the deed were designed and intended to secure and maintain the property donated for the benefit of the religious society, and not for the advantage of the grantors personally.

In Sellers Chapel M. E. Church's Petition, 139 Pa. 61, 11 L.R.A. 282, 21 Atl. 145, and Strong v. Doty, 32 Wis. 381, it was held that a conveyance to trustees in trust that they "shall erect and build, or cause to be erected and built, a house or place of worship for the use of the members" of a certain denomination, did not create a conditional estate, but only a trust for a charitable use.

In Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376, a conveyance for an adequate consideration "for the following uses and trusts, to wit: That the said John Brown [the grantee], his heirs and assigns, shall at all times permit all the white religious societies of Christians, and the members of such societies, to use the aforesaid acre of land as a common burying ground, and for no other purpose, unless it be for erecting thereon a house for public Christian worship,"—was held not to be upon a condition subsequent, there being no apt or proper words to create a condition, no clause of re-entry or forfeiture, and the use declared not being for the benefit of the grantor or his heirs or assigns, but a trust which is void for want of certainty of the beneficiaries.

The trust is void because its object is unascertained and indefinite.

Church Extension of M. E. Church v. Smith; Maught v. Getzendanner; and Gambell v. Trippe, supra; Henry Watson Children's Aid Soc. v. Johnston, 58 Md. 143; Trippe v. Frazier, 4 Harr. & J. 446; Dashiell v. Atty. Gen. 5 Harr. & J. 392, 9 Am. Dec. 572, 6 Harr. & J. 1; Wilderman v. Baltimore, 8 Md. 551; State use of Methodist Episcopal Church v. Warren, 28 Md. 338; Needles v. Martin, 33 Md. 609; Orrick v. Boehm, 49 Md. 71; Rizer v. Perry, 58 Md. 112; Isaac v. Emory, 64 Md. 333, 1 Atl. 713; Dulaney v. Middleton, 72 Md. 67, 19 Atl. 146; Yingling v. Miller, 77 Md. 104, 26 Atl. 491; Methodist Episcopal Church v. Jackson Square Evangelical Lutheran Church, 84 Md. 173, 35 Atl.

8; Trinity M. E. Church, South v. Baker, 91 Md. 539, 46 Atl. 1020.

The trust is void because it creates a perpetuity.

29 Am. & Eng. Enc. Law, 2d ed. p. 444; Missionary Soc. v. Humphreys, 91 Md. 130, 80 Am. St. Rep. 432, 46 Atl. 320; Trinity M. E. Church, South v. Baker, 91 Md. 572, 46 Atl. 1020; Carne v. Long, 2 DeG. F. & J. 75; Thomson v. Shakespeare, 1 DeG. F. & J. 399; Gray, Rule against Perpetuities, § 629.

Messrs. John Milton Reifsnider and Guy W. Steele, for appellees:

A trust is the right of a person to the beneficial enjoyment of property, the legal title of which is in another.

1 Lewin, Tr. 8th ed. 91; Missionary Soc.

In devise, as creating trust.

In Elliot's Appeal, 74 Conn. 586, 51 Atl. 558, a devise of property to a church society "for the purpose of erecting a chapel thereon" was held to create a valid charitable trust.

In Littell v. Wallace, 80 Ky. 252, a devise to the trustees of a certain church, and to their successors forever in fee simple, "to be used, occupied, and enjoyed by the church aforesaid and their minister as a parsonage," was held to give the trustees a fee-simple title to the property in trust for the church.

In Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781, a devise to a diocesan body corporate, of property "to be held as a place for a church school for boys," was held to create a valid charitable trust.

In conveyance, as creating condition.

In Eldridge v. See Yup Co. 17 Cal. 44, the words "for the use of a Chinese church, or a place of religious worship or moral instruction," in the habendum of a deed given for a valuable consideration, were held not to create a trust, since no intention appears to make the grantee a trustee, but a limitation upon the use, which, being repugnant to the estate granted by the premises, was void.

In Nelson v. Solomon, 112 Ga. 188, 37 S. E. 404, a deed conveying a described lot and building to an organized church, declaring that "the intention of this conveyance is to restrict the use of said lot and building to use of a place of worship for the Baptist denomination;" and also that, "in case a majority of the members should wish to sell this property and buy and build in another place, they have the right,"—was held to be upon conditions the compliance with which was essential to a lawful sale of the property by the church.

In Board of Education v. First Baptist Church, 63 Ill. 204, it was held that, where a deed to church trustees provided that the

property should be used for church purposes only, but, when it ceased to be so used, that the grantees might acquire an absolute title by paying to grantor an additional sum, if any condition was created thereby it was a condition subsequent, which might be discharged by payment or tender of the sum stipulated.

In Tomlin v. Blunt, 31 Ill. App. 234, it was held that the stipulation in a deed to trustees of a church and to their successors in office "for church purposes," that the church building "is to be open, at all times when not used by the Baptist denomination, to all evangelical orders of Christians," created a condition which was not invalid for repugnance to the grant.

In Scott v. Stipe, 12 Ind. 74, a grant to the trustees of a church and their successors, in consideration of the respect of the grantors for the institution of Christianity, and that the said church might have a suitable place for erecting a house of worship, was held to be upon a condition subsequent, which was violated by a sale of the property and its use for secular purposes.

In Reed v. Stouffer, 56 Md. 236, it was held that a conveyance to trustees for a religious society, of land to be thereafter used as a burial ground for the members of such society, and for no other purposes whatever, was upon condition, although a valuable consideration was paid for the grant; and that the property would revert to the heirs of the grantor upon its diversion to other uses.

In Second Universalist Soc. v. Dugan, 65 Md. 460, 5 Atl. 415, a deed, habendum "for and to the use of and purpose following,—to say, for the use of the society of Christian people called Quakers, inhabiting and dwelling in and near the town and the county of Baltimore, . . . to inclose and keep the same for a burying place, . . . and also to erect or build a meeting house for the same society,"—was construed as conveying the property for the expressed purposes only.

In Austin v. Cambridgeport Parish, 21 Pick. 215, a deed to a religious corporation in con-

v. Humphreys, 91 Md. 131, 80 Am. St. Rep. 432, 46 Atl. 320; Pratt v. Sheppard & E. P. Hospital, 88 Md. 610, 42 Atl. 51; Williams v. Baptist Church, 92 Md. 497, 54 L.R.A. 427, 48 Atl. 930.

A gift to a corporation capable of taking, to be used for its corporate purposes, does not create a trust.

Woman's Foreign Missionary Soc. v. Mitchell, 93 Md. 199, 53 L.R.A. 711, 48 Atl. 737; Erhardt v. Baltimore Monthly Meeting of Friends, 93 Md. 669, 49 Atl. 561; Bennett v. Baltimore Humane Impartial Soc. 91 Md. 10, 45 Atl. 888; Trinity M. E. Church, South v. Baker, 91 Md. 539, 46 Atl. 1020; Barnum v. Baltimore, 62 Md. 275, 50 Am. Rep. 219; Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 L.R.A. 293, 32 Atl.

1052; Eutaw Place Baptist Church v. Shively, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. 244; Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781; Domestic & Foreign Missionary Soc. v. Gaither, 62 Fed. 422.

A naked collateral power, antagonistic to the fee, is void.

2 Perry, Tr. 5th ed. § 744.

Pearce, J., delivered the opinion of the court:

This is an appeal from a judgment of the circuit court for Carroll county, in an action of ejectment brought by Lucretia E. Doan, George L. Van Bibber, and others against The Vestry of the Parish of the Ascension of Carroll County, a body corporate of the

sideration of \$1, "provided always, and this grant is on this express condition," that the property should be held for the support of ministers who should be settled to preach in a certain meeting house, and void in default of the appropriation of its rents and profits to such use, was said to be clearly on a condition subsequent.

In Upington v. Corrigan, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359, a deed to an ecclesiastic, the habendum clause of which contained a condition that the grantee should consecrate, or cause to be consecrated, the said property for the purpose of erecting a church building; and should, within a reasonable time, erect, or cause to be erected, such building,—was held to be upon a condition subsequent, the breach of which would entitle the grantor or his heirs to re-enter.

In Erwin v. Hurd, 13 Abb. N. C. 91, a deed to the trustees of a religious society, with habendum, for the use and purpose of maintaining upon the premises a place of worship upon the express condition that, if the said premises should be left vacant for the space of two successive years, then they should revert to the grantors, was held to convey a title subject to be divested by non-performance of the condition.

And in Branch v. Wesleyan Cemetery Asso. 11 Ohio C. C. 185, it was held that a deed to church trustees, containing a provision that, should the land cease to be occupied for church purposes and as a place of divine worship, the grant should cease and determine, vested in the trustees an estate in fee, subject to be divested only by breach of condition.

In devise, as creating condition, or conditional limitation.

In General Assembly of Presby. Church v. Alexander, 20 Ky. L. Rep. 391, 46 S. W. 503, it was held that a devise to the general assembly of the Presbyterian Church in the United States, of certain property "as a place of worship in perpetuity," was upon a condition, which was violated by a sale of the property.
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But in St. Luke's Church's Appeal, 1 Walk. (Pa.) 283, where a devise was made to a church "for the sole use and benefit of said church, and not to be disposed of; and if at any time the same shall be directly or indirectly disposed of, then this devise shall be void;" with devise over to other persons in that event,—it was held that the devise over on the contingency of alienation was void for remoteness; and the provision against alienation was also void as a restriction on the fee.

So, also, in Church in Brattle Square v. Grant, 3 Gray, 142, 63 Am. Dec. 725, a devise of a house and land to deacons and their successors forever "upon this express condition and limitation,"—that a minister shall constantly reside in the house, and that, if it is not improved for this use only, then the bequest shall be void and the premises revert and the estate be given to a named person,—was held to create a conditional limitation, and not a condition subsequent, which being void for remoteness, the first taker had an absolute estate in fee.

In conveyance, as creating covenant.

But in Carroll County Academy v. Galatin Academy Co. 104 Ky. 621, 47 S. W. 617, a deed to the trustees of an academy, habendum, "unto said parties of the second part, their heirs and assigns, forever, on condition and in trust that they shall erect and put up a suitable building or buildings for a high school or seminary of learning; and that same shall always be devoted to school purposes, whether retained by said association or be passed into the hands of others,"—was construed as containing a covenant, and not a condition subsequent; there being no language importing that the grant should be void in case the purpose for which the land was conveyed was not carried out, or reserving to the grantor in that event the right to re-enter.

In conveyance, as indicating motive or recognizing contemplated use.

There is also a class of cases in which the

state of Maryland, and The Order of the Holy Cross of Westminster, Maryland, also a body corporate of the state of Maryland, to recover thirteen undivided eighteenths of a parcel of land lying in Westminster, in Carroll county, Maryland, and fully described in the declaration. The case was tried below without a jury on an agreed statement of facts, providing that, if the court should be of opinion that the plaintiffs were entitled to recover, then the court should enter judgment accordingly with 1 cent damages and costs; but, if the court should be of opinion that the plaintiffs were not entitled to recover, then judgment should be entered for the defendants, with costs, reserving the right of appeal to either party. It appears from the statement

of facts: (1) That Lucretia E. Van Bibber, being seised in fee of the parcel of land described in the declaration under a valid conveyance thereof, erected certain buildings thereon, and, on September 25, 1892, conveyed said land and buildings to the defendant, The Order of the Holy Cross of Westminster, Maryland, so long as it should use said land and buildings for the corporate purposes mentioned in its certificate of incorporation, with a proviso that, if it should cease to use the same for such corporate purposes, then the title thereto should revert to and vest in the said Lucretia E. Van Bibber, her heirs and assigns. (2) That the said The Order of the Holy Cross of Westminster, Maryland, without ever obtaining the sanction of the legisla-

expression of purpose to which the land granted or devised is to be put is taken merely as indicating the motive of the grantor or deviser, or a recognition by him of a contemplated use.

Thus, in *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364, a deed to trustees of a church, of property "to be used as a church location," was held not to restrict the title; it not being stated in the deed that the premises were conveyed upon condition that they were to be used as a church location, and there being no provision for a re-entry by the grantor in case of a breach.

In *Episcopal City Mission v. Appleton*, 117 Mass. 326, it was held that a deed of land given for a nominal consideration to a religious society "upon and subject to a condition" that it should be held for religious worship, was held not to be on a condition subsequent, where it also provided that no building should be erected on a certain portion until the adjoining owner should cease to keep open a contiguous strip, or the premises should cease to be a chapel; but that, when it was unfit for such use, it might be sold.

In *Farnham v. Thompson*, 34 Minn. 331, 57 Am. Rep. 59, 26 N. W. 9, it was held that a conveyance of land to a religious corporation, "for the purpose of erecting a church thereon" only, was not upon condition subsequent.

In *Methodist Protestant Church v. Laws*, 7 Ohio C. C. 211, it was held that, where property was conveyed to a church corporation "for a place of burial, and for other purposes," there being no words indicating that the grant should be void and the property revert if the declared purpose should not be carried out, the grantee took a fee-simple title.

In *Brendle v. German Reformed Congregation*, 33 Pa. 415, it was held that, where property was conveyed in fee simple to certain persons, who executed a declaration of trust setting forth that the land was granted to them by direction and appointment of the members of a certain church, and stating that they held the same in trust for the benefit, use, and behoof of the poor of said 7 L.R.A. (N.S.)

church, and for a place to erect a house for religious worship and a place to bury the dead, the congregation, in its corporate capacity, held the entire title, the foregoing declaration simply recognizing the uses for which by law they might hold the land.

In *Rankin Regular Baptist Church v. Edwards*, 204 Pa. 216, 53 Atl. 770, it was held that no condition subsequent was created by the use, in the habendum of a deed to a church corporation, of the words "for mission school purposes;" there being no provision in the deed that a building should be erected upon the lot, and be used exclusively for such purposes, and no provision for reverter in case of the nonuser of the ground for the purposes named.

In *Shaarai Shomayim v. Moss*, 22 Pa. Super. Ct. 356, it was held that no condition subsequent was created in a deed conveying certain premises "forever in trust for the society of Jews settled and about Lancaster, to have and to hold the same as a burying ground;" but that the conveyance passed a fee simple absolute.

In devise, as indicating motive or contemplated use.

In *Erhardt v. Baltimore Monthly Meeting of Friends*, 93 Md. 669, 49 Atl. 561, a devise to a religious corporation in trust for the purpose of applying the income for the use of the school under the control of such corporation was held valid as a gift to the corporation; the purpose expressed being within the scope of its corporate functions, and the devise therefore not being objectionable as creating a trust for unascertained beneficiaries.

In *Lane v. Eaton*, 69 Minn. 141, 38 L.R.A. 669, 65 Am. St. Rep. 559, 31 N. W. 1031, a residuary devise to a church "absolutely, to be used by said church in aiding the cause of home and foreign missions equally," was sustained as a gift for a corporate purpose, although, considered as a devise in trust, it would not be valid for want of an ascertained beneficiary.

So, also, in *Preston v. Howk*, 3 App. Div. 43, 37 N. Y. Supp. 1079 (Affirmed without

ture of Maryland to said conveyance, entered into possession of said land and buildings upon the execution and delivery of said conveyance, and continued to use the same for its corporate purposes until April 24, 1905, when it finally abandoned the user thereof for its corporate purposes. (3) That the said Lucretia E. Van Bibber died February 8, 1896, leaving a last will and testament duly executed and admitted to probate by the orphans' court of Carroll county, whereby, amongst other things, she devised as follows: "Whereas, I have heretofore, by deed dated September 25, 1892, granted and conveyed a parcel of land containing one acre, one rood and four perches of land more or less to The Order of the Holy Cross of Westminster, Maryland (a body corporate of the state of Maryland), subject to the following condition, 'that, in the event said Order of the Holy Cross should at any time hereafter abandon said premises for the uses in its certificate of incorporation mentioned, then in that event said land and premises with the buildings and improvements thereon shall revert to me, my heirs and assigns, as appears by said deed; and desiring to provide for the disposal of said property in the event of the abandonment and the reversion of the same, as in said deed set forth, I give and devise said land in said deed described and thereby conveyed, to the Vestry of Ascension Church, Ascension Parish, in Westminster, Carroll county, Maryland, to be used for such church purposes as the rector of said church shall or may direct, it being my purpose and desire that the said land and buildings thereon shall be under the control of the rector of the Ascension church, and shall be used for such church work as he may deem for the best interest of Ascension church." (4) That, upon the abandonment of said land and buildings as aforesaid, the said Order of the Holy Cross of Westminster, Maryland, surrendered and delivered the actual possession of said land and buildings to the Vestry of the Parish of the Ascension of Carroll County, one of the de-

fendants, which accepted said delivery and possession, and entered upon said lands and buildings and now holds the same, and has ever since rented the same by the direction and with the consent of the rector of said church; the money derived therefrom being used for the purposes of the Ascension church, it now and always being the only church within the territorial limits of said parish, and there being but one Ascension church, and but one Ascension parish in Carroll county, embracing the town of Westminster. (5) That since the institution of this suit, at the first session of the legislature after the abandonment of said premises by the said Order of the Holy Cross, the legislature gave its sanction and consent to the devise now in question in the will of said Lucretia E. Van Bibber. And (6) that, if said devise is not valid and effective, then the plaintiffs are entitled to thirteen undivided eighteenthths of said land and premises.

It will be seen that the corporate name and title of "The Vestry of the Parish of the Ascension of Carroll County" is not correctly given in Miss Van Bibber's will; it being there called "The Vestry of Ascension Church, Ascension Parish, in Westminster, in Carroll county, Md." It is too well settled, however, to admit of question, that the misnomer of a corporation will not defeat a devise or bequest to it if its identity is otherwise sufficiently certain. As was said in *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 203, 53 L.R.A. 711, 48 Atl. 739: "When it is clear who was intended to take, the accidental miscalling of the beneficiary's name will not invalidate the gift." And again, in *Reilly v. Union Protestant Infirmary*, 87 Md. 668, 40 Atl. 894, it was said: "The name is simply descriptive of the legatee. The name is no more the legatee than is the name of an individual the individual himself." It is too obvious for argument, upon reference to the agreed statement of facts, that the beneficiary was intended to be "The Vestry of the Parish of the Ascension of Carroll County," and we understand that this is practically

opinion in 154 N. Y. 734, 49 N. E. 1103), it was held that a residuary legacy to trustees of a church, "to be used by them to help defray the expense of preaching the Gospel in said church from year to year," was a gift for a corporate purpose, and did not create a trust.

In *Griffitts v. Cope*, 17 Pa. 96, a devise of property to the trustees of a religious society, "there to build a meeting house upon, if the members of that meeting shall agree to build a meeting house there, but not else," was held to carry a fee simple; it being presumed that, by that declaration, the deviser meant merely to recognize the pur-

pose for which a religious society is allowed to hold land.

No objection appears to have been made in *DOAN v. PARISH OF THE ASCENSION* to the validity of the devise to the defendant upon the ground that the estate of the testatrix in the property in question was not devisable. That a possibility of reverter upon breach of a condition subsequent is neither descendible nor devisable, but that such breach may be taken advantage of only by the grantor or by his heirs as representatives of the grantor, has, however, been held in *Upington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359.

conceded by the appellants. Neither is it denied that Miss Van Bibber had the power and right to devise this property; and the sole question presented is whether, under a proper construction of the language, the devise is valid or void. The plaintiffs assert that this devise creates a trust in its subject-matter, and that the trust thus created is void, because its objects are not ascertained, and also because, even if ascertained, it is a perpetuity; while the defendants contend that the devise is of a fee-simple estate, to the Vestry of the Parish of the Ascension, and not a trust, and that the only construction of the subsequent clause relating to the control of the said land and buildings by the rector of the parish is that it is an attempt to ingraft upon the fee a naked collateral power to cut down the fee, to which the law will not permit effect to be given. Mr. Hill, in his work on Trustees, (4th Am. ed.) *44, says: "Before the relation of trustee can be constituted, there must necessarily exist: (1) A subject-matter for a proper trust; (2) a person competent to create the trust; (3) one capable of holding property as trustee; and (4) a person for whose benefit the trust property may be held, who is known by the somewhat barbarous appellation of '*cestui que trust*.'" In the case at bar the land and buildings devised are proper subject-matter for a trust. The deviser is competent to create a trust, and the devisee is capable of taking and holding property as a trustee. But there must still be found within the terms of the devise a *cestui que trust*. On page 55, Mr. Hill says: "The legal owner of property is prima facie entitled to its beneficial enjoyment, and, in order to convert him into a trustee, there must be a sufficient indication of the intention of the parties that he should hold the estate for the benefit of others." To effect this conversion there must be a proper declaration of the trust, for "it is not the legal conveyance, or transfer of the property, but the declaration of the trust, that operates in the creation of the trustee." Id. p. 64.

It is apparent, therefore, that, wherever a trust is alleged to be created by any instrument or instruments, there must be a separation of the legal estate from the beneficial enjoyment, and that a trust cannot exist where the same person possesses both. As expressed by Mr. Lewin in his work on Trusts, vol. 1, p. 14 (1st Am. ed.): A trust "is a confidence reposed in some other than the *cestui que trust*, for which the *cestui que trust* has no remedy but by subpoena in chancery; . . . for, as a man cannot sue a subpoena against himself, he cannot be said to hold upon trust for himself. If the legal and equitable interests happen to

meet in the same person, the equitable is forever merged in the legal." Mr. Lewin is equally explicit as to the necessity of a proper declaration of trust, saying, upon page 83: "It is essential to the creation of a trust that there should be the intention of creating a trust; and therefore, if, upon a consideration of all the circumstances, the court is of opinion that the settler did not mean to create a trust, the court will not impute a trust where none in fact was contemplated." In *Bennett v. Baltimore Humane Impartial Soc.* 91 Md. 19, 45 Atl. 889, this court said: "Whilst no set form of words is required to create a trust, if there be an intention to create one, still there must be a manifestation on the face of the will of such an intention before a trust will be declared. The particular circumstances which denote such an intention are necessarily variant; but . . . it may be generally affirmed that where there is a gift to one for the use of another, or where the legatee or devisee is clearly designed to have no beneficial interest in the property given to him, a trust for the benefit of someone was intended to be created; and this conclusion would result either from the words used, or from the legal effect of the instrument itself. In the one case there would be an express declaration of a trust, in the other there would be a trust by construction; but in both it is essential that there should be an intention to create a trust, or none will arise."

It is obvious that there is in this will no express declaration of any trust, and, if any can be declared to exist, it must rest upon implication derived from the language of the will; and it is contended by the plaintiffs that the words following the devise to the vestry, *vis.*, "to be used for such church purposes as the rector of such church shall or may direct, it being my purpose and desire that the said land and buildings thereon shall be under the control of the rector of the Ascension church, and shall be used for such church work as he may deem for the best interest of Ascension church," creates a trust for indefinite purposes or beneficiaries. Let us see, then, what is meant by the "church purposes" and "church work" which is here referred to. If there were anything in this will to justify the conclusion that Miss Van Bibber meant thereby general or diocesan missions, or any of the charitable or religious objects which the Christian church at large is concerned in, there might be ground for holding that The Vestry of the Parish of the Ascension of Carroll County was not designed to take the beneficial interest in the property devised to it, and was only designed to be the administrator of its benefits to these in-

definite beneficiaries; but this intention must be deduced from some rational and substantial analysis of the will, and not from abstract speculation merely. If the contention of the plaintiffs is to prevail, they will defeat the intention of the testatrix that they should in no event have this particular property; and, as was said in *Bennett v. Baltimore Humane Impartial Soc.* supra: "Courts are not, or ought not to be, astute in searching for a construction which nullifies a will, if there are other equally reasonable interpretations which uphold it."

In *Phillimore's Ecclesiastical Law*, vol. 2, p. 1755, the word "church" is said to be derived from the two Green words *kurion oikos*; the house of the Lord, and this plainly appears in the Scotch word "kirk." Its primary meaning, as given in the *Century Dictionary*, is: "An edifice or a place of assemblage . . . for Christian worship." Several secondary meanings are there given, conforming to different contexts in which the word is used, among which are the following: An "organized body of Christians belonging to the same city, diocese, province . . . as the Church at Corinth, the Syrian Church,"—and: "A body of Christians worshipping in a particular church edifice or constituting one congregation." It is in this latter sense that the word is used in *Code Pub. Gen. Laws 1888*, art. 23, § 206, which provides for incorporating religious societies or congregations generally; and which authorizes them to take and hold property and "to use or lease, mortgage, or sell and convey the same in such manner as they may judge most conducive to the interest of their respective churches, societies, or congregations." It is used in the same sense in the act of 1798, chap. 24, which provides specially for the incorporation of vestries for each of the parishes of the Protestant Episcopal Church in this state. In § 29 of that act it is declared that "no vestry shall sell, alien, or transfer any of their estates, or property belonging to their church or churches without the consent of at least five of their body (of which number the rector shall always be one), together with the consent of both the church wardens." And in § 9 of the same act it is provided that the vestry of each parish, for the time being, shall have an estate in fee simple in all lands and other property belonging to them, and "shall manage and direct all such property as they may think most advantageous to the interest of the parishioners." In the case of *Weld v. May*, 9 Cush. 181, the word "church," it was contended, meant an indefinite aggregation of persons; but the court said: "As commonly used in our law, it is synonymous with

'parish' . . . and designates an incorporated society." The references above made to *Code*, art. 23, and the act of 1798, chap. 24, are sufficient to show that, as the word is used in the law of Maryland, it is synonymous with the corporate entity holding the title to its property. The devise in this will is to "The Vestry of Ascension Church, Ascension Parish in Westminster, Carroll County, Maryland;" and when she added, "to be used for such church work or church purposes as the rector of said church may deem for the best interests of the Ascension church," it is, we think, obvious, in the light of what we have said as to the meaning of the word "church," that she meant parish purposes and parish work; that is, the purposes and work of The Vestry of the Parish of the Ascension of Carroll County, or for the corporate work and purposes of the vestry of that parish. This purpose would be sufficiently clear if the last clause in the devise had been omitted; but it is distinctly asserted and emphasized in that clause where the "church work" previously mentioned is declared to be such as the rector should deem best, not for the interest of the church at large, but of Ascension church. In *Domestic & Foreign Missionary Soc. v. Gaither*, 62 Fed. 422, there was a bequest of \$5,000 to the society above named, with a request and desire that it be applied to domestic missions. Judge Morris said: This society "has for its immediate object two purposes,—one domestic, the other foreign, missions. . . . It would seem, therefore, that money given to the corporation, as this legacy was, is not to be held by it upon any trust, but is to be expended by it in the missionary work which it carries on within the United States. . . . This is not a case in which there is a trust, or trustee or *cestui que trust*. It is a direct expenditure by a corporation for the very object for which it was created. It is therefore not within the ruling in the case of *Church Extension of M. E. Church v. Smith*, 56 Md. 362, and is even stronger . . . than the case of *Eutaw Place Baptist Church v. Shively*, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. 244, in which that court sustained the validity of the bequest as being for one of the corporate uses of the donee." So, in *Looks Case*, 26 N. Y. S. R. 745, 7 N. Y. Supp. 298, a bequest to the American Bible Society, to be used for the promulgation of the Holy Bible, was held to be a gift limited to the very use for which the donee was incorporated, and not a trust for an indefinite beneficiary.

Holding, as we do, that the purposes and uses for which she desired this property to be used were the corporate purposes of the donee, it is immaterial that she wished the

rector to determine for which of these corporate uses it should be employed, or whether this was determined by the rector or by the vestry. Inasmuch as the whole beneficial interest in the property is given to the Vestry of the Parish of the Ascension, the true reading of the will is that the estate given is not an estate given in trust, but one devised to the corporation for its general and corporate purposes. *Bennett v. Baltimore Humane Impartial Soc.* 91 Md. 19, 45 Atl. 889; *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 203, 53 L.R.A. 711, 48 Atl. 730. The legal estate and beneficial interest being thus vested in the defendant, the estate it takes is an absolute fee simple. The rector has neither estate nor interest in the subject of the devise, and the power which the testatrix desired to be exercised by him, of designating the particular corporate uses to which it should be applied, was not to be exercised for his own benefit or that of another, but for that of the vestry alone. It is therefore a naked collateral power repugnant to the fee devised to the vestry, and for that reason void. As was said in *Smith v. Clark*, 10 Md. 194: No interest in terms is attempted to be reserved or carved out of the land for any other person, the enjoyment of the whole estate being the benefit intended by the testator there to be conferred upon the devisee; but he attempted to do that which the law will not permit him to do, namely, to prescribe the mode by which this benefit of property, during all time, was to be enjoyed by the devisee, which would be wholly inconsistent with a fee-simple interest, as well as public policy.

For the reasons assigned, the judgment will be affirmed.

Judgment affirmed, with costs to the appellees above and below.

UTAH SUPREME COURT.

STATE OF UTAH EX REL. EMMA K. ALDRACH

v.

C. W. MORSE.

(— Utah, —, 87 Pac. 705.)

Divorce—jurisdiction—nonresidents.

1. The courts of the state of the matrimonial domicile have jurisdiction of a suit for divorce, although the defendant is out of

Case Note.—Jurisdiction of court of state of matrimonial domicile to grant a divorce upon constructive service of process against defendant, who is out of jurisdiction: — This case is very interesting and instructive not only for its discussion of the general 7 L.R.A. (N.S.)

the jurisdiction, and service of process is made upon him by publication only.

Matrimonial domicile—change.

2. A man cannot change the matrimonial domicile by abandoning his wife and going into another state to reside.

Mandamus to compel procedure with cause.

3. Mandamus lies to compel a trial court to proceed with a cause of which it has jurisdiction.

(November 20, 1906.)

APPPLICATION for a writ of mandamus to compel defendant to proceed with the trial of a suit for divorce. Relief granted.

The facts are stated in the opinion.

Mr. S. P. Armstrong, for petitioner:

The decree of divorce stands on the same plane as a decree which adjudicates pedigree, legitimacy, slavery, bankruptcy, naturalization, settlement of pauper, etc.,—all proceedings *in rem*. The court deals with the status on which its jurisdiction is predicated.

2 Black, Judgm. §§ 803-807.

Jurisdiction attaches through constructive service.

Amy v. Amy, 12 Utah, 320, 42 Pac. 1121; 2 *Smith*, Lead. Cas. 699; 1 *Greenl. Ev.* § 525; 1 *Herman*, Estoppel, p. 37; *Reno*, Nonresidents, §§ 256, 260; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Hoagland v. Hoagland*, 19 Utah, 103, 57 Pac. 20; *Atherton v. Atherton*, 181 U. S. 160, 45 L. ed. 797, 21 Sup. Ct. Rep. 544.

Mandamus lies to compel an inferior court to assume jurisdiction.

Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *State ex rel. Nichols v. Cherry*, 22 Utah, 1, 60 Pac. 1103; *State v. Norrell*, 17 Utah, 8, 53 Pac. 610; *State v. Hart*, 19 Utah, 438, 57 Pac. 415; *State ex rel. Citizens' Bank v. Seventh Dist. Judge*, 38 La. Ann. 499; 13 *Enc. Pl. & Pr.* pp. 529, 537, 542.

Messrs. S. R. Thurman, A. L. Hoppaugh, and Charles C. Dey, amici curiæ:

The respondent has jurisdiction to render a decree in the case made before him by the petitioner.

2 *Bishop*, Marr. & Div. § 152.

Frick, J., delivered the opinion of the court:

On the 14th day of July, 1906, Emma

question of jurisdiction under the circumstances appearing in the case, but also because it apparently proceeds throughout upon the implicit assumption that the question whether the Utah court ought to assume jurisdiction depended upon the ques-

K. Aldrach, the petitioner herein, filed her affidavit and petition in this court praying for a writ of mandate, wherein she states, in substance, the following facts: That on the 6th day of December, 1905, she duly filed her complaint against William F. Aldrach, her husband, in the district court of Salt Lake county, Utah, in which, as appears therefrom, she alleged the necessary facts which entitled her to a decree of divorce upon the grounds of wilful desertion and for wilful failure to support. She alleged her residence as being and having continued to be in Utah ever since her

marriage to said Aldrach, and that she and said Aldrach were married in Utah, and were husband and wife. She further sets forth in her petition all the facts necessary to confer jurisdiction upon the district court aforesaid in an action for divorce granted upon what is generally known as "constructive service." It further appears that due service by publication was had in conformity to the law of this state, that the defendant in said action for divorce failed to appear therein, and that C. W. Morse, the judge of said district court, the respondent herein, upon a hearing of said

tion whether, under the doctrine of the Haddock Case and other cases decided by the United States Supreme Court, a decree of divorce rendered in the action would be entitled to recognition in other states under the full-faith-and-credit clause of the Federal Constitution. For reasons stated at length in a note in 59 L.R.A. 135 et seq., that assumption seems to the present annotator to be perfectly logical and well founded in reason, and to afford a practical way of escape from the confusion, theoretical and practical, in which the whole subject has become involved. It must be conceded, however, that very little direct authority for this view is to be found in cases dealing directly with the jurisdiction in divorce, although it seems to be a logical deduction from the general doctrine established in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, that a judgment *in personam* on constructive service against a nonresident is contrary to due process of law and void, even in the state where rendered. While it is true that Justice Field, who wrote the opinion in that case, suggested that a divorce suit by a resident against a nonresident might not fall within the doctrine there laid down, that suggestion was *obiter*, and was based upon the idea that a divorce suit is a suit *in rem*, and not *in personam*. If, however, as it seems to be assumed in the Haddock Case and is clearly held in the New York cases, a suit for a divorce is not a suit *in rem*, the doctrine of *Pennoyer v. Neff* seems to be clearly applicable, assuming, farther, that the constitutional provision as to due process of law applies to a divorce suit. If this position could be maintained, it is apparent that, as soon as it has been determined by the United States Supreme Court that a divorce upon constructive service under a certain state of facts is not entitled to recognition in another state under the full-faith-and-credit clause, it would follow that such a divorce would not be valid even in the state where granted; and hence, that a court of that state ought not to assume jurisdiction to grant it. Conversely, under this theory, if that court should decide, even upon direct appeal from a decree of divorce rendered by a state court, that the latter court had jurisdiction upon a given state of facts, it would

follow that such decree would be entitled to recognition in other states under the full-faith-and-credit provision. In this view, therefore, upon any given state of facts, there would be theoretically no change of matrimonial status as a party to a divorce decree passes from one state to another, and no practical diversity after the jurisdiction on that state of facts had been passed upon by the United States Supreme Court, either upon a direct appeal from the decree of divorce, or from the decree of another state refusing to recognize that decree. In other words, under this theory, the same criterion of jurisdiction would be applied whether the validity of the decree in the state where rendered, or in another state, was involved. The difficulty, however, in establishing this theory, is very great from the standpoint of authority, for the reason that the very courts which go the farthest in refusing to recognize a decree of divorce rendered in another state against a nonresident upon constructive service very generally concede the validity of such decree in the state where rendered, and themselves assume jurisdiction to grant a domestic decree under exactly the same circumstances. This is notably true of the New York courts; and the Haddock Case itself seems to countenance this position, as it appears to be conceded, at least in the prevailing opinion,—although the point was not directly involved,—that the decree of divorce there involved was valid in Connecticut where it was granted, although the courts of New York were not obliged to recognize it under the full-faith-and-credit clause.

Assuming, however, for the purposes of the argument, the soundness of the premise apparently assumed by the Utah court,—that is, that the question whether the local court ought to take jurisdiction depended upon the question whether a decree, if rendered, would be entitled to recognition in other states under the full-faith-and-credit clause,—there is considerable doubt as to the correctness of its conclusion, tested by the Haddock Case and the case of *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544. It will be remembered that in the *Atherton* Case the suit was brought by the husband in Kentucky, where both parties were domiciled prior to the

cause, duly made and filed findings of fact and conclusions of law, in substance as follows: That the defendant in said action, William F. Aldrach, was duly served with summons by publication; that the petitioner and Aldrach were married at Salt Lake City, Utah, on the 24th day of May, 1893, and are husband and wife; that the petitioner, plaintiff in said action, had been and was an actual bona fide resident of Salt Lake City for more than one year immediately preceding the commencement of said action; that the petitioner and said Aldrach cohabited together as husband and wife, and

lived here and had their marriage domicil in the state of Utah until September, 1904, when said Aldrach wilfully, and without cause or excuse, deserted and abandoned the petitioner, and continues to wilfully and without cause so to do; further, that said Aldrach, being able so to do, has wilfully neglected to provide for petitioner and her child, the fruit of said marriage, the necessities of life, and continues to neglect to so provide for her and said child. As conclusions of law the said court found that the petitioner, plaintiff in said action, is entitled to a decree of divorce, but con-

time the wife left her husband and went to New York. It is somewhat difficult to determine from the opinion in that case whether the decision that the New York courts were bound to recognize the Kentucky decree, which was rendered on constructive service against the wife, proceeded upon the assumption and hypothesis that the wife was still constructively domiciled in Kentucky at the time the decree in that state was rendered, or upon the assumption that, although she may have subsequently acquired a valid separate domicil, yet that Kentucky was the domicil of both parties up to the time of the separation. The phrase "matrimonial domicil," employed in the opinion, might embrace either hypothesis. Upon the whole, however, and in spite of the recital in the statement of facts preceding the opinion, that the New York court found that the wife, prior to the Kentucky suit, had acquired a separate domicil in New York, the opinion seems to sustain the view that the decision was rendered upon the hypothesis that the wife, although out of Kentucky at the time, was still constructively domiciled therein, and that she had not acquired a separate legal domicil in New York; and this view of the ground of the decision in that case seems to be corroborated by the opinion in the Haddock Case.

In this view of the decision in the Atherton Case, it is apparent, as pointed out in the able brief of the *amici curiæ* in *STATE EX REL. ALDRACH v. MORSE*, that there is a vital difference whether, as in the Atherton Case, the suit is by the husband against the wife, or, as in the *ALDRACH CASE*, by the wife against the husband. In the former case the husband's domicil remains the constructive domicil of the wife, assuming that she was not justified in leaving him, even though she is actually residing in another state; whereas in the latter case, while the fact that the husband abandoned the wife without cause may prevent her domicil from following his, and enable her to retain or acquire a separate domicil, it certainly does not prevent the husband from acquiring a separate domicil.

The former case therefore falls within the exception—covering cases where the defendant, though absent at the time of the decree, was legally domiciled in the state where the divorce was granted—which even 7 L.R.A. (N.S.)

the New York courts make to the general doctrine denying recognition to a divorce granted in another state upon constructive service. See *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, and other cases cited in 59 L.R.A. 163. The reason that the New York court of appeals refused to recognize the Kentucky decree in the Atherton Case was that the trial court expressly found that Mrs. Atherton (the defendant) had acquired a separate domicil in New York before the Kentucky decree. A case, however, in which the wife was plaintiff, would not fall within that exception for the reason that the husband does not take the wife's domicil, even if the circumstances are such that she can acquire or retain a separate domicil.

If, however, it were to be assumed that the decision in the Atherton Case proceeded upon the assumption that Mrs. Atherton had acquired a separate domicil in New York before the Kentucky decree was granted, and rested upon the ground that Kentucky was the last common matrimonial domicil of the parties, it would—even upon the assumption that the same criterion of jurisdiction is to be applied whether it is a question of taking jurisdiction in a domestic suit or of passing upon the validity of a decree rendered in a sister state—sustain the assumption of jurisdiction on the facts presented in *STATE EX REL. ALDRACH v. MORSE*.

And it may be remarked, in this connection, that there is a class of cases which, without admitting or denying under all circumstances the extraterritorial effect of a divorce rendered against a nonresident upon constructive service, apparently concede it such effect when, as in *STATE EX REL. ALDRACH v. MORSE*, the last common matrimonial domicil of the parties prior to their separation was in the state where the decree was rendered, notwithstanding that, prior to the commencement of the suit, one of them may have acquired a separate domicil in another state. That seems to be the principle deducible from the Pennsylvania cases,—both those involving the jurisdiction of a domestic court upon constructive service, and those involving the recognition of a decree of divorce rendered in another state upon such service. See note in 59 L.R.A. 159.

cludes, further, inasmuch as said Aldrach did not appear in said action for divorce, and was served with process by publication only, while being absent from the state of Utah, that therefore the district court had not acquired jurisdiction of said Aldrach; and upon that ground alone refused to grant petitioner the decree of divorce. It further appears from the record in said case that said Aldrach was a nonresident of the state of Utah at and prior to the time said action for divorce was commenced, and was a resident of the territory of Arizona. The foregoing is a mere skeleton or outline of the facts stated in the petition upon which the petitioner prayed that the Honorable C. W. Morse, as judge of said district court, be required to show cause to this court why a peremptory writ of mandate should not issue against him requiring him to assume jurisdiction of said action for divorce and enter a decree in favor of the petitioner upon the findings of fact and conclusions of law made and signed by him in said case. The petition is duly verified, and, upon being presented to this court, the then chief justice issued an alternative writ of mandate directed to the respondent herein, of which he duly admitted service, and in due time filed his answer thereto, in which he practically admits all the facts stated in said petition, but states that he is advised that, in virtue of a decision in the case of *Haddock v. Haddock*, rendered by the Supreme Court of the United States, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, an enforceable decree of divorce could not be rendered in a case where the service upon an absent defendant therein was by publication only, and no appearance by him was made in the case; and that upon that ground alone he refused to render a decree of divorce in the action aforesaid. The applicant will be designated "petitioner," and the judge will be styled "respondent" in this opinion.

The only question for solution upon the foregoing facts is, Should the respondent be required to assume jurisdiction of the divorce action, and, in view of the findings of fact and conclusions of law made and filed by him, as judge of the district court of Salt Lake county, proceed to a completion of said action by granting a final decree of divorce to the petitioner? It seems to us there is but one answer possible to the foregoing proposition, which must be in the affirmative. Every essential element necessary under our law, both substantive and of procedure, is present in the divorce proceeding to entitle the petitioner to a decree of divorce. Neither do we think that the case of *Haddock v. Haddock*, supra, can possibly

be applied so that a different result could be reached. As we read that case, the one essential to confer jurisdiction upon a state court in divorce proceedings is what is denominated in that case "domicil of matrimony," and that such domicil must be within the state where the action is planted, and be with the party bringing the action. If such a domicil exists, then the state courts have full power to sever the marital relations upon constructive service in cases where statutory residence and a cause for divorce coexist.

As we view it, the pith of the whole matter is stated in *Haddock v. Haddock*, supra, at page 570 of 201 U. S., page 870 of 50 L. ed., page 527 of 26 Sup. Ct. Rep., where Mr. Justice White, speaking for the majority of the court, says: "Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state, in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and therefore is not to be treated as the actual or constructive domicil of the wife. Hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired." It is further said, at page 571 of 201 U. S., page 870 of 50 L. ed., page 528 of 26 Sup. Ct. Rep.: "So, also, it is settled that, where the domicil of a husband is in a particular state, and that state is also the domicil of matrimony, the courts of such state, having jurisdiction over the husband, may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the state of the matrimonial domicil for the purpose of the dissolution of the marriage, and, as a result, have power to render a judgment dissolving the marriage, which will be binding, upon both parties and will be entitled to recognition in all other states by virtue of the full-faith-and-credit clause." If, therefore, the abandonment of the wife by the husband does not affect the domicil of matrimony, and it is this domicil that confers jurisdiction and empowers the state courts to dissolve the marriage relation as to both parties, and such a dissolution, when made, is binding upon all the states, under the full-faith-and-credit clause of the Federal Constitution, how can we avoid a conclusion in this case adverse to the petitioner? Can it reasonably be contended that the husband may obtain a dissolution binding upon all in a case where the wife deserts him, but the wife may not do so

when the husband abandons the wife? This would be contending not only for an illogical, but to our minds an absurd, result. The Supreme Court of the United States, in the quotations above given, clearly points out that the fiction that the domicile of the husband is that of the wife does not apply where, as in this case, the husband has wrongfully abandoned the wife. In such a case the husband cannot draw to himself, by virtue of that fiction, the domicile of the wife; but the matrimonial—that is, the jurisdictional—domicile remains with the wife, and within the state of that domicile. In fact, this is just what is decided in the Haddock Case, as we understand it.

We remark here, as it seems to us from a close analysis of the decision in the Haddock Case, that the matters therein really decided, which at first blush seem somewhat revolutionary, as regards divorces granted on constructive service, are after all more apparent than real. The whole difficulty arises out of the fact that both bench and bar have assumed the law to be a certain way in divorce proceedings, in the absence of an authoritative declaration, which is now made for the first time by the Supreme Court of the United States in the Haddock Case. The rule established in that case, as we understand it, may, for want of a better statement, perhaps, be formulated as follows: Divorces may be granted by state courts upon constructive service where statutory cause and residence coexist, which become binding upon the parties, the courts of all states, and upon all persons: (1) In cases like the one at bar, where the parties are residents of the state at the time of the marriage, and thus establish a domicile of matrimony in that state, and the complaining party continues this domicile up to the time of the action. (2) In all cases where the parties are married out of the state, but come to reside in the state afterwards and recognize the marriage relation within the state, and thus establish a domicile of matrimony therein, and the party bringing the action continues this marital domicile up to the time of bringing the action. (3) In all cases where a statutory cause and residence coexist where personal service is had. We are not now concerned with the question of whether the courts in this state should grant divorces in cases falling within the third class, above stated, upon merely constructive service, or whether they should give force and effect to decrees of divorce when granted by courts other than the courts of this state. That is a question not presented by this record, and we are therefore not authorized to decide 7 L.R.A. (N.S.)

it. It can best be determined when it is presented in the proper way.

In view of the facts presented in this case, and the law applicable thereto, we are convinced that the respondent should have granted the petitioner a decree of divorce dissolving the marital relations existing between her and her husband, and we so hold.

In concluding this opinion, we desire to make our acknowledgments to Messrs. S. R. Thurman, C. C. Dey, and A. L. Hopbaugh, whom we requested to act as friends of the court in this case, and who in that capacity have rendered us valuable service in presenting the questions involved.

It is therefore ordered that a peremptory writ of mandate be, and the same is hereby, granted, requiring respondent to assume jurisdiction of the case of Emma K. Aldrach (the petitioner herein) v. William F. Aldrach (her husband), and that the respondent vacate the conclusion of law that the district court of Salt Lake county has no jurisdiction of the person of the defendant in said action, and that he substitute therefor a conclusion of law in conformity with the law as stated in this opinion, and that he enter a decree of divorce dissolving the marriage relation existing between the petitioner herein and her husband, the defendant in said action, and grant her the relief prayed for in accordance with the findings of fact made by him in said action, and the conclusion of law as modified, as hereinbefore stated.

It is not deemed necessary to issue a peremptory writ in this case,—not for the present at least,—as the respondent will, undoubtedly, act on request, upon being advised of the views expressed in this opinion, or upon being served with a copy thereof. Neither party to recover any costs in this court.

Writ allowed.

McCarty, Ch. J., and Straup, J., concur.

COLORADO SUPREME COURT.

CITY AND COUNTY OF DENVER, Plff. in Err.,
v.

H. D. FRUEAUFF.

(— Colo. —, 88 Pac. 389.)

Municipal corporation—ordinance—trading stamps.

1. An ordinance forbidding merchants to give out trading stamps in their business is

Note. — Validity of legislation regulating or forbidding the use of trading stamps is

not authorized by constitutional and statutory provisions making lotteries and gift enterprises unlawful.

Same—arbitrary definition.

2. A municipal council cannot, by arbitrarily defining the giving out of trading stamps as a gift enterprise, bring it within the statutory prohibition of such enterprises.

(January 7, 1907.)

ERROR to the County Court for the City and County of Denver to review a judgment in favor of defendant in a proceeding against him for violation of a municipal ordinance. Affirmed.

Statement by Goddard, J.:

The defendant in error, a merchant carrying on a legitimate business in the city of Denver, was charged with violating ordinance No. 62 of the series of 1904 entitled "A Bill for an Ordinance to Prohibit Gift Enterprises, Defining the Same, and Providing Penalties for the Violations of Said Ordinance," which said ordinance is in words and figures as follows, to wit:

"Sec. 1. It shall be unlawful for any person, persons, partnership, association, or corporation to engage in, aid, abet, or patronize any 'gift enterprise,' as herein defined.

"Sec. 2. A 'gift enterprise,' as herein employed, is defined to be and shall include the selling, giving, presenting, or distributing of any stamp, trading stamp, coupon, or other device which shall entitle the purchaser of property, goods, wares, or merchandise to demand or receive from any person, persons, partnership, association, or corporation other than the vendor any article, property, goods, wares, merchandise, or money other than that actually sold to the purchaser; or the delivery to any person, per-

sons, partnership, association, or corporation, by any person, persons, partnership, association, or corporation other than the vendor of any article, property, goods, wares, merchandise, or money other than that actually sold, upon presentation of any such stamp, trading stamp, coupon, or other device; or the issuing, selling, giving, or distributing to any person, persons, partnership, association, or corporation, of any stamps, trading stamp, coupon, or other device by any person, persons, partnership, association, or corporation engaged in any trade, business, or profession, with the promise, express or implied, that he, they, or it will give to the person presenting to him, them, or it such stamp, trading stamp, coupon, or other device any money, or anything of value, without receiving from such person the value thereof, or make to any such person, persons, partnership, association, or corporation any concession or preference in any way on account of the presentation of such stamp, trading stamp, coupon, or other device; or the distributing or presenting by any person, persons, partnership, association, or corporation engaged in any trade, business, or profession, to any person, persons, partnership, association, or corporation dealing with him, them, or it any such stamp, trading stamp, coupon, or other device in consideration of any article or thing purchased of, or any service performed by him, them, or it; or the selling or offering for sale of any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise of the gift or bestowal of, any article or thing for or in consideration of a purchase by any person, persons, partnership, association, or corporation, of any

treated in the subject note in 2 L.R.A.(N.S.) 588.

Since the publication of that note it has been held, in *O'Keeffe v. Somerville*, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, that a statute providing that persons selling or giving trading stamps in connection with the sale of articles entitling the holders to receive articles other than those so sold shall pay an excise tax for carrying on such business, equivalent to 3 per cent of the gross receipts from the sale of the articles so sold, and from the trading stamps given or delivered in connection therewith,—is unconstitutional, since the right to conduct a business in the manner prescribed in the statute cannot be regarded as a "commodity," within the provision of the Constitution empowering the legislature to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities.
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But in *Gamble v. Montgomery* (Ala.) 39 So. 353, also decided since that note, it was held that a municipal ordinance which imposed an occupation tax of \$400 upon merchants issuing trading stamps, and only \$24 on merchants whose capital in business is the same, but who do not issue trading stamps, was not invalid because of the discrimination. It was also held in this case that the tax of \$400 would not be held so unreasonable or prohibitive as to render the statute invalid, it appearing that the stamps issued are not available unless and until \$500 worth have been accumulated, and it not appearing how many of the stamps have been redeemed. The report of the case does not show the amount of the stock carried or the total amount for sale of stamps, although it is stated that that was shown by the bill of exceptions.

other article or thing, whether the object shall be for individual gain, or for any other purpose; and the term 'gift enterprise' shall also include the premium stamp, periodical ticket, trading stamp, and similar schemes and devices wherein, by means of stamps, checks, tickets, or other device, certain merchants, manufacturers, and their customers are exploited.

"Sec. 3. Whoever shall violate any provision of this ordinance shall for each offense, on conviction thereof in any court of competent jurisdiction, pay a fine of not less than one hundred dollars (\$100.00) or more than three hundred dollars (\$300.00), or be imprisoned in the common jail of the city and county of Denver for a term of not less than thirty (30) days or more than ninety (90) days, or both such fine and imprisonment, in the discretion of the court."

The case was tried to the court upon an agreed statement of facts, which, so far as necessary to a decision of the case, is as follows:

"(2) That the Sperry & Hutchinson Company is a corporation organized under the law of the state of New Jersey, and doing business in the city and county of Denver, in the state of Colorado.

"(3) That the defendant, at all of the times hereinafter mentioned, was, and now is, a resident of the city and county of Denver, and engaged in a mercantile business in the city and county of Denver, and selling and disposing of goods, wares, and merchandise at retail and otherwise, and is carrying on a large business.

"(4) That heretofore the said the Sperry & Hutchinson Company and the said H. D. Frueauff entered into a memorandum of agreement which is in words and figures as follows, to wit:

"Memorandum of Agreement.

"This agreement, made the — day of —, 190—, by and between the Sperry & Hutchinson Company, a corporation of the state of New Jersey (hereinafter called the Company), party of the first part, and —, a —, of —, doing a general — business at — street, —, state of —, party of the second part, witnesseth:

"That, in consideration of the mutual promises and agreements hereinafter contained, said parties agree as follows:

"Said company agrees to advertise in the directory in its trading-stamp books distributed in the city or town of —, the name, business, and aforesaid business address of the party of the second part; to deliver to the people of said city or town said books, and explain to them how to use the same; to maintain a store for the pur-

pose of redeeming its trading stamps when issued in the regular way by the party of the second part, and others duly authorized to issue the same; to keep on exhibition in said store goods and merchandise with which to redeem said stamps when presented in said books in lots of nine hundred and ninety (990) stamps, and according to law, collected in the manner prescribed and subject to the conditions in said books, and to use its best endeavors to promote the cash sales and trade of the party of the second part.

"The party of the second part agrees to order and receive from said company its green trading stamps in lots of not less than — pads per lot, each pad containing five thousand (5,000) stamps, and to pay upon delivery thereof the sum of — dollars per pad, for the use of said stamps as an advertising medium; and agrees to supply said stamps from the aforesaid business address as an inducement for cash trade to all persons who pay cash for purchases; to give out said stamps as follows, and not otherwise to dispose of the same without the prior consent in writing of said company, viz.: To give to each customer one stamp for each and every ten cents represented in the retail price of merchandise for which cash is paid by said customer.

"Said party of the second part also agrees to display signs furnished by said company which read, 'We Give S. & H. Green Trading Stamps,' or otherwise, in the windows and other prominent places about its stores, and agrees not to procure said stamps in any way except direct from said company, either during the term of this contract or at any time; and also agrees to mention favorably the use of said stamps in all newspaper and other advertisements published by or for it; and not to use any other coupons, trading stamps, or similar device during the term of this contract, and not to join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps.

"It is mutually agreed between the parties hereto that the property in and title to said stamps and signs shall remain in the said company, and shall not in any event pass to the party of the second part, or any other person, firm, or corporation, and that this agreement shall remain in force for one year from the date of its execution, and shall be considered renewed for an equal period from year to year, unless written notice to the contrary be given by either party to the other at least thirty (30) days prior to the yearly periods of expiration; and, provided such notice be given by said company, said company may thereafter omit

from its directory and advertisements the name of the party of the second part.

"It is mutually understood and agreed that this contract is made for the benefit of the public as well as of the parties hereto, and subject to legislative restriction. . . .

"That, in accordance with the provisions of said contract, the said H. D. Frueauff did order and receive from the Sperry & Hutchinson Company pad or pads of green trading stamps, each pad containing not less than 5,000 stamps, as in said contract provided, and has for some months last past and is now engaged in supplying and giving out to customers said green trading stamps, in the following manner, to wit: To each customer one stamp for each and every 10 cents represented in retail price of merchandise for which cash is paid by said customer, and that on the 10th day of December, A. D. 1904, the said defendant was thus engaged, and did give out green trading stamps to each customer who called for the same, one stamp for each and every 10 cents represented in retail price of merchandise for which cash was paid, not only to one, but to numerous, customers of the said defendant's place of business on said day; and the said defendant has not disposed of the green trading stamps so purchased from said Sperry & Hutchinson Company in any other manner; and the said defendant has also displayed, and is now displaying, and did display on the 10th day of December, A. D. 1904, signs reading, 'We give S. & H. green trading stamps,' in the window and other prominent places about his store, and has not used any other coupons or trading stamps or similar device than those mentioned in said contract. That the property in and title to said stamps so purchased as aforesaid by the said defendant from the Sperry & Hutchinson Company has at all times remained, and does now remain, in the said company, according to the terms of said contract. That prior to, at the time of, and since the making of the said contract, the said the Sperry & Hutchinson Company have distributed a book containing nine hundred and ninety (990) blank spaces, in which green trading stamps could be pasted, and containing a notice and explanation and other writing, said distribution being made in various homes, places of business, and other places in and about the city and county of Denver. That the notice contained in the said book is as follows:

" 'This book and the trading stamps which are issued by the undersigned are so issued, and are received by you, pursuant to certain restrictions concerning their use contained in the written contracts made for your benefit between the undersigned and

the merchants from whom you receive the same. Neither the books nor the stamps are sold to you or the merchant, the title thereto being expressly reserved in the undersigned. They are merely loaned to you. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them, or make any other use of them without our consent in writing. We will in every case, where application is made to the undersigned, give you permission to turn over your stamps to any other bona fide collector of "S. & H." green trading stamps; but, if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from, other parties. It is to your interest that you fill the book, and personally derive the benefit and advantage of exchanging it for your choice of the many useful and valuable articles supplied by us.

" 'These stamps, when received by you, must be pasted in the book, as that is a method we have adopted for the purpose of preventing their further use as an advertising medium.'

"That the explanation in said book is in words and figures as follows, to wit:

" 'The object of green trading stamps is to enable the merchants who give them to sell their goods for cash instead of upon credit. By paying cash, therefore, you will be entitled to green trading stamps, one stamp for each 10 cents represented in a purchase; that is to say, the number of stamps you receive will be equal to the number of times "ten" is contained in the amount of your cash purchase.

" 'Thus green trading stamps are a benefit to both buyer and seller. The merchant saves the inevitable losses through bad accounts. He gets his money promptly, is enabled to discount his bills, and, having the cash, can buy cheaper than upon credit.

" 'By paying cash you are equally benefited. You, also, can buy cheaper. You can also obtain a discount—in the way of green trading stamps—which may be taken to our store and exchanged for an endless variety of goods.

" 'By exerting just a little care in trading where green trading stamps are given, it takes but a short time to fill a book with them (33 pages, 30 stamps on a page). The result is that, with no greater expenditure for your needs, perhaps less, you gradually accumulate a great many things, useful and ornamental, which have cost you absolutely nothing, but which you otherwise would not have possessed unless you had paid cash for them.'

" 'See back page of cover for partial list of goods given for green trading stamps.

" 'The better way for you to do is to call at our local branch store and see for yourself. Make all the inquiries you desire. We sell nothing,—everything in our store is given in exchange for green trading stamps only. The attendants there have nothing to do but to show you goods and answer questions.'

"That one of said books is hereto attached, marked 'exhibit A,' and made a part hereof, and is the same kind of a book as issued to John Jones, a customer of the said defendant, to whom stamps were given on the said 10th day of December, A. D. 1904.

"On the fourth page of cover of book is the following.

" 'For many years we have made a study of the public's requirements. It is not necessary to say that we understand the importance of supplying you, so nearly as possible, with just what you desire. Nor to say that the immense quantity of goods purchased by us each year naturally places at our disposal the wares of the best manufacturers and designers in every part of the world. These facts you already understand. Be assured that, if you collect green trading stamps, you cannot fail to obtain something in exchange for them that will thoroughly satisfy you.

" 'It is hardly possible for us to enumerate, on this page, the entire line of goods which can be had in exchange for green trading stamps. Among them, however, are the following, *viz*

" 'Furniture, art squares, rugs, lace curtains, bookcases, vases, jardinières, onyx tables, clocks, watches, opera glasses, china, cut glass, musical instruments, lamps, carving sets, knives, forks, spoons, anything and everything in silverware, etc., etc.,

" 'Yours very respectfully,

" 'The Sperry & Hutchinson Co.'

"That the stamps so ordered and received from the Sperry & Hutchinson Company by the defendant, and used and given to the said John Jones on the 10th day of December, A. D. 1904, have no value in themselves, and that neither the book nor the stamps are the property of the defendant, and the rights of the customer receiving such stamps are defined and restricted by the 'notice' on the inside of the cover of exhibit A. That the said customers of the defendant could not take said stamps to the said Sperry & Hutchinson Company in lots of less than 990, and then only when pasted in said books, and have them redeemed, and that they are only redeemable when 990 have been received and pasted in said book, and that the said Sperry & Hutchinson Company do not and will not redeem from the 7 L.R.A.(N.S.)

customers of the said defendant said green trading stamps, or any of them, unless 990 are presented and are pasted in said book. That some of said books are never filled or presented for redemption. That the said stamps consist of gummed paper, about the size of a postage stamp, the face bearing the name of said company and also the words 'green trading stamp.' Samples of, said stamps are hereto attached and made a part hereof. That the said Sperry & Hutchinson Company maintains a store at 1630 Stout street, in the city and county of Denver, where various articles of merchandise are exhibited and kept. That said articles of merchandise are marked 'One Book,' 'Two Books,' or any other number, as the case may be, which means that said article is given in redemption for the number of books marked upon the tag fastened to said article of merchandise, and the customer has an option or right of selection among said articles, when books of stamps are presented for redemption. That said contracts between the Sperry & Hutchinson Company are only made with a limited number of merchants in the same class or line of business; that is to say, stamps are not ordered or used by all of the merchants engaged in any particular class of business, but only certain ones so engaged therein, with whom the said Sperry & Hutchinson Company elect to contract. That the said stamps are given to merchants contracting with the said Sperry & Hutchinson Company at the price agreed upon by contract, this price being almost without exception \$4.75 per 1,000, in thousand lots, and \$4 per 1,000 in lots of 15,000. That the said Sperry & Hutchinson Company do not sell said articles of merchandise or premiums kept in their said store for cash or on credit, but they are only disposed of in redemption of said green trading stamps.

"(5) That on the 10th day of December, A. D. 1904, and succeeding days thereafter, and until the present time, the said contract between the Sperry & Hutchinson Company and the said defendant was in full force, and the said defendant had on hand a large number of stamps purchased under the provisions of said contract from said Sperry & Hutchinson, and on said dates gave and disposed of a large number of stamps to its patrons and customers, and among them to John Jones, on the said 10th day of December, A. D. 1904, and the said John Jones had in his possession one of said books in which stamps given to him by the defendant were pasted, and on said dates the said defendant was conducting his business and giving away trading stamps, and the said Sperry & Hutchinson Company were redeeming said stamps and carrying on their business in the

manner and way hereinbefore set forth. That the Sperry & Hutchinson Company maintains stores and carries on its business in the same manner as hereinbefore set forth in other cities and states of the United States, and that stamps issued in Denver are redeemable at any store of said Sperry & Hutchinson Company at any place where it carries on said business, and that stamps issued at any other of the places where it carries on business are redeemable here under like terms as stamps issued here."

The county court adjudged that the ordinance "violates the Constitution of the state of Colorado and of the United States, and is absolutely void and of no effect," and defendant was discharged. To this judgment, the city and county of Denver prosecutes this writ of error.

Messrs. Milton Smith, D. L. Webb, and H. A. Lindsley, for plaintiff in error:

In states wherein the constitutional provision is tantamount to ours the courts have found no trouble in sustaining a law prohibiting a gift enterprise "of any nature" or "for any purpose," where it is not necessary to show an element of chance, but merely a gift enterprise in operation.

Lansburgh v. District of Columbia, 11 App. D. C. 512; Dunn v. People, 40 Ill. 465; Long v. State, 73 Md. 527, 12 L.R.A. 89, 25 Am. St. Rep. 606, 21 Atl. 683.

The ordinance is within the police power.

Barbier v. Connolly, 113 U. S. 27, 30, 31, 28 L. ed. 923-925, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Crutcher v. Kentucky, 141 U. S. 47, 61, 35 L. ed. 649, 653, 11 Sup. Ct. Rep. 851; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 700, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714; State v. Dobard, 45 La. Ann. 1412, 14 So. 253.

The ordinance itself can define the terms used.

St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; People v. Weiss-Chapman Drug Co. 5 Colo. App. 153, 38 Pac. 334; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Sheedy v. District of Columbia, 19 App. D. C. 280; Humes v. Ft. Smith, 93 Fed. 865.

Messrs. T. J. O'Donnell and J. W. Graham, Jr., for defendant in error:

The giving of trading stamps by the defendant to his customers was a fair, legitimate, and proper method of advertising his business.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916.

The ordinance is unreasonable, unlawful, discriminating, and void.

Winston v. Beeson, 135 N. C. 271, 65 L.R. 7 L.R.A. (N.S.)

A. 167, 47 S. E. 457; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28.

Laws declaring the method of advertising and attracting customers which is involved in this case illegal have been pronounced unconstitutional.

State v. Shugart, *supra*; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Ex parte McKenna, *supra*; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958; People v. Gillson, *supra*; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 82 N. Y. Supp. 497; Winston v. Beeson, *supra*; Com. v. Moorehead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Young v. Com. 101 Va. 853, 45 S. E. 327.

Goddard, J., delivered the opinion of the court:

The question presented by this record has been considered by several of the ablest courts in this country, and has, with few exceptions, been determined adversely to the contention of the plaintiff in error. Not only has the character of legislation embodied in the ordinance in question been generally condemned, but the particular business aimed at therein has been held immune from interference under the police power of the state or municipality. The proposition announced in these cases is that legislation which purports to have been enacted to protect the public health, public morals, and public safety, and which has no real or substantial relation to those objects, is a palpable invasion of the rights guaranteed to individuals by the Federal and state Constitutions; that the legislature may not arbitrarily interfere with private business and impose unnecessary restrictions upon lawful occupations under the guise of protecting the public interests; and that its determination as to what is within its police power is subject to the supervision of the courts. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; People ex rel. Madden v. Dycker, 72 App. Div. 308, 317, 76 N. Y. Supp. 111; State v. Dodge, 76 Vt. 197, 56 Atl. 983; Com. v. Young, 101 Va. 853, 45 S. E. 327; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Com. v. Sisson,

178 Mass. 578, 60 N. E. 385; *Hewin v. Atlanta*, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958.

In *State v. Dalton* the court had under consideration a statute which, like the ordinance before us, prohibited the use of trading stamps; and the violation of the statute upon which the prosecution was predicated was for giving and distributing with certain merchandise sold the same kind of stamps issued and redeemable in the same manner and by the same parties, to wit, the Sperry & Hutchinson Company, named in this case. In that case, after discussing the police power, and citing numerous authorities, the court concluded that the statute before it did not fall within the police power of the legislature, and was clearly an unlawful interference with a private right, because it did not look to, or in any manner concern, the public health, public safety, or the public morals, and said: "In this connection it is pertinent to observe that it is not enough to warrant the state in absolutely prohibiting a given business that it is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public in some one of the ways before mentioned, in order to warrant the state in interfering therewith. Nor is it enough to bring a given business within the prohibitory power of the state, that it is so conducted as to seriously interfere with, or even destroy, the business of others." After discussing the question whether the transaction there under consideration involved any element of lottery, and the method of carrying on the business which the act prohibited, the court concluded: "The element of chance, which is the basal principle of every scheme in the nature of a lottery, is wholly wanting." And, in speaking of the act there in question, the learned writer of the opinion used this language: "The act, as we construe it, prohibits a person from selling a given article, and at the same time, and as a part of the transaction, giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring that it is illegal for a man to give away one article as a premium to the buyer for having purchased another. . . . We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen both by our state Constitution and also by the 14th Amendment to the Constitution of the United States." And, in finally summing up, he says: "What we

do decide is that the statute in question is so broad as to interfere with the right of an individual to deal with his own property in his own way; that is to say, to make such contracts regarding the sale and disposition thereof as he shall see fit, so long as he observes the rule that each one shall so use and enjoy his own property as not to injure that of another person, and, also, the further rule that his use of it shall not be injurious to the community; and hence is not a valid exercise of the legislative power."

In *Young v. Com.* a similar statute which inhibited the same transaction complained of here was considered. *Harrison, J.*, after speaking in detail as to the manner in which the business of the Sperry & Hutchinson Company was conducted, said: "We can find nothing in the contract between the Sperry & Hutchinson Company and the defendant, nor the transactions with customers in pursuance of such contract, that is not a legitimate exercise of one's right to prosecute his business in his own way. As already said, 'it appears to be simply one of the many devices fallen upon in these days of sharp competition between tradespeople' to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any other of the many forms of advertising."

In *Winston v. Beeson* the court had under consideration the question as to whether dealers in trading stamps came within the provisions of an ordinance taxing gift enterprises, the business there under consideration being that of the Sperry & Hutchinson Company; in other words, whether their business, in the manner in which it was conducted, constituted a gift enterprise in the sense that those words were used in the charter. After an able and elaborate discussion as to what was meant by the term "gift enterprise," and concluding that, as generally defined and understood, it constituted "a scheme for the division and distribution of certain articles of property, to be determined by chance among those who have taken shares in the scheme," citing *Black's Law Dictionary*, p. 539, *Bouvier's Law Dictionary*, vol. 1, p. 884, *Anderson's Law Dictionary*, p. 488, and *Lohman v. State*, 81 Ind. 17, as approving that definition,—the court, speaking by *Walker, J.*, said: "From the definitions we have already given of a lottery or scheme for the disposition or distribution of prizes or property by chance, it appears that three things must concur in order to constitute it: (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the contingent right must

depend upon a lot or chance. We have not been able to discover any one of these elements in the plan devised by the defendant company for the conduct of its business. The right to have the stamps redeemed depends upon no contingency, chance, or lot whatsoever; the person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed, by the contract he is given full and free exercise of his choice and will. The right of selection among the articles kept by the stamp company, in its store is expressly given, and the stamp collector may choose the best or the most valuable, or such a one as may be most useful to him or pleasing to his taste, as he may be minded. The articles are all publicly exhibited, and, before the purchases are made or the stamps collected, any person proposing to buy and to receive the stamps from the merchant has free access to the store, where he may see and examine the goods from which his selection may be made. There is therefore no uncertainty as to the nature, character, or value of the premium, if we may so call it, with which the stamps will be redeemed. The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase; and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case or change the real and substantial character of the transaction. The plan as outlined in the verdict [being the same as set out in the statement of facts in this case] seems to be one for advertising the merchant's business and his wares, and enabling him to sell his goods for cash instead of on time. This, it must be conceded, is an advantage to him. It is also a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means."

We quote thus fully from the opinion of the learned judge in that case because it is a fair, lucid, and correct statement of the trading-stamp business as conducted by the Sperry & Hutchinson Company as it is set out in the agreed statement of facts in this case, and gives a clear understanding of the character of the business sought to be inhibited by the ordinance before us, and shows that the element of chance is wholly lacking.

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Counsel for plaintiff in error attempt to distinguish the case before us from the foregoing cases upon the ground that our Constitution provides: "The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets in this state." Const. art. 18, § 2. And § 2927, Mills's Anno. Stat. enacts that "it shall not be lawful hereafter for any person, persons, association of persons, or corporation, to engage in or otherwise promote any lottery or gift enterprise of any nature, or for any purpose whatsoever;" and making it a misdemeanor to knowingly engage in, or in any wise promote, any lottery or gift enterprise. It is contended that these provisions are broad enough to include "gift enterprises" of any nature, whether they involve the element of chance or not, and therefore justify the adoption of the ordinance in dispute. We do not think the term "gift enterprise," as used in the foregoing provisions, is susceptible of this construction. Associated as these words are in both Constitution and statute with the word "lottery," they involve, as that term does, the element of chance or hazard, and necessarily mean that character of "enterprises" which appeals to the gambling instinct, and tends to debauch public morals. This being so, there is no warrant for saying that the transaction sought to be prohibited by the ordinance under consideration comes within the category of "gift enterprises" contemplated by the Constitution or statute; and it is equally clear that the city council cannot, by arbitrarily defining the business of the trading-stamp company as such, bring it within the class of inhibited enterprises, and, under the guise of the exercise of its police power, prohibit the carrying on of that which we have seen is a legitimate business. The case of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, is relied on by plaintiff in error as authorizing the legislation in question. While it is true that the decision in that case is ostensibly predicated upon the fact that the statute there considered furnished a definition of a "gift enterprise," and that it was therefore unnecessary to declare that the acts proved in the case constituted a lottery or gift enterprise, as those words were commonly used, or that the element of chance operated intentionally or directly in the scheme of the trading-stamp company, which was the same as that herein set forth, yet it will be seen that, in his reasoning, the writer of the opinion laid great stress upon the fact that the scheme there involved, according to his notion, was "the exploitation of nothing more or less than a cunning device" and

"one of the most shrewdly planned of the many devices to obtain something for nothing;" that they (the trading company) had "intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both," evidently regarding the scheme in itself as inimical to public morals and detrimental to the public welfare, and, while disclaiming the necessity of undertaking to specify the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course of competitive business, or to determine just what character of inducements by way of gift or premium may or may not be held out to purchasers at the time and as a part of their purchase, used this significant language: "That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain; and the exercise of such power would doubtless be denied if expressly attempted. Nor can it, with reason, be said to apply to bona fide co-operative associations and the like. It is possible, also, that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale." It is apparent that the learned judge was of the opinion that the statute would be inoperative if it intended to apply to, and include within its definition of, "gift enterprises," a transaction involving the sale of a lawful article accompanied by a gift of something specific and certain, not accompanied by the element of chance. In other words, it is very probable that, if he had taken the same view of the business carried on by the trading-stamp company as was adopted in all of the cases above cited, wherein the same transaction was investigated, his conclusion would have been in accord with that reached in those cases. If the decision in that case is to be construed as announcing the doctrine that a legislative declaration that a business, lawful in itself, is a "gift enterprise," and is thereby rendered unlawful regardless of the fact that it wholly lacks the essential element of chance, it is at variance with the uniform current of authority; and if, as we understand it, the conclusion therein reached was because the scheme under consideration was, in the opinion of the court, obnoxious to public morals or detrimental to the public welfare, we decline to follow it, because it is directly opposed to the conclusion reached as to its character in all the cases in which the business of the

trading-stamp company has been under investigation. *Humes v. Ft. Smith* (C. C.) 93 Fed. 857, is similar to, and follows, the *Lansburgh Case*. We find no other case which, when carefully considered, supports the position assumed by plaintiff in error in this case. In the view we take of the scheme of the trading-stamp company, as described in the agreed statement of facts, we are clearly of the opinion that the ordinance prohibiting it cannot be sustained, and the court below properly discharged the defendant, and its judgment will be affirmed.

All the Justices concur.

GEORGIA SUPREME COURT.

MUSCOGEE MANUFACTURING COMPANY, Plff. in Err.,

v.

EAGLE & PHENIX MILLS.

(126 Ga. 210, 54 S. E. 1028.)

Covenant running with land.

1. To constitute a covenant running with the land, the covenant must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed. A covenant running with the land relates directly to the land, and follows it into the hands of assignees. A personal covenant does not do so.

Water power—contract rights—covenant.

2. Where land abutting on a river and including its bed, in which river there was an undeveloped water power, was divided by a city into water lots which were respectively numbered, beginning with that lying furthest north, and the lots bearing even numbers were sold; and in the deed it was provided that the purchaser should build above or opposite lot No. 1 a dam with a canal or race of the character described, which canal or race should extend through the other lots; and where the deed also contained the covenant, "Said lots of even numbers and their improvements, and no other property whatsoever, to be forever liable for the payment of any damage which said city, or person or persons, or

Headnotes by LUMPKIN, J.

Note.—The authorities upon the question of water rights as appurtenances to mills are collected in a note to *Cox v. Howell*, 58 L.R.A. 487. See also the subsequent case of *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765, holding that a power constructed by owners of and always in connection with a mill which is dependent on it, is appurtenant to it, notwithstanding a portion of the water may be applied to irrigation purposes.

company of persons, to whom they may sell or convey any one or more of said lots of odd numbers may sustain by reason of the failure to complete said race or canal, or to keep the same and said dam in good repair,"—held, that the covenant quoted was one running with the land.

Implied grant.

3. Grants by implication are not favored.

Water power—merger.

4. Where the legislature authorized the city of Columbus to lay off water lots on the Chattahoochee river, and to dispose of them by sale or lease "for such times, and on such terms as they deemed for the interest of the city;" and where subsequently, all the water lots having been acquired by certain persons, the legislature incorporated four persons and their associates and successors as the water-lot company, conferring upon them in the charter full power "to have, hold, purchase, receive, possess, enjoy, and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of whatsoever kind, nature, or quality the same may be, and the same to sell, grant, demise, alien, or dispose of;" and provided that the "death of one or more of the directors, or parties in interest, shall at no time, or in any case, prevent, or hinder, or delay a sale or sales of the said lots, or any of them, or an interest therein, by the survivors, in the name of the corporation,"—held, that there was no legislative restriction which prevented a merger of rights running in favor of some of the lots for the benefit of others, when all became the property of one person, although before the incorporation.

Same—contract rights—restriction.

5. Nor did the action of the legislature so operate as to restrict the right of the owner of all the lots, or the corporation which it created, from making covenants or stipulations as to the rights which purchasers under them should have in regard to the amount of water or power to be used by them respectively; nor so as to require that each purchaser from such common owner should be entitled to one-nineteenth part of the water afforded by the river (19 of the lots being involved in the present controversy).

Covenant—extinguishment.

6. As a general rule, a covenant in a deed of land, restricting the mode of its use, and inserted for the benefit of adjoining land of the grantor, will be extinguished by the subsequent vesting in one person of the title to both tracts of land.

Same—merger—proof.

7. If two estates in the same property united in the same person in the same capacity, and it is contended that no merger took place, the person making such contention, if entitled so to do, must allege and prove facts negating the existence of such merger.

7 L.R.A. (N.S.)

Grant—appurtenance.

8. One who grants a thing is deemed, also, to grant that within his ownership, without which the grant itself would be of no effect. But this rule applies only to such things as are incident to the grant and directly necessary to the enjoyment of the thing granted.

Same—water power.

9. If the right to use power from a dam has been acquired and affixed to a particular mill or parcel of real estate, it will pass by a grant of the property, with appurtenances. But, if the power was not an appurtenance of the property at the time of the grant, it will not pass as such, although the grantor had a right to make use of the power at that time.

Same—creation of appurtenances.

10. A grant of property will carry with it actual existing appurtenances, but will not create any appurtenances.

Same—pleading.

11. The allegations of the present petition fail to show such an existing appurtenance or necessary incident at the time of the grant under which the plaintiff claims as to bring the case within the rule stated above. Moreover, it seeks to determine what a person claiming to be a remote grantee from the holder of the entire title acquired, not so much by grants which the latter made, as by those which he received.

(August 13, 1906.)

ERROR to the Superior Court for Muscogee County to review a judgment in favor of plaintiff in a proceeding to establish certain water rights. Reversed.

Statement by Lumpkin, J.:

The Eagle & Phenix Mills filed its petition against the Muscogee Manufacturing Company, alleging substantially as follows: The state of Georgia, being the original owner of all the land in the Coweta Reserve in Muscogee county, in the year 1828 set aside 1,200 acres for a town to be called Columbus, caused the tract to be divided into streets, lots, and commons, and offered lots for sale. The tract had for its western boundary the line indicated by high-water mark on the western bank of the Chattahoochee river, being the line that separates the states of Georgia and Alabama, so that the land set apart for the town embraced the entire river. See Dawson's Compilation, 132, 470, 474. At a point within the town for a length of four blocks there was a marked descent from the natural flow of the river, which was known as "Coweta Falls." The land on the east bank of the river, not being available for either residence or business lots, was not divided into separate lots until, by the act of 1840 (Acts 1840, p. 187), the legislature authorized the

mayor and council of Columbus to define Bay street and to lay off water lots fronting on that street, to extend them across the river, and to sell or lease them on such terms as might be deemed best for the interest of the city. In 1841 the city council passed a resolution stating the terms on which the water lots were to be sold. In December of that year the city granted to John H. Howard and Josephus Echols, their heirs, executors, administrators, and assigns, all the even-numbered lots beginning with No. 2 and ending with No. 36; each being 72 feet wide. The consideration recited in the deed was \$1,000 and the performance on the part of the grantees, "of the conditions hereinafter named, and for and in consideration of their bond made to said mayor and council of the city of Columbus bearing date the 13th day of June in the year aforesaid, requiring under a penalty the performance of said condition." The deed contained the following: "The said John H. Howard and Josephus Echols shall erect a suitable and sufficient and well-constructed dam across the Chattahoochee river, terminating in the eastern bank thereof, at any point on or above lot No. 1, in the aforesaid plan, plat, and survey designated, and below the north common lots, so that when said river is at its usual height five head of water may be obtained on said lot No. 1, and an increase had [the resolution of council says "an increased head"] on each of the lots below it (for the purpose of propelling machinery) by an almost level canal or race; and to construct and form a safe and well-constructed canal or race, extending from said dam through all of said lots; said dam to be so high, and said canal or race to be so capacious, that when said river falls to the lowest height at which it usually stands in very dry weather, all the water of said river may, as it runs down, pass through said canal or race; and keep said dam and race forever in good repair. Said lots of even numbers and their improvements, and no other property whatsoever, to be forever liable for the payment of any damage which said city, or any person or persons, or company of persons, to whom they may sell and convey any one or more of said lots of odd numbers, may sustain by reason of a failure to complete said race or canal, or to keep the same and said dam in good repair; and to commence in good faith and not evasively the erection of said dam and the construction of said race or canal within twelve months from the 29th day of June in the year aforesaid; and to have said dam completed and said canal or race so far completed that said five head of water may be obtained on said lot number one, and available for propelling machinery, within

twenty-seven months from the date hereof; and to fully complete said canal or race within five years from the date and year last aforesaid; and, in the event of a failure to erect said dam and said race within the time limited, said lots of even numbers shall revert to said mayor and council." In 1843 the city conveyed to John H. Howard, for the expressed consideration of \$5,000, all the odd-numbered lots, including numbers 1 to 37. The deed contained the following clause: "To have and to hold the right and title and interest which the said party of the first part has in and to said bargained lots and premises, together with all and singular the rights, members, and appurtenances and privileges thereunto in any wise belonging to or appertaining, so far as the same are now vested in and belonging to the said party of the first part, to him the said John H. Howard, his heirs and assigns, forever in fee simple." And also the following: "It is hereby covenanted and agreed between the parties that the said John H. Howard, his heirs and assigns, shall improve one or more of said lots, by the erection of machinery to be propelled by water, within four years from the date hereof, and that all the conditions, limitations, restrictions, and provisions of a deed made by the said party of the first part to John H. Howard and Josephus Echols, bearing date in December in the year 1841, for the lots of even numbers in said plan and survey, and shall be and are hereby made a part and parcel of the conveyance, and shall be binding upon the parties hereto, to all intents and purposes, as if the survey were herein specifically set forth." It provided for a basin at a point on some of the lots, and that the canal or race specified in the deed to Howard and Echols should terminate at this basin, and another canal or race should commence at that point and extend through the lots below it. Thus only the lots from 1 to 19 are now involved. It was also provided that the lots conveyed by this deed should revert to the city upon the same conditions as the lots of even numbers previously conveyed; and also if John H. Howard should refuse or fail to perform his contract as in this deed set out. To the change in the conditions Echols, one of the grantees of water lots of even numbers, assented in writing; and on April 21, 1845, Echols sold and conveyed all his interest in the water lots of even numbers to Howard, thus vesting the title to all the water lots in him. The Muscogee Manufacturing Company, through a number of mesne conveyances, is the successor in title of John H. Howard as to water lot No. 1. In accordance with the covenants and conditions under which he held title, John H. Howard

constructed a wooden dam and canal so as to give 5 feet head of water to lot No. 1 when the river was at its usual height, and completed it in the year 1847, and then proceeded to erect a cotton mill on that lot. This dam becoming inefficient by lapse of time, the successors in title of Howard and Echols in the year 1857 constructed a new wooden dam extending across the river to a point opposite lot No. 13, and also a new retaining wall extending from lot No. 1 south to lot No. 20. This dam was replaced substantially in the same location by a wooden dam constructed in 1868. Subsequently to this time the Eagle & Phenix Manufacturing Company was organized, and by purchase acquired title to all the water lots from No. 2 to No. 19, inclusive. In 1882, at its own expense, it constructed a stone dam immediately below the dam of 1868. In 1869 the defendant acquired title to lot No. 1, added to the buildings and improvements thereon and to the machinery employed, and operated such machinery by water power drawn from the river. Its predecessors in title first acquired the water power under the original dam constructed in 1847, and subsequently under those built in 1857 and 1868. When the defendant went into possession of lot No. 1, it operated its machinery with water power furnished by the last-mentioned dam; and when it was replaced by the dam of 1882 the defendant used water furnished thereby. The Eagle & Phenix Manufacturing Company, being the owners of lots Nos. 2 to 19, inclusive, did not maintain the division of the water power into 18 parts, but the power to which each lot separately would be entitled if divided was concentrated in such manner that the best results could be obtained and distributed to other localities along the aggregate area of its lots, so that the power to which it was entitled as the owner of 18 lots was not confined by an arbitrary division to each lot. In accordance with this plan, it built its factory and other buildings. Plaintiff is the successor of the Eagle & Phenix Manufacturing Company. When the flow of the river is normal or above normal opposite the water lots, ample power is afforded to operate plaintiff's machinery without regard to the amount of water power used by the defendant on its lot No. 1; but when the flow of the river, on account of prevailing droughts or other causes, is lessened from its usual or normal amount, if the defendant takes from the canal or basin opposite lot No. 1 more water than it is entitled to have in the just proportion fixed by the original conveyance, the operation of the machinery of the plaintiff on its lots below No. 1 is seriously affected and great loss is occasioned to it.

instances of this character are cited. The defendant claims the right to take from the canal or basin opposite its lot as much water as is necessary to operate the machinery of its mills located thereon. The plaintiff contends that the defendant is entitled only to use one nineteenth of the whole power generated by a 5-foot head of water made by the entire flow of the river when at its usual height or normal condition, or less than one nineteenth; and that there should be a diminution of the head of water on lot No. 1 in proportion to the diminution of the flow of the river below its normal state, and an increase of the head of water on lot No. 1 in proportion to an increase of the flow of the river above its normal state. Plaintiff prayed for an injunction and damages. The defendant demurred to the petition. The demurrer was overruled, and it excepted.

Messrs. Slade & Swift, J. H. Martin, and S. B. Hatcher, for plaintiff in error:

Covenants running with the land will not be implied when the intent to create the same is not clear, and where they ought to have been expressed.

Sheets v. Selden, 7 Wall. 423, 19 L. ed. 168; *Chautauqua Assembly v. Alling*, 46 Hun, 582; *Madore's Appeal*, 129 Pa. 15, 17 Atl. 804; *Brugman v. Noyes*, 6 Wis. 1.

Restrictions and prohibitions as to the use of real property should generally be resolved in favor of the free use of the property.

Hutchinson v. Ulrich, 145 Ill. 336, 21 L. R.A. 391, 34 N. E. 556; *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275.

Covenants will not be read into a deed.

Hoard v. Chesapeake & O. R. Co. 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74.

Before a court of equity will attempt an apportionment of water or power in named amounts to each of several parties, the party seeking relief must show some statutory, contract, or prescriptive right entitling him to such an amount of water or power as he alleges to be the measure of his rights.

Warren v. Westbrook Mfg. Co. 86 Me. 32, 26 L.R.A. 284, 29 Atl. 927.

All covenants relating to a subject-matter not in esse are personal covenants, and do not run with the land so as to bind the assignees, unless they are expressly named therein.

2 Kerr, Real Prop. § 1218; *Atlanta Consol. Street R. Co. v. Jackson*, 108 Ga. 639, 34 S. E. 184; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Spencer's Case*, 5 Coke, 16. 1 Smith, Lead. Cas. 137; *Gulf. C. & S. F. R. Co. v. Smith*, 72 Tex. 122, 2

L.R.A. 282, 9 S. W. 865; *Brown v. Southern P. R. Co.* 36 Or. 128, 47 L.R.A. 409, 78 Am. St. Rep. 761, 58 Pac. 1104; *Tallman v. Coffin*, 4 N. Y. 136; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Tiedeman, Real Prop.* § 190, p. 158.

Covenants running with the land, having application to certain conditions, do not apply to different conditions resulting from change.

Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Amernan v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741.

It is the capacity of the stream in its normal stages which should govern the court in a division.

Janesville Cotton Mills v. Ford, 82 Wis. 416, 17 L.R.A. 570, 52 N. W. 764.

Covenants in deeds of land restricting the mode of its use, and inserted for the benefit of adjoining land of the grantor, will be extinguished by the subsequent vesting in one person of the title to both tracts of land.

Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; *Waterbury v. Head*, 12 N. Y. S. R. 361; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Silverman v. Loomis*, 104 Ill. 142; *Stevens v. Winship*, 1 Pick. 318, 11 Am. Dec. 182; *Goodell v. Bennett*, 22 Wis. 565; *Eveleth v. Crouch*, 15 Mass. 307; *Sibley v. Beard*, 5 Ga. 552; *Martin v. Gordon*, 24 Ga. 533; *Fields v. Willingham*, 49 Ga. 344; *Willis v. McGough*, 56 Ga. 198.

Messrs. Goetchius & Chappell, and Spencer R. Atkinson, for defendant in error:

These lots are laid off on and across the river as water lots, and to be used in connection with the water power of the river, the water and its power going in common with the lots.

Ford v. Harris, 95 Ga. 97, 22 S. E. 144; *Hogue v. Albina*, 20 Or. 182, 10 L.R.A. 673, 25 Pac. 386; *Dill v. Board of Education*, 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739; *Gould, Waters*, § 540; 2 *Farnham, Waters*, 1593 et seq.

The covenants run with the land.

Colquitt v. Howard, 11 Ga. 556; *Howard Mfg. Co. v. Water Lot. Co.* 53 Ga. 689; *Moses v. Eagle & P. Mfg. Co.* 62 Ga. 455; 5 Am. & Eng. Enc. Law, 2d ed. p. 12; *Landell v. Hamilton*, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239; *Gould, Water*, § 161, p. 324, note 2, §§ 301, 302; *Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219; 3 *Farnham, Waters*, p. 2221.

Merger does not in general take place 7 L.R.A. (N.S.)

where the person in whom the two estates meet intends that it shall not take place.

Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290; *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347; *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834; 2 *Farnham, Waters*, § 1593.

Whoever grants a thing is supposed also, tacitly, to grant that without which the grant would be of no effect.

Broom, Legal Maxims, p. 362; *Branch, Maxims*, p. 32; 2 *Washb. Real Prop.* p. 622; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Huttemeier v. Albro*, 18 N. Y. 48.

Mr. Charlton E. Battle also for defendant in error.

Lumpkin, J. delivered the opinion of the court:

The plaintiff's petition does not rest upon the general law of riparian rights, but upon contractual rights. It claims that there were certain covenants running with the land, embraced in the deeds from the mayor and council of Columbus to John H. Howard and Josephus Echols and to John H. Howard. In the deed to Howard and Echols, executed in 1841, conveying the lots of even numbers, there was an agreement or covenant that the grantees should erect a suitable and sufficient dam across the river at a point on or above lot No. 1, "so that when said river is at its usual height 5 feet head of water may be obtained on lot No. 1, and an increase had [in the resolutions of the municipal council the expression is, and an increased head] on each of the lots below it (for the purpose of propelling machinery) by an almost level canal or race; and to construct a firm and safe and well-constructed canal or race extending from said dam through all of said lots; said dam to be so high, and said canal or race to be so capacious, that when said river falls to the lowest height at which it usually stands in very dry weather, all the water of said river may, as it runs down, pass through said canal or race; and keep said dam or race forever in good repair." The deed also provided that the grantees should commence the erection of the dam and the construction of the race within twelve months, and have the dam completed and the canal or race so far completed that "a 5-foot head of water" might be obtained on lot No. 1, available for propelling machinery, within twenty-seven months from the date of the deed, and that the canal or race should be fully completed within five years; and there was a condition subsequent that, in the event of a failure to construct the dam and race within the time limited, the lots so conveyed should revert to the mayor and council. The resolutions of the council also required that a bond should be given condi-

tioned for the completion of the dam and the construction of the canal or race to lot No. 1 within the time named. It is evident that, relatively to them, what they wished to have guaranteed was that a dam and race of a certain character should be constructed within a certain time. They did not require that manufactories should be built, or improvements or machinery should be placed, upon any of the lots; but they doubtless took it for granted that the building of a dam and race would be followed by the construction of some character of machinery. They also retained the title to the odd-numbered lots, which it was most probably believed could be sold to persons who would wish to utilize them after the construction of the dam and race. It is alleged in the petition that they were constructed in accordance with the covenants, and it does not appear that the municipal authorities ever complained. So far, therefore, as that portion of the agreement directly affecting the mayor and council is concerned, we need not give it further consideration.

There was also this covenant: "Said lots of even numbers and their improvements, and no other property whatsoever, to be forever liable for the payment of any damage which said city, or any person or persons, or company of persons, to whom they may sell and convey any one or more of said lots of odd numbers, may sustain by reason of a failure to complete said race or canal, or to keep the same and said dam in good repair." This contained a covenant running with the land. *Howard Mfg. Co. v. Water Lot Co.* 53 Ga. 689; *Colquitt v. Howard*, 11 Ga. 568. As to the distinction between a personal covenant and one running with the land, see *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. 174; *Willow v. Kehoe*, 124 Ga. 484, 4 L.R.A.(N.S.) 466, 52 S. E. 896; *Atlanta, K. & N. R. Co. v. McKinney*, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701; *Tiedeman, Real Prop.* § 190, p. 158; *Atlanta Consol. Street R. Co. v. Jackson*, 108 Ga. 638, 34 S. E. 184. We are not prepared to hold, however, that the covenant relied on can be extended by implication to the limits claimed by the plaintiff. Grants by implication are not favored. *Civil Code* 1895, § 3675 (7); *McDonough v. Martin*, 88 Ga. 680, 681, 18 L.R.A. 343, 16 S. E. 59; 3 *Farnham, Waters*, § 774; *Hoard v. Chesapeake & O. R. Co.* 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; *Wabash & E. Canal v. Brett*, 25 Ind. 410; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 8 Wall. 276, 19 L. ed. 349. The rule as to appurtenances and necessary incidents will be considered later. Controversies growing out of these

water lots have been several times before this court, and the plaintiff in error contends that the decisions are authority for the claims now asserted by it. But an examination of those decisions will show that they were not based on a construction of the original deeds to Howard and Echols and to Howard, but involved deeds made by subsequent holders of some of the water lots and the particular provisions in them. See *Colquitt v. Howard*, 11 Ga. 556; *Water Lot Co. v. Leonard*, 30 Ga. 577; *Howard Mfg. Co. v. Water Lot Co.* 53 Ga. 689; *Moses v. Eagle & P. Mfg. Co.* 62 Ga. 455.

It is contended that, under the general scheme evidenced by the acts of the legislature and the action of the municipal council, each water lot was impressed with rights as claimed in the petition. It will be observed, however, that the act of 1840 authorized the municipal authorities of Columbus to dispose of the water lots by sale or lease, "for such time and on such terms as they may deem for the interest of said city." Thus the terms on which such disposition might be made were not fixed by the legislature, but left entirely to the mayor and council. The charter granted by the legislature will be mentioned later. The mayor and council first conveyed the lots bearing even numbers to Howard and Echols, and the deed included a covenant running with the land, as already stated. Subsequently they conveyed the lots bearing odd numbers to Howard. Later Echols conveyed all of his interest to Howard, and all of the lots became the property of the latter. Thus the title and the covenant running with the land both found their way into the hands of the same person; so that it may be said that some of his lots were encumbered with a covenant for the benefit of others of his lots. He stood practically in the situation of both covenantor and covenantee. If he violated the covenant in favor of some of his property, other parts of his property were liable for the breach. As the owner of the whole, in case of a breach of the covenant, he would have been both plaintiff and defendant in its enforcement. What was the result of such a condition? In *Post v. Weil*, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145, it is said: "A covenant in a deed of land restricting the mode of its use, and inserted for the benefit of adjoining land of the grantor, will be extinguished by the subsequent vesting in one person of the title to both tracts of land." *Bouvier (Law Dictionary, word "Merger," subtitle "Of rights")* says: "Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights,

or extinguishment." See also Rawle, Covenants, 5th ed. § 223; Sibley v. Beard, 5 Ga. 550; Fields v. Willingham, 49 Ga. 344; Willis v. McGough, 56 Ga. 198; Civil Code 1895, § 3106; Goodell v. Bennett, 22 Wis. 565; Brown v. Metz, 33 Ill. 339, 85 Am. Dec. 277; Silverman v. Loomis, 104 Ill. 137; Waterbury v. Head, 12 N. Y. S. R. 361. Analogous to this principle is the rule that, by the union of the dominant and servient estates in one person, the easement is extinguished. On this subject, in Washburn on Easements, 4th ed. 684 (*517), it is said: "As no one can be said to use one part of his own estate adversely to another part, the proposition is universally true that, if the owner of one of the estates, whether dominant or servient, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership, and thereby extinguished." On page 685 (*518) it is said: But, where there is a union of an absolute title to and possession of the dominant and servient estates in the same person, it operates to extinguish any such easement absolutely and forever, for the single reason that no man can have an easement in his own land." See also Hathorn v. Stinson, 10 Me. 224, 25 Am. Dec. 228; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715; 2 Washb. Real Prop. 4th ed. 273. It is contended that a merger does not take place where the person holding two estates intends that it shall not do so. The Civil Code of 1895 declares as follows (§ 3106): "If two estates in the same property unite in the same person in his individual capacity, the less estate is merged in the greater." § 3107: "As a general rule a party cannot hold a lien on his own property; but the owner of property subject to a lien created or imposed against the property by another may protect himself by purchasing the lien for levy on other property, or to hold it as a claim against the person liable to pay the same." In Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290, it was held that, "if the holder of the equity of redemption takes an assignment of the mortgage which is in the process of foreclosure, and goes on with the suit of foreclosure, his intention, it is to be presumed, is that the equity of redemption shall not merge in the legal estate; and therefore the equity of redemption does not merge in the legal estate." This decision was rendered prior to the adoption of the Code; but the principle that a merger of an equity of redemption into a legal estate may be prevented,—and whether it occurs depends to a considerable extent on the intention of the person in whom the two estates meet,—has been carried forward into decisions rendered since the Code went into effect. 7 L.R.A. (N.S.)

See Marshall v. Dixon, 82 Ga. 436, 9 S. E. 167; Ferris v. Van Ingen, 110 Ga. 111, 35 S. E. 347 (where it was held that the intention that there should be no merger was a necessary deduction from the writings themselves); Coleman & B. Co. v. Rice, 115 Ga. 510, 42 S. E. 5. But, "if two estates in the same property unite in the same person in the same capacity, the lesser estate is merged in the greater, unless there is a manifest intention that such merger shall not take place." Goodell v. Hall, 112 Ga. 435, 37 S. E. 725; Jackson v. Tift, 15 Ga. 557; Woodside v. Lippold, 113 Ga. 877, 84 Am. St. Rep. 287, 39 S. E. 400; Clay v. Banks, 71 Ga. 363; Luquire v. Lee, 121 Ga. 633, 49 S. E. 834. And, where it is manifest that the person in whom the two estates meet intends that the merger shall take place, it cannot be defeated by other parties. Wilder v. Holland, 102 Ga. 46, 29 S. E. 134. In its petition the plaintiff shows that it practically deals with its property upon this basis, so far as there may rest upon some of its lots a covenant for the benefit of others; for it alleges that it is the owner of the entire power which would belong to each of the 18 lots held by it, and it employs this power, not upon the respective lots, but concentrated at different points upon the entire property, as it deems best; thus claiming the right, as the owner of 18 lots, to deal with them as it pleases in respect to the matter of water power *inter sese*. If it may do so, why had not Howard the same right while all the lots belonged to him? We perceive nothing in the petition to show that he intended that there should not be a merger, or what the French law, borrowing from the civil law, terms "a confusion." Under the original deed to Howard and Echols it was provided that the dam should be built terminating at any point on or above lot No. 1. It appears that the original dam was constructed at that point, but the later dams have all been built lower down the stream; that of 1857 being at a point opposite lot No. 13, and the present dam, which was erected by the predecessor of the plaintiff, being still somewhat further down. It appears, therefore, that the successors in title of Howard, including the plaintiff, have not felt themselves to be bound literally by the terms of the original deed,—at least so far as the location of the dam is concerned. Howard, while owning all the lots, first built a cotton mill on lot No. 1. In conveying the other lots he certainly could have made a reservation as to the amount of water to be used by his own mill; and, even if it should be conceded that there was an original covenant providing that lot No. 1 should only enjoy the use of one-nine-

teenth part of the water power or less, there is nothing to indicate that he intended to keep this restriction open and prevent a merger, so as to limit the use of water by himself in his own mill as against persons buying lots from him further down the stream. What covenants or restrictions he actually made would appear from his deed; but there is an entire silence in the petition on that subject. We do not mean to say that it was impossible to prevent a merger in Howard, or to carry forward the covenants in the deeds from the city. In a case involving a somewhat similar question (*White v. Amsden*, 67 Vt. 1, 30 Atl. 972), it was held, under the facts and the practical dealings between the parties, that there was no merger, or, at least, that certain by-laws antedating the union of the estates were carried forward into subsequent conveyances. See also *Simmons v. Cloonan*, 81 N. Y. 557; *Albee v. Huntley*, 56 Vt. 454. But, if the plaintiff relied on the claim that no merger or extinguishment took place when title to all the lots was united in Howard, it carried the burden of alleging facts which would negative such a merger. There is no allegation of any such fact, no statement of the provisions or covenants in deeds made by Howard, and none as to what plaintiff's own deeds contained. It does not even appear whether he first conveyed lot No. 1 or those of higher numbers. So far as the facts are alleged, they tend to support the theory of merger rather than to oppose it. As to the claim that there was a legislative intent to preserve the status of these lots, respectively, as originally laid out and sold by the city, the grant of authority to the city has already been mentioned. It may also be noted that on December 27, 1845, the legislature incorporated Howard and others as owners of the water lots, under the name of the Water Lot Company of the City of Columbus, "in order to conduct their affairs and carry on their operations with greater facility." The incorporators were made able and capable in law "to have, hold, purchase, receive, possess, enjoy, and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of whatsoever kind, nature, or quality the same may be, and the same to sell, grant, demise, alien, or dispose of;" and it was provided that the "death of one or more of the directors, or parties in interest, shall at no time, or in any case, prevent, or hinder, or delay a sale or sales of the said lots, or any of them, or an interest therein, by the survivors, in the name of the corporation." Acts 1845, p. 123. The italics are ours. This charter was amended on November 16, 1866; and, among other things, it was de-

clared that the president and directors should "manage the entire business of the corporation in such manner as they shall deem most expedient to develop the water power owned by said company," and that "all deeds or contracts made by or with the Water Lot Company as heretofore organized shall be of like force and effect as though made under this amended charter." Acts 1866, p. 211. The putting of this property in the hands of a corporation with these broad powers indicates no legislative intention to place restrictions upon the use of water by the owners of different lots otherwise than as might be agreed on between the company and purchasers.

The petition before us is drawn with much skill and ability; but a careful analysis will disclose that it rests on an erroneous basis. It sets out what were the conveyances prior to the union of the title to the entire property in Howard, and then assumes that he should or must have conveyed land on the same terms as to the right to use water. It merely alleges that he built a mill on lot No. 1, and that by means conveyances this lot passed to the defendant; and, as to the other lots, it alleges that, subsequently to the construction of the dam in 1868, the Eagle & Phenix Manufacturing Company was organized, and, "by purchase, acquired title to all the water lots from No. 2 to No. 19, inclusive, . . . and being successors in title to John H. Howard and Josephus Echols, and being bound by the covenants and agreements set out in the original deeds of conveyance to Howard and Echols," it constructed a stone dam, and also that the plaintiff "is the immediate successor in title of the Eagle & Phenix Manufacturing Company, that it owns water lots from No. 2 to No. 19, inclusive." When Howard became the owner of the entire property, including the water power, it is perfectly clear that he was not obliged to sell at all, either the whole or any part of it. He could have retained all of the property and utilized it as he deemed best. The requirement in the deed to him was that he should improve one or more of the lots within four years by erecting machinery to be propelled by water. If he sold off some of the property, no reason is apparent why he could not have provided in his conveyance the extent of the right to use water which the purchaser should have; and, if he did so, the purchaser would take subject to such restrictions. Suppose, for instance, he had thought that more than one-nineteenth part of the water power was necessary for the operation of the mill, why could he not have reserved what he considered necessary, or have limited the amount of water to be used by his grantee?

And, if he did so, can it be contended that the grantee would be entitled to more than the conveyance included? The real question to be determined is, not what Howard might have conveyed, or even what he should have conveyed, but, What did he convey, and what did the plaintiff acquire under the conveyance or conveyances made by him or his successors? To attempt to hold that the plaintiff acquired certain rights, including the right to use one-nineteenth part of the water which the river or the pond resulting from the dam afforded, under the conveyances from Howard, without reference to those conveyances themselves, either alone or in connection with the previous conveyances and attendant circumstances, would be little more than a guess in the dark. In effect, what we are asked to do by this petition is to determine that the plaintiff, as holder under a chain of conveyances beginning with Howard, acquired certain rights and privileges, without any reference to what Howard in fact conveyed, but by reference to the deeds under which he acquired the entire property. In other words, to declare what rights Howard's remote grantees acquired, not by considering the grants from him, but solely the grants to him. As an illustration of the great difference in rights which may have arisen according to the provisions contained in the deeds intervening between Howard and the present plaintiff, two cases only need be cited. Thus, in *Water Lot Co. v. Leonard*, 30 Ga. 560, 572, the covenant in the deed then under construction provided that the vendor would "so finish all the eyes in the canal or reservoir as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on lot No. 11, by Leonard." It was held that the true interpretation of the deed was that, if the canal was completed and the eyes or gates at its mouth were so finished or constructed as to permit the water from the river to flow freely and without interruption into the canal, and the balance of the eyes so finished as to prevent the escape of the water from it, except as it was intended that it should, and the race or wasteway was blasted out (except as to blasting out the race opposite to lots Nos. 11 and 12, which the grantee was to do), then the canal would furnish and contain sufficient water to propel the machinery; but "there was no covenant against great drought or unusual and excessive low stages of the water in the river." Again in *Moses v. Eagle & P. Mfg. Co.* 62 Ga. 455, an execution in favor of Leonard against the Water Lot Company was levied on certain of the water lots, and a claim was interposed by the

Eagle & Phenix Manufacturing Company, which the present petition alleges was the immediate predecessor in title of the plaintiff. It was held that the deed under which the claimant asserted title did not convey an absolute estate in fee to the entire water lots therein referred to, but only up to a certain line, with an easement to use the water beyond it, leaving the fee in the grantor to the remainder of the river bed up to the Alabama line. These deeds are not set out in the record or before us in the present case, but the decisions are cited to show how different may be the rights of the present plaintiff according to the conveyances under which it holds, and that it is not sufficient to establish those rights to merely show what was contained in the deeds antedating the ownership of the entire property by Howard. In *Gray v. Saco Water Power Co.* 85 Me. 526, 27 Atl. 455, it was said: "Water rights acquired by grant, and not by ownership of the soil through which the water flows, depend upon the intention of the parties as expressed in the deed taken, in connection with their situation and the subject-matter of their transaction at the time of the conveyance."

In further illustration of this subject, it is said in 3 *Farnham on Waters*, § 753, page 2274. "The power which may be developed is dependent upon the height of the volume of water above the point of discharge, which is termed the head, and upon the amount which is available for use, which is usually measured by what will pass through an aperture of given dimensions." In *Gray v. Saco Water Power Co.* 85 Me. 528, 27 Atl. 455, it is said: "Grants and reservations relating to water and water power are various in their nature and effect. Some refer to a certain extent of water power sufficient for the propulsion of a specific mill or machinery. *Warner v. Cushman*, 82 Me. 168, 19 Atl. 159; *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219; *Covel v. Hart*, 56 Me. 518; *Elliot v. Shepherd*, 25 Me. 371. Some to a quantity of water to be restricted to a specific purpose. *Deshon v. Porter*, 38 Me. 293. Others to 'such a quantity of water as the grantor or his predecessor has been accustomed to use.' *Avon Mfg. Co. v. Andrews*, 30 Conn. 476. Still others to such a quantity of water as will flow through a gate of specific dimensions under a specific head of water. *Bardwell v. Ames*, 22 Pick. 333; *Tourtellot v. Phelps*, 4 Gray, 373. 'Head' is a well-known material factor in determining the quantity of water which will pass through a given aperture in a given time. *Eubanks, Hydraulics*, 38; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 102, 21 L. ed. 64, 68." Various other forms of expression are also used in

such grants. Sometimes the amount of water to be taken is referred to as so many square inches of water, referring to the size of the aperture. If the grant measures the water right by the aperture merely, it has been held that it will not prevent a change of the head under which the water is delivered. *Gray v. Saco Water Power Co.* supra. And it has also been declared that, although a conveyance of a mill site and the right to a certain number of inches of water describes the lot by metes and bounds, and fixes the river boundary of the lot at low-water mark, this does not limit the head of the water power so as to prevent the grantee from excavating his tailrace below the then low-water mark. *Forrest Mill Co. v. Cedar Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076. Where the description is by the head and aperture or gate method, it is evident that both the head and the size of the aperture enter into a determination of the amount of water taken; and, if a grant specifying the size of the opening or gate does not place a limitation upon a change of head, it may well be doubted whether a specification of the head alone acts also as a limitation upon the size of the aperture or gate,—at least unless the size of such opening operates to destroy the head stipulated for.

Perhaps we might content ourselves with stopping at this point; but, as certain other questions have been urged in argument, it is not inappropriate that we should refer briefly to some of them. It is contended that the petition shows the plaintiff to be entitled to the rights asserted by it under the principle that whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect. This principle is undoubtedly sound and well established. Familiar illustrations of its application are where a man, having a close surrounded with his land, grants the close, the grantee shall have a way over the land as incident to the grant; and if one grants the fish in his pond, this includes the power to come upon the banks and fish for them; and, where minerals are granted, it is presumed that they are to be enjoyed, and that the power to get them is also granted as a necessary incident. The rule, however, applies only to such things as are incident to the grant and directly necessary to the enjoyment of the thing granted. So, a way of necessity is limited by the necessity for it, and ceases with the termination of such necessity; and one to whom the fish in a pond has been granted, while having the right to take the fish by hooks, nets, or other devices, would not have the right to cut the banks of the pond for the purpose of draining it, and thus

taking the fish. *Broom, Legal Maxims*, 7th Eng. ed. 357, 360. In the present case the plaintiff alleges that it is in possession of valuable water power, and "at such times as the flow of the river is in a normal condition and above, opposite to the water lots, that ample power is afforded it to operate its machinery on the water lots it owns, without regard to the amount of water power used by the defendant on its lot No. 1," and that it is only under abnormal conditions, occasioned by continued droughts, that it is affected. The allegations of the petition fail to show distinctly what Howard conveyed or what the plaintiff acquired by conveyances under him, and fail affirmatively to allege that the flow of water for which the plaintiff now contends was a necessary incident to any grant from Howard. Closely akin to, and to some extent overlapping, the principle above referred to is another which it is urged applies to this case, namely, that the grant of real estate includes a grant of existing appurtenances and easements. In *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31, 49, 48 L. J. Ch. N. S. 853, *Thesiger, L. J.*, in a case involving the rights of the parties to the grant of part of a tenement, said: "I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements); or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted." In a note to *Mason v. Horton*, 48 Am. St. Rep. 817, on page 821, the rule (or that branch of it applicable to a grant by an owner of the entire property) is thus stated: "Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of the law." In 3 *Farnham on Waters*, § 747, page 2207, it is said: "If the right to use power from a dam has been acquired and affixed to a particular mill or parcel of real estate, it will pass by a grant of the property of the grantor with 'appurtenances.' But, if the power was not an appurtenance of the property at the time of the grant, it will not pass as such, al-

though the grantor had a right to make use of the power at the time of the grant. A mere grant of the property will not create any appurtenances." See also, on this subject, *United States v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463; *Pray v. Great Falls Mfg. Co.* 38 N. H. 442; *Forrest Mill. Co. v. Cedar Falls Mill. Co.* supra; *Towaliga Falls Power Co. v. McElroy*, 124 Ga. 1014, 53 S. E. 682; *Hathorn v. Stinson*, 10 Me. 224, 25 Am. Dec. 228; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 190; *Dexter Sulphite Pulp & Paper Co. v. Frontenac Paper Co.* 20 Misc. 442, 46 N. Y. Supp. 363.

It is contended that easements and things appurtenant pass by deed, though the word "appurtenances" may not be used, including what is in use for the land as an incident or appurtenance at the time of the conveyance. See *Devlin, Deeds*, 2d ed. § 863; 2 Am. & Eng. Enc. Law, 2d ed. p. 522, note 1; 14 Cyc. Law & Proc. p. 1184; *Gould, Waters*, 3d ed. §§ 306, 307; 3 *Farnham, Waters*, §§ 777, 778. The difficulty with the petition under consideration is that it does not measure up to the rules on which the plaintiff relies. The allegations of the petition fail to show such an existing appurtenance or necessary incident at the time that Howard conveyed the lots now claimed by the plaintiff, or, indeed, at any time when a conveyance was made under which the plaintiff claims, as to meet the requirements of the rules of law invoked.

We do not deem it necessary to enter into a discussion of riparian rights which may be acquired by owners of land bordering upon artificial channels, nor the partition of water powers owned in common; nor of rights which may be acquired in connection with manufactories located upon a canal or system for supplying water created by authority of the legislature. *Augusta v. Lombard*, 93 Ga. 284, 20 S. E. 312. The case made does not require it.

Viewed in the light of the principle above discussed, the plaintiff's petition does not show that it has the right alleged by it, and it was therefore demurrable. It is only necessary to add that the allegations as to damages are entirely too general and indefinite, if the petition could otherwise withstand the demurrer. It seeks not only injunction, but a recovery of damages. But its allegations on that subject are wanting in sufficient specification.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

Rehearing denied.
7 L.R.A. (N.S.)

ILLINOIS SUPREME COURT.

ROY ALDRICH, Plff. in Err.,

PEOPLE OF THE STATE OF ILLINOIS.

(224 Ill. 622, 79 N. E. 964.)

Larceny—fraud.

1. The rule that, if the owner of goods parts with both the possession and title to another, not expecting their return or disposition in accordance with his directions, the one receiving them is not guilty of larceny, although he procures them by fraud, does not apply where the property is obtained from a transportation company having custody of it merely as bailee, by one wrongfully claiming title to it.

Same—delivery of possession.

2. The mere turning over by a transportation company, upon the mistaken supposition that he is entitled to its possession, of baggage to one claiming it, is not such a consent to the latter's possession as will prevent his being liable for larceny in case he has not such right.

Same—transposition of baggage checks.

3. One who wrongfully obtains from a transportation company possession of baggage to which he is not entitled, by placing the wrong check on it with intent to appropriate it to his own use, is guilty of larceny.

(December 22, 1906.)

Case Note.—Larceny; effect of consent of bailee, agent, or servant to taking of property: —In *Queen v. Prince*, L. R. 1 C. C. 150, it was held that, where the servant is intrusted with the possession of the goods for a special purpose, and has no authority to part with the property in the goods, except for that special purpose, the person who, by fraud, obtains the property from the servant, is guilty of larceny; but, where the servant has a general authority to conduct the business and to part with the property, the person obtaining the goods by fraud would not be guilty of larceny.

This appears to be the general rule governing cases where the taker obtains the goods from the bailee, agent, or servant by fraud or deceit.

Thus, in *Rex v. Jackson*, 1 Moody, C. C. 119, where a pawnbroker's servant, who had general authority to act in his business, delivered up a pledge to the pawnner, on receiving a parcel from the latter which he supposed contained diamonds he had just seen in the pawnner's possession in a similar package, when in fact it contained stones of very little value, it was held that, because the servant, who had a general authority from the master, parted with the property and ownership, the prisoner was not guilty of larceny.

In *Shipply v. People*, 86 N. Y. 375, 40 Am. Rep. 551, it was held that, where the owner of goods placed them in the hands of

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of larceny. Affirmed.

Statement by Vickers, J.:

The record in this case brings up for review the judgment of conviction of Roy Aldrich for the crime of larceny.

The facts developed on the trial were, in substance, as follows: In July, 1905, Miss Flora May Barr checked her trunk at Grand Haven, Michigan, for Chicago, and took passage on one of the steamships belonging to the Goodrich Transportation Company. She left Grand Haven about 9:15 on the evening of July 10th, and arrived at Chicago about 6 o'clock on the morning of the 11th. At Chicago Miss Barr gave the check for her trunk to a transfer company, with instructions to transfer it to the Bur-

lington depot and recheck it to Oakland, Cal., which was done. Miss Barr saw the baggageman attach the check to her trunk at Grand Haven, where she received a duplicate check, but she did not see the trunk again before leaving Chicago for Oakland. Upon her arrival at Oakland she gave her trunk check to a transfer company, with instructions to deliver the trunk to her at the place where she intended to stop. When the trunk was brought to her she at once discovered that it was not her trunk. She refused to receive the trunk, although it had a check attached to it corresponding to the one which she had received for her trunk at Chicago. The trunk which was sent to Oakland was a zinc-covered trunk with an oval top, while Miss Barr's trunk was a canvas-covered trunk and of a different shape. Miss Barr's trunk contained be-

an expressman or public carrier with directions to deliver them to defendant on receiving pay therefor, and the defendant, knowing that it was only by payment of money that he would be entitled to the goods, nevertheless received them from the expressman and sent him back to the owner with a worthless check, he was guilty of larceny. It appeared that the expressman acted in good faith, believing that he had authority to deliver the goods for the check.

In *Queen v. Stewart*, 1 Cox, C. C. 174, the facts were very similar to those in the preceding case, and the ruling was the same.

And so it was held in *Rex v. Small*, 8 Car. & P. 46, and *Reg. v. Webb*, 5 Cox, C. C. 154, where the servant who was sent with the goods was instructed to deliver them for cash, and the accused accepted them, giving counterfeit money to the servant, who believed the same to be good.

In *Reg. v. Robins*, Dears. C. C. 418, it was held that the prisoner was properly convicted of larceny where, by a false statement, he induced the servant who had the care of the property to allow him to remove a part of it, which he carried away and appropriated to his own use.

In *Reg. v. Little*, 10 Cox, C. C. 559, where goods were intrusted to a cartman for delivery to a certain person, but he delivered them to another person, who claimed to be the consignee, and who appropriated them to his own use, it was held that the latter person was guilty of larceny.

Where fraud on the part of the taker does not appear, and it does appear that he honestly believed that the owner's agent had authority to consent to the taking, the felonious intent necessary to sustain a conviction is wanting.

Thus, in *Fetkenhauer v. State*, 112 Wis. 491, 88 N. W. 294, it was held that, if the overseer of the farm from which the accused took the property gave him permission to take it and convert it to his own use, and he honestly believed that the overseer

had authority to give such permission, and he took and used it in pursuance of such permission, then there was no felonious intent. In this case the defendant swore that he had the permission of the overseer, and the overseer would not swear that he had not given such permission, and there was no evidence that he was acting as an accessory.

And in *Heskey v. State*, 18 Tex. App. 275, where defendant proved that he took and used the property publicly, after being told to take it, by one who professed to be the agent of the owner and who promised to procure and send him a bill of sale for it, and that he wrote the professed agent for the bill of sale, it was held that the trial court should have charged the jury that, whether or not the party professing to be agent had authority to sell the property, if the defendant really believed that he did have, the jury should acquit.

But where the taker had reason to know that the bailee or servant had no authority to consent to the taking, he cannot defend on the ground that he actually had such consent.

Thus, in *State v. McCarty*, 17 Minn. 76, Gil. 54; it was held that, if the property was taken without the consent of the owner, the taking involved a trespass notwithstanding a servant who had the custody thereof consented to the taking. In this case the accused probably knew that the servant had no authority to give consent, and the servant was probably guilty of embezzlement.

In *Oakley v. State*, 40 Ala. 372, it was held that the consent of the bailee to the larceny or asportation of the chattels bailed to him cannot take away from the transaction its character of larceny, unless it was given by the authority of the owner. In this case there was no actual delivery by the bailee, but he probably knew that the property was going to be stolen.

As to the effect of the owner's intentionally facilitating the taking, see case note to *Topolewski v. State*, ante, 756.

tween \$300 and \$400 worth of wearing apparel and other articles of value which she intended to take with her on her summer trip to California, while the trunk which was brought to her at Oakland was afterwards found to contain nothing except waste paper and rubbish. She immediately notified the Goodrich Transportation Company of the loss of her trunk, and shipped the empty trunk back to Chicago. The Goodrich Transportation Company instituted a search for the missing trunk. About a week or ten days after Miss Barr passed through Chicago an unknown man appeared at the baggage room of the Goodrich Transportation Company in Chicago with two trunks, bought a ticket and checked the trunks to Milwaukee. The servants of the transportation company, in handling the two trunks, discovered that they were apparently empty,—at least they were very light. It was also noticed that both of these trunks had the locks broken and that they were fastened with ropes or straps. When the boat arrived at Milwaukee plaintiff in error presented two checks and demanded the two trunks. The employees in charge of the boat, suspecting that this transaction might not be all right, refused to deliver the trunks to Aldrich in Milwaukee, but agreed to recheck them for him back to Chicago, which they did. The trunks were not called for after their return to Chicago for several days. Finally plaintiff in error presented checks and demanded the two trunks. The transportation company again refused to deliver the trunks to plaintiff in error. Plaintiff in error called a second time and demanded the trunks, and threatened legal proceedings unless they were delivered to him. In the meantime one of the trunks had been positively identified as Miss Barr's lost trunk. It was afterwards learned that a man by the name of Frank Bushre had hauled the two empty trunks from a room occupied by plaintiff in error in a house at 128 Dearborn avenue, Chicago. It is also shown that plaintiff in error and a woman known as "Daisy Dean" occupied the room from which the trunks were obtained by Bushre. Plaintiff in error was then arrested on a charge of larceny of the Barr trunk and its contents. In the room occupied by plaintiff in error and the woman were found substantially all of the articles which Miss Barr had packed in her trunk in Grand Haven, Michigan, and these articles were afterwards identified by her as her property. There was also found in this room a large quantity of other goods of various description, among other things, two tickets from Grand Haven to Chicago which had never been used.

The theory of the prosecution is that

plaintiff in error, somewhere between Grand Haven and Chicago, transferred the check from the zinc-covered trunk to Miss Barr's trunk and from her trunk to the zinc-covered trunk, and that the plaintiff in error secured possession of Miss Barr's trunk by having the duplicate of the check that was originally attached to the zinc-covered trunk. Plaintiff in error denies all connection with the theft, and claims that he bought the stolen trunk, together with another large trunk, from a man by the name of Doc. Lebey. His explanation as to how he obtained possession of the lost trunk is not corroborated by any testimony in the record, or by facts and circumstances.

The indictment charged the plaintiff in error with feloniously stealing one trunk and various articles of personal property, the personal goods and property of the Goodrich Transportation Company, a corporation of the state of Wisconsin. The jury found plaintiff in error guilty, and found the value of the property stolen to be \$230. Motions for a new trial and in arrest of judgment were made and severally overruled, and plaintiff in error was sentenced to an indeterminate term of imprisonment in the penitentiary.

Messrs. Cantwell & Erbstein and Charles P. R. Macaulay, for the plaintiff in error:

Where a party intends to divest himself of all further interest, and, in pursuance of such intention, delivers property to another, the person receiving it cannot be convicted of larceny, although the transfer is induced by the fraud of the latter and with a purpose to steal the property.

Johnson v. People, 113 Ill. 99; Steward v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; Stinson v. People, 43 Ill. 397; 2 Bishop, Crim. Law, § 808, Clark, Crim. Law, 2d ed. 290; Rapalje, Larceny & Kindred Offenses, § 401.

On petition for rehearing.

Mr. Henry Roth, also for plaintiff in error:

If the agent, acting innocently in the performance of his duty, is induced to consent, his consent is the consent of his employer, and there is no trespass against him.

1 McClain, Crim. Law, § 683; Barton v. People, 135 Ill. 405, 10 L.R.A. 302, 25 Am. St. Rep. 375, 25 N. E. 776.

Mr. Howard O. Sprogle, with Messrs. W. H. Stead, Attorney General, John J. Healy, and John R. Newcomer, for the People:

Obtaining possession of property by trick, with the present purpose and intention of stealing the same, is larceny.

Rapalje, Larceny & Kindred Offenses, §§ 57, 401; 1 Wharton, Crim. Law, 10th ed. §§ 964, 973, 974; 1 McClain, Crim. Law, §§

560, 562; Clark, *Crim. Law*, p. 257; Johnson v. People, 113 Ill. 99; Stinson v. People, 43 Ill. 397; Welsh v. People, 17 Ill. 339; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; Quinn v. People, 123 Ill. 333, 15 N. E. 46.

Vickers, J, delivered the opinion of the court:

1. The court instructed the jury, as a matter of law, that, if one obtains property from the owner or custodian thereof by some sort of a trick or device, for the purpose of stealing and converting the same to his own use, he will be guilty of larceny. Error is assigned upon the giving of this instruction. The contention of plaintiff in error is that, if the property was obtained with the consent of the transportation company, it would not amount to larceny, even though such consent was obtained by means of a trick or device and with the intention of stealing the same.

It is an established rule of the common law relating to the offense of larceny that, if the owner of the goods alleged to have been stolen parts with both the possession and the title of the goods to the alleged thief, not expecting the goods to be returned to the owner or to be disposed of in accordance with his directions, then neither the taking nor the conversion amounts to larceny; and this is true even where the owner is induced to part with the title and possession through the fraud and misrepresentation of the alleged thief. If, however, the owner merely parts with the possession and retains the title, expecting and intending that the goods shall be returned to him or disposed of in some particular manner agreed upon, in such case the subsequent felonious conversion of the property by the alleged thief will relate back and make the taking and conversion a larceny. Welsh v. People, 17 Ill. 339; Stinson v. People, 43 Ill. 397; Murphy v. People, 104 Ill. 528; Johnson v. People, 113 Ill. 99; Quinn v. People, 123 Ill. 333, 15 N. E. 46; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; Steward v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; Bergman v. People, 177 Ill. 244, 52 N. E. 363.

The doctrine illustrated and applied in the above cases is based on the rule of the common law that every larceny includes a trespass; and, since the alleged thief could not commit a trespass on property in his possession and respecting which the owner had parted with the possession and title, such property could not be the subject of larceny by the fraudulent possessor. The above rule does not, in our opinion, have any application to the case at bar, for the reason that the Goodrich Transportation Company held the trunk and its contents merely

as bailee of the rightful owner, of which plaintiff in error must, upon the theory of the prosecution, be presumed to have had notice, and therefore such transportation company had no authority to consent to the title passing, with the possession, to plaintiff in error. But, even it could be held that the corporation could have given such consent by its proper officers, it certainly cannot be said that the mere act of its servants in turning over the trunk to plaintiff in error upon the mistaken supposition that he was entitled to the possession thereof would amount to such a consent as is necessary to bring the case within the rule contended for by plaintiff in error. In McClain on Criminal Law, vol. 1, § 558, it is said: "The fact that the servant, in whose possession the property is, consents to its taking, will not prevent the act being larceny, he having no authority to consent, and the wrongdoer being aware of that fact." State v. McCarty, 17 Minn. 76, Gil. 54; People v. Griswold, 64 Mich. 722, 31 N. W. 809; State v. Edwards, 36 Mo. 394. It seems clear, on principle, that, if property is obtained from an infant or an insane person, who is legally disqualified from giving consent, with the felonious intent to steal the same, such consent could not be availed of as a defense to a charge of larceny. The same principle ought to apply to bailees whose interest in the property is known to the alleged thief.

In our opinion the case at bar is not controlled by the principle contended for by the plaintiff in error. The case comes within the rule laid down in *Com. v. Barry*, 125 Mass. 390. This case, in all of its essential facts, is like the case at bar. The charge was for the larceny of a trunk, and the offense was committed by the shifting of checks, as is alleged in the case at bar. In disposing of the case, the court said: "It does not appear that the question whether there was an asportation at or before the changing of the checks was raised at the trial. . . . An asportation at that precise time was unimportant. The real question was whether the defendant then, feloniously and with an intent to steal, set in motion an innocent agency by which the trunk and contents were to be removed from the possession of the true owner and put into the defendant's possession, and, by means of such agency, effected the purpose. . . . 'There is no occasion that the carrying away be by the hand of the party accused, for, if he procured an innocent agent to take the property,' by means of which he became possessed of it, 'he will himself be a principal offender.' 3 Chitty, *Crim. Law*. 925. It is held to be a larceny 'if a person intending to steal my horse take

out a replevin and thereby have the horse delivered to him by the sheriff, or, if one intending to rifle my goods, get possession from the sheriff by virtue of a judgment obtained without any the least color or title, upon false affidavits, etc.; in which cases the making use of legal process is so far from extenuating, that it highly aggravates, the offense by the abuse put on the law in making it serve the purposes of oppression and injustice.' 1 Hawk. P. C. chap. 33, § 8; 1 Hale, P. C. 507."

It will thus be seen that an asportation may be effected by means of innocent human agency as well as mechanical agency, or by the offender's own hands. One may effect an asportation of personal property so as to be guilty of larceny by attaching a gas pipe to the pipes of the company, and thus draw the gas into his house, and consuming it without its passing through the meter. *Clark & M. Crimes*, p. 446, and cases cited in note; *Woods v. People*, 222 Ill. 295, 78 N. E. 607. From these cases, the law appears to be well settled that where, with the intent to steal, the wrongdoer employs or sets in motion any agency, either animate or inanimate, with the design of effecting a transfer of the possession of the goods of another to him in order that he may feloniously convert and steal them, the larceny will be complete, if, in pursuance of such agency, the goods come into the hands of the thief and he feloniously converts them to his own use; and in such case a conviction may be had upon a common-law indictment charging a felonious taking and carrying away of such goods. If, in the case at bar, the plaintiff shifted the checks on the trunks, by means of which the servants of the transportation company were innocently led to further the criminal purpose by delivering the trunk in question to the accused, who received and converted the same to his own use; and, if there was in the mind of the plaintiff in error a felonious intent to steal this property pervading the entire scheme and attending every step of it,—then he is guilty of larceny; and the instruction under consideration, as applied to such a state of facts, is a correct statement of the law and there was no error in giving it to the jury.

2. Instruction No. 2, given on behalf of the people, contains the same principle of law as No. 1, and the objections thereto are disposed of by the foregoing discussion of the first instruction.

Instruction No. 3 relates to the count in the indictment charging plaintiff in error with receiving stolen property. Since the jury acquitted plaintiff in error of this charge, we need not consider the exception to this instruction.

3. Instruction No. 7, given for the people, is also excepted to. That instruction is as follows: "The court instructs the jury, as a matter of law, that in this state the accused is permitted to testify in his own behalf; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness; and, in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness stand; and the jury are also to take into consideration the fact, if such is the fact, that he has been contradicted by other credible witnesses. And the court further instructs the jury, that if, after considering all the evidence in this case, they find that the accused, or any other witness, has wilfully and corruptly testified falsely to any fact material to the issue in this case, they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other evidence or facts and circumstances in evidence."

The objection to this instruction, as stated by plaintiff in error in his brief, is that it is erroneous in informing the jury that, if they found that any witness had committed perjury, they had a right to disregard the testimony of the defendant. This argument is based on the assumption that the pronoun "his," in the third line from the bottom of the instruction, refers to the defendant only, and not to the defendant "or any other witness." This construction is as illogical as it is ungrammatical. The language of the instruction does not mean that the jury should disregard the defendant's testimony if some other witness had wilfully and corruptly testified falsely to some material fact in issue; and we cannot believe that anyone with intelligence enough to serve on a jury would understand the instruction as announcing a rule so unreasonable and absurd.

Other objections to the instructions given, as well as the exceptions to the refusal of the court to give some and to the modification of other of the instructions of plaintiff in error, have all received our careful consideration, and we have reached the conclusion that no error exists for which the judgment below should be reversed. Accordingly, the judgment below should be and is affirmed.

Petition for rehearing denied February 7, 1907.

MASSACHUSETTS SUPREME JUDICIAL COURT.

STEPHEN W. REYNOLDS et al.

v.

SUPREME COUNCIL OF THE ROYAL ARCANUM.

(192 Mass. 150, 78 N. E. 129.)

Benefit society—by-laws—amendments.

1. A mutual-benefit society has power to amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter authority to provide for the payment of a certain death benefit, to be secured by assessment, and to provide for the amendment of its by-laws.

Case Note.—Right of mutual-benefit society to increase rates:—While there is more or less conflict of authority as to the right of a mutual-benefit association to increase its charges for life insurance, it may be considered to be well settled that, if the policy is issued upon the express condition that the holder thereof shall be bound by all laws, rules, and regulations of the society in force at the time he becomes a member, or which may thereafter be enacted; or if the member, in his application, has expressly agreed to such condition,—he cannot afterwards complain of any change in the manner or amount of his assessments, merely upon the ground that such change increases the cost of his insurance, and is, for that reason, a breach of the contract.

Accordingly, in *Gaut v. Mutual Reserve Fund Life Assn.* 121 Fed. 403, it was held that the holder of a policy issued by such society, containing such condition, could not refuse to pay an assessment thereon and recover damages as for breach of contract, because the company had changed its methods and graduated its assessments according to the age of the policy holder when each assessment was made, instead of basing them upon his age when his policy was issued, where the company's charter gave it the power to change the rate of assessment from time to time, and there was no showing that the increase was fraudulent or unnecessary; even though the change increased the assessments to such an extent as to render them prohibitive as to members of long standing who aimed to continue in the society. Here there were no express words in the contract of insurance giving the insured the right to have any assessment made as of the age when he became a member. Nor was it deemed material that he had been assessed at that age for twelve years; the court declaring it to be the company's right to do that, and to abandon such method at any time. To quote from the opinion: "It was not a construction by the company of their contract with the plaintiff; but it was a method chosen, by which the company hoped to make its busi-

Same—classification of members.

2. The classification of members of a mutual-benefit society according to age, in a by-law readjusting methods of assessment, is not illegal.

Same—increasing assessment—violation of contract.

3. Raising the rate of assessment on a member of a mutual-benefit society by change of by-laws does not impair his contract, where the by-laws to which he agreed required him to conform to the laws then in force, or which might thereafter be adopted.

(May 18, 1906.)

RESERVATION by the Supreme Judicial Court of Suffolk County, for the opinion of the full bench, of a bill to set aside

ness attractive, and so attractive that it might last as a rule of assessment always, no doubt; but when the time came that it was confronted with changed conditions, and confronted with the fact that it did not have enough money to pay constantly increasing losses, it was within the province of their contract, and strictly within its provisions, and wholly within the competency of the charter, for the company to devise a means by which these assessments could be increased; and then, likewise, under the terms of the contract and the charter, it was permissible to have changed the method or proportion of assessments from the age of entry to the age attained at the time the assessment was made."

And such an agreement on the part of a member was held in *Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485*, to deprive him of any vested right to have the rate of assessment remain unchanged as fixed by a by-law in force when he became a member. It was said that the express recognition which the member made in his contract with the society, of the latter's power to make new by-laws, was necessarily a recognition of the right to repeal or amend those theretofore made; and that, while the court strongly disfavored any alteration or change in an insurance contract without the consent of the insured, "yet, where the contract does reserve to the corporation the right, from time to time, to amend its rules or by-laws, and binds the assured to compliance with such rules or by-laws, and such provision is expressly assented to in writing by the assured, it cannot be said that it would be an extraordinary power to make such change, and such a contract would not meet with disfavor from the courts."

To the same effect is *Messer v. Grand Lodge, A. O. U. W.* 180 Mass. 321, 62 N. E. 252, in which it appeared that the certificate of membership was issued on such condition, and was altogether silent in regard to the rates to be paid; and that at the time of its issue the association had no statutory authority to make assessments upon its members at other than a fixed

changes in the by-laws of the defendant society. Bill dismissed.

The facts are stated in the opinion.

Messrs. Moorfield Storey and John P. Leahy, for plaintiffs:

By-laws which alter, or change, or affect the essential terms or conditions of the contract itself are *ultra vires*, and inoperative and void, without the express consent of the members. By-laws making certificates void in the event of suicide do not affect certificates issued before their passage.

Fargo v. Supreme Tent, K. of M. 96 App. Div. 491, 89 N. Y. Supp. 65; Weber v. Supreme Tent, K. of M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Sautter v. Supreme Conclave I. O. of H. 72 N. J. L. 325, 62 Atl. 529.

rate, the same for all members, regardless of age. It further appeared that statutes were afterwards enacted which gave the association authority to levy assessments at different rates according to the age of the member. It was held that the association had the power to collect such assessments from members who had joined before the enactment of such statutes. The court said that the mode of making assessments under the earlier statutes and as provided in the original laws of the society was simply a detail in the management of the business of the order, which it might change at any time.

Such condition was also contained in the policy sued upon in *Conner v. Supreme Commandery Golden Cross* (Tenn.) 97 S. W. 306, in which it was held that a change in the society's laws, whereby all members were to be assessed at their attained age instead of on the basis of the age at which they entered the order, was not unreasonable as to the insured, and did not violate his vested rights, nor breach his contract, though it raised his assessment from \$52.08 to \$144 per year.

The same result was reached in *Miller v. National Council, K. & L. of S.* 69 Kan. 234, 76 Pac. 830, in which it was held that the change in the by-laws of a fraternal beneficiary association, whereby all level rate members were required to pay a graduated rate as of the age when admitted, was valid and binding, which increased the rates to such members, where the certificate contained the express condition that the insured should in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof, and the member, in his application for membership, agreed to abide by all its rules and regulations if accepted as a member; though the certificate of membership in question did not contain the specific provision to abide by all laws to be thereafter enacted. This decision proceeds upon the ground that this condition was equivalent to a consent upon the member's part, not only to comply with the laws then in force, 7 L.R.A. (N.S.)

Where the member was engaged in an occupation at the time of entrance, which was afterwards prohibited by amendment to the by-laws, the subsequent by-law cannot affect his contract without his consent.

Tebo v. Supreme Council, 89 Minn. 3, 93 N. W. 513; Deuble v. Grand Lodge, A. O. U. W. 66 App. Div. 323, 72 N. Y. Supp. 755, 172 N. Y. 665, 65 N. E. 1116.

By-laws defining the kind of disability for which liability will be assumed cannot be restricted by subsequent enactments.

Beach v. Supreme Tent, K. of M. 177 N. Y. 100, 69 N. E. 281; Starling v. Supreme Council R. T. of T. 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340; Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066. A certificate issued at a time when the

but also to comply with all reasonable rules and regulations which might thereafter be made in the interest of the association. The opinion in this case is a complete reversal of the same court's position upon the first hearing of this same case, 73 Pac. 88, where it was held that the by-laws and constitution as in existence at the time of the application, together with the application and the certificate of membership, constituted the contract between the parties, and that the same could not be altered without the consent of both parties; and that therefore the change in question was beyond the power of the society.

On the other hand, in *Covenant Mut. Life Asso. v. Kentner*, 188 Ill. 431, 58 N. E. 966, it was held that, unless there was an express agreement that a member should be bound by future by-laws varying or modifying his contract, he was not so bound, and that therefore an assessment which increased the rate of insurance to him would be invalid without his consent, and that his refusal to pay the same would work no forfeiture of his contract; though the court admitted that the by-laws of the association existing at the time the member entered the association were a part of the contract, and that the contract was to be construed with reference to them.

So, in *Covenant Mut. Life Asso. v. Tuttle*, 87 Ill. App. 309, it was held that a provision in a certificate that the application for membership and the certificate should constitute the complete and only contract between the certificate holder and the association excluded any idea that the by-laws of the association were to be looked to as a part of the contract, and that, even if it were conceded that the by-laws in force when the certificate was issued entered into and became a part of the contract, it was only those then in existence, and the society had no right, by amending or repealing any of them without the consent of the certificate holder, and in the absence of any such right reserved in the contract, to impose new conditions or burdens affecting the contract to his injury, or, by a new provision

beneficiary named therein was legally designated cannot be affected by a subsequent by-law making this designation illegal, without express consent.

Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 85 Am. St. Rep. 263, 61 N. E. 127; *Wist v. Grand Lodge*, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Roberts v. Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57, 173 N. Y. 580, 65 N. E. 1122; *Grand Lodge*, A. O. U. W. v. *Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840; *Hadley v. Queen City Camp No. 27*, W. O. W. 1 Tenn. Ch. App. 413; *Spencer v. Grand Lodge*, A. O. U. W. 22 Misc. 147, 48 N. Y. Supp. 590, 53 App. Div. 627, 65 N. Y. Supp. 1146.

A change in the manner of sending no-

tice of assessments is not binding without consent.

Thibert v. Supreme Lodge K. of H. 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220.

Subsequent by-laws affecting the maximum amount of the benefit are void, unless enacted with the express consent of the member.

Langan v. Supreme Council, A. L. of H. 174 N. Y. 266, 66 N. E. 932; *Williams v. Supreme Council*, A. L. of H. 80 App. Div. 402, 80 N. Y. Supp. 713; *Simon v. Supreme Council*, A. L. of H. 91 App. Div. 390, 86 N. Y. Supp. 866; *Smith v. Supreme Council*, A. L. of H. 94 App. Div. 357, 88 N. Y. Supp. 44; *Butler v. Supreme Council*, A. L. of H. 105 App. Div. 164, 93 N. Y. Supp.

passed after making the contract, to forfeit his rights under it; and that the refusal of a certificate holder to pay an assessment largely in excess of any previous assessment would not avoid his certificate, even though such holder had paid former assessments which were also in excess of the original contract rate.

And this principle was carried still further in *Pearson v. Knight Templars & M. Indemnity Co.* 114 Mo. App. 283, 89 S. W. 588, in which it was held that a mutual beneficiary life association could not nullify a contract of insurance without the express assent of the member insured, and, if a change was made, whereby his assessments were materially increased contrary to his contract, he could recover the excess, though in his application he agreed to abide by the constitution and rules as they then were, or might thereafter be constitutionally changed. The court said that the cost of the member's insurance was measured chiefly by the number and amount of the assessments that the company might make upon him for the payment of death losses, and that the increase in amount of each of these assessments necessarily increased the cost of his insurance, and that, for this reason, the change objected to materially modified his contract.

To the same effect is *Wright v. Knights of Maccabees*, 48 Misc. 558, 95 N. Y. Supp. 996, where a mutual beneficiary association was denied the right, under the power reserved in the contract of insurance, to amend its laws, and, under the member's agreement to conform to subsequent laws, to increase the amount of a member's assessments, without his consent, though such proposed increase was necessary to keep the association solvent.

Even if the policy or certificate of membership, or other contract of insurance entered into by a mutual benefit society, by whatever name called, contains a table purporting to show the amounts to which its members would be subjected at a given age, such table is not binding on the company, and affords no protection to the unwary

member who trusts to its figures as representing the maximum amount for which he can be assessed. Thus, in *Haydel v. Mutual Reserve Fund Life Asso.* 44 C. C. A. 169, 104 Fed. 718, Affirming 98 Fed. 200, it was held that such table was merely a memorandum showing how assessments were to be apportioned as between persons of different ages, and the probable amount of the assessments as then foreseen and estimated, and was not an agreement between the insured and the insurer binding the latter not to make assessments in a sum greater than therein shown, which, in the opinion of the court, would divest the company's directors of the power plainly conferred upon them by the company's charter, to make such assessments as might at any time be found necessary to meet death losses. The reasons given by the court for its conclusion were as follows: First, the company was a mutual one, operating on the assessment plan; second, the rate indicated by the table was so far below the usual cost of insurance as to compel the court to believe that the insured did not himself regard the table as a binding contract on the part of the company to furnish insurance at the rate therein specified regardless of its actual experience; third, that, if a fixed or level rate of assessment was contemplated, it was more likely to be embraced as a stipulation in the body of the contract, instead of being indorsed in the form of a memorandum on the back of the policy; lastly, the policy holder had paid numerous assessments in excess of that shown by the table, and his final refusal to pay the one in question was based on grounds other than that the company lacked the power to make such assessments.

And in *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498, it was held that it was not the purpose of a table of assessment rates to fix a limitation upon the amount of the gross assessment that might be levied against a member, but only to afford a guide, after such gross amount had been ascertained, for its equitable and fair apportionment among the members,

1012; *Gaut v. American Legion of Honor*, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070; *Blair v. Supreme Council*, A. L. of H. 208 Pa. 262, 101 Am. St. Rep. 934, 57 Atl. 564; *O'Neill v. Supreme Council*, A. L. of H. 70 N. J. L. 410, 57 Atl. 463; *Makely v. American Legion of Honor*, 133 N. C. 367, 45 S. E. 649; *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 78 S. W. 297; *Supreme Council A. L. H. v. Champe*, 63 C. C. A. 282, 127 Fed. 541; *Supreme Council*, A. L. of H. v. *Getz*, 50 C. C. A. 153, 112 Fed. 119; *Black v. Supreme Council*, A. L. of H. 120 Fed. 580; *Lippincott v. Supreme Council*, A. L. H. 130 Fed. 483, 69 L.R.A. 803, 67 C. C. A. 650, 134 Fed. 824; *Supreme Council A. L. H. v. Daix*, 64 C. C. A. 435, 130 Fed. 101; *Morton v. Supreme Council* R. L. 100

Mo. App. 76, 73 S. W. 259; *Wuerfler v. Grand Grove*, O. of D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; *Pokrefky v. Detroit Firemen's Fund Asso.* 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057; *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 44 C. C. A. 93, 104 Fed. 638, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108.

Where the member seeks to enforce money demands, a contractual relation exists between the association and its members, and that draws to it a legal rule not applicable to cases of discipline.

Roxbury Lodge, No. 184, I. O. O. F. v. *Hocking*, 60 N. J. L. 439, 64 Am. St. Rep. 596, 38 Atl. 693; *Bragaw v. Supreme Lodge*, K. & L. of H. 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905; *Morrison v. Wisconsin Odd*

graduated according to age. Here the constitution and by-laws of the association were expressly made a part of the contract of insurance, and those instruments provided that assessments should be made for such sum as the executive committee might deem sufficient to meet existing death claims, and that the same was to be apportioned among the members according to the age of each.

To the same effect is *Crosby v. Mutual Reserve Fund Life Asso.* 38 Misc. 708, 78 N. Y. Supp. 237, in which it was held that an assessment insurance association had a right to make an assessment for a death benefit at the rate of the member's attained age, instead of at the rate of his age of entry, where the certificate of membership provided that assessments should be made at such rates, according to age, as the directors might establish, and made the constitution and by-laws a part of the contract, and those instruments provided that assessments should be apportioned among the members in accordance with the rates found in a table annexed to the certificate.

But, if the attempted increase of assessments is plainly contrary to the express terms of the contract of insurance, or is made for a purpose not contemplated thereby, the member will not be required to pay such increased assessments in order to preserve his rights. Accordingly, it was held in *Benjamin v. Mutual Reserve Fund Life Asso.* 146 Cal. 34, 79 Pac. 517, that assessments levied by a co-operative life insurance association were void, and imposed no liability upon a member for payment thereof, and could not affect his rights under his policy, where it appeared that he was one of the older members, whom the association placed in a class by themselves, by which arrangement they were required to pay according to the attained age of each at the date of the assessment, while of the other members other classes were established who were to be assessed as of the age of their entry into the association: upon the ground that such classification, being solely for the purpose of levying an increased rate of as-
. L.R.A.(N.S.)

essment upon such older members, was an inequitable and arbitrary discrimination against them. Here it appeared that the certificate of membership and policy of insurance provided that assessments should be made upon the entire membership of the association, the same to be apportioned among the members according to the age of each member, and that the contract should be subject to all the provisions and stipulations contained in the constitution and by-laws of the association and the amendments thereto, and these provided that the apportionment should be according to the rates shown in the certificate, though they also empowered the board of directors to adopt such other rules and regulations as they might deem for the interest of the association, and were by their express terms subject to revision and amendment.

So, in *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, it was held that, while the board of directors of a corporation organized for the purpose of conducting life insurance upon the co-operative or assessment plan had authority to change the rates of assessments from time to time to meet the death losses and expenses, if the apportionment was equitable, they could not, in the absence of any authority in the contract of insurance, arbitrarily place all members who joined prior to a certain year in a class by themselves and advance the ages of their assessments from year to year, while all members joining after that date were assessed as of the age of their entry; that such discrimination against the old and in favor of the new members was not an equitable distribution of the increasing cost of carrying the older members, and was not contemplated by the terms of their contracts.

And the same result was reached in *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55, in which it appeared that the certificate

Fellows' Mut. L. Ins. Co. 59 Wis. 162, 18 N. W. 13; 1 Cooley, Briefs on Insurance, p. 719; Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977.

The attempted change in this case was illegal.

Evans v. Southern Tier Masonic Relief Asso. 182 N. Y. 453, 75 N. E. 317; Ebert v. Mutual Reserve Fund Life Asso. 81 Minn. 116, 83 N. W. 506, 84 N. W. 457; Strauss v. Mutual Reserve Fund Life Asso. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55; Pearson v. Knight Templars' & M. Indemnity Co. 114 Mo. App. 283, 89 S. W. 588; Benjamin v. Mutual Reserve Fund Life Asso. 146 Cal. 34, 79 Pac. 517; Covenant Mut. Life Asso. v. Kentner, 188 Ill. 431, 68 N. E. 966.

Mr. A. E. Pillsbury, with Messrs. John Haskell Butler and Curtis H. Waterman, for defendant:

The court will not interfere with the action of the order unless there has been an abuse of its discretion.

Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; Hall v. Western Travelers' Acci. Asso. 69 Neb. 601, 96 N. W. 170; Supreme Lodge,

K. of P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

The plaintiffs' contracts provide for subsequent amendment.

Foley v. Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; Niblack, Ben. Soc. 2d ed. § 136; 3 Am. & Eng. Enc. Law, 2d ed. p. 1080; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Swan v. Mutual Reserve Fund Life Asso. 155 N. Y. 9, 49 N. E. 258; May, Ins. § 548; Saunders v. Robinson, 144 Mass. 306, 10 N. E. 815.

The promise to pay fixed benefits is binding upon the corporation, and it must make adequate provision to pay the fixed amount in settlement of the claim.

Newhall v. Supreme Council A. L. of H. 181 Mass. 111, 63 N. E. 1; Porter v. Supreme Council A. L. of H. 183 Mass. 326, 67 N. E. 238; Wuertler v. Grand Grove O of D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; Evans v. Southern Tier Masonic Relief Asso. 182 N. Y. 453, 75 N. E. 317; Gundlach v. Germania Mechanics' Asso. 4 Hun, 339; Weiler v. Equitable Aid Union, 92 Hun, 277, 36 N. Y. Supp. 734; Jarman v. Knights Templars' & M. Life Indemnity Co. 95 Fed. 70, 44 C. C. A. 93, 104 Fed. 638; Becker v. Berlin Ben. Soc. 144 Pa. 232, 27

of membership provided that assessments should be made upon the entire membership for such sum as the executive committee might deem sufficient, the same to be apportioned among the members according to the age of each member, as set out in a table indorsed on the certificate. Afterwards the association placed in a separate class all members who entered prior to a certain date, and required them to pay on the basis of the age attained by each at the date of each assessment, while other members continued to be assessed as of their age of entry, with the result that such older members were assessed at a higher amount than if the entire membership were assessed at the rates of their attained ages. The call which the plaintiff refused to pay was larger in amount than it would have been had all the members been assessed at their full attained ages. It was held that such assessment was in violation of the association's constitution, and excessive and invalid. Here it was evident that, if this change was binding upon the older members, they would eventually be forced out of the company by the constantly increasing assessments.

The same principles were applied in Covenant Mut. Ben. Asso. v. Baldwin, 49 Ill. App. 203, in which it was held that, so long as assessments were made according to the certificate of membership, the certificate holder was bound to pay them, and that a failure to do so would work a forfeiture; but that the directors of the association

issuing the same could not, without the member's consent, change his contract of insurance; and that if, in making assessments, more was called for and collected than was authorized by the contract, the excess would stand to his credit, and his failure to pay an assessment would not avoid his certificate if the amount overpaid by him on previous assessments was more than the amount of the unpaid assessment. Here the certificate provided that the application for membership and the certificate itself constituted the complete and only contract between the member and the society, and that the certificate holder should pay such assessments, not exceeding a specified sum, as were necessary to meet death claims; and the directors adopted a by-law under which assessments were made in excess of the amount required for such purposes, and the insured paid all of them except the one assessed just before his death.

And in Margesson v. Massachusetts Ben. Asso. 165 Mass. 262, 42 N. E. 1132, it was held that the failure on the part of a member of a beneficiary association to pay an assessment of an amount larger than the maximum amount specified in his contract of insurance under a call for "mortality and disability purposes" and for "contingent liabilities" worked no forfeiture of the contract, where the contract itself required the member to pay a specified sum annually, and, upon the death of a brother member, an additional assessment of another specified sum if required, and no more; though

Am. St. Rep. 624, 22 Atl. 699; Pokrefky v. Detroit Firemen's Fund Asso. 121 Mich. 456, 80 N. W. 240; Supreme Council A. L. of H. v. Jordan, 117 Ga. 808, 45 S. E. 33; O'Neill v. Supreme Council A. L. of H. 70 N. J. L. 410, 57 Atl. 463.

The classification made by the amendments, based upon attained ages, and applying equally to all members of the order, is not arbitrary or unreasonable; nor does it make the order into a commercial insurance company.

Supreme Commandery, K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge, K. of P. v. Knight, 117 Ind. 498, 3 L.R.A. 409, 20 N. E. 479; Messer v. Grand Lodge, A. O. U. W. 180 Mass. 321, 62 N. E. 252.

Every member of the corporation impliedly contracts to accept all changes regularly adopted by it within the scope of its chartered purposes.

Durfee v. Old Colony & F. River R. Co. 5 Allen, 230; Wright v. Minnesota Mut. L. Ins. Co. and Hall v. Western Travelers Acci. Asso. supra; Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125; Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; 1 Bacon, Ben. Soc. 2d ed. § 186; Pain v. Société St. Jean Baptiste, 172 Mass. 319,

70 Am. St. Rep. 287, 52 N. E. 502; Dornes v. Supreme Lodge K. of P. 75 Miss. 466, 23 So. 191; Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362; Chambers v. Supreme Tent, K. of M. 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 734.

The changes were valid.

Smith v. Galloway [1898] 1 Q. B. 71; Bradbury v. Wild [1893] 1 Ch. 377; Rosenberg v. Northumberland Bldg. Soc. L. R. 22 Q. B. Div. 373; British Equitable Assur. Co. v. Baily [1906] 1 A. C. 35.

The payment of assessments is clearly a duty owed by the member in his capacity as an insurer.

Jarman v. Knights Templars' & M. Life Indemnity Co. supra; Morton v. Supreme Council, R. L. 100 Mo. App. 76, 73 S. W. 259; Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070.

It follows that all provisions relating to payment of assessments and regulation and alteration of rates may be modified by amendment of the by-laws.

Messer v. Grand Lodge, A. O. U. W. supra; Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Haydel v. Mutual Reserve Fund Life Asso. 98 Fed. 200, Affirmed in 44 C.

the member had paid earlier calls "for mortuary and disability purposes."

And in Hicks v. Northwestern Aid Asso. (Tenn.) 96 S. W. 962, in which it appeared that the policy of insurance issued by the association provided that, if any unexpected emergency should arise whereby the mortuary and reserve fund should become exhausted, "then, and in such case only," the policy holder should be liable for such further assessment as might be necessary to meet such emergency and maintain the solvency of the company, it was held that the company had no power, under the contract, to increase the rate of existing insurance except in the case of the specified emergency, and that the insured's refusal to pay an assessment at a higher rate than the maximum called for by his policy, arbitrarily made by the company without his consent, would not work a forfeiture of his policy.

So, in Mutual Reserve Fund Life Asso. v. Taylor, 99 Va. 208, 37 S. E. 854, it was held, under a policy providing that the rate of assessment might be changed each five years to correspond with the actual mortality experience of the insurer, a beneficiary association could change its rates as to different ages in accordance with the results of its experience; but that an increase in the rate of assessments which did not correspond with such experience was unauthorized, and a member's failure to pay an increased assessment under such circum-

stances would not forfeit his rights under his policy.

The Federal court refused to interfere with the system inaugurated by the defendant society in REYNOLDS v. SUPREME COUNCIL, R. A., and out of which grew the litigation involved in that case, and, in Gaines v. Supreme Council, R. A. 140 Fed. 978, held that the society's action in thus changing its system of assessments was not so clearly in violation of the contract rights of its older members, whose rates were thereby increased, as to authorize a court in another jurisdiction to enjoin the association from making such assessments.

In Seymour v. Mutual Reserve Fund Life Asso. 14 Misc. 151, 35 N. Y. Supp. 793, a preliminary injunction was refused to a member of a co-operative life insurance company to enjoin the enforcement of assessments in excess of the amount named in his certificate of membership, where it appeared that the company's constitution gave its directors power to fix the amount of the assessments, and the assessments objected to were a result of a change of policy suggested by the superintendent of the state insurance department, and the member had paid similar assessments without objection; upon the ground that the plaintiff had not shown that his right was of such a clear character as to entitle him to the relief sought, in advance of a trial upon the merits.

C. A. 169, 104 Fed. 718; *Gaut v. Mutual Reserve Fund Life Asso.* 121 Fed. 403; *Bartram v. Supreme Council Royal Arcanum*, 6 Ont. W. R. 404; *Gaines v. Supreme Council*, R. A. 140 Fed. 978; *Richmond v. Supreme Lodge O. of M. P.* 100 Mo. App. 8, 71 S. W. 736; *Miller v. National Council*, K. & L. of S. 69 Kan. 234, 76 Pac. 830; *Crosby v. Mutual Reserve Fund Life Asso.* 38 Misc. 708, 78 N. Y. Supp. 237; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498; *Mutual Reserve Fund Life Asso. v. Taylor*, 99 Va. 208, 37 S. E. 854; 1 Bacon, Ben. Soc. 2d ed. pp. 371, 387.

Knowlton, Ch. J., delivered the opinion of the court:

This is a bill in equity to set aside certain changes in the defendant's by-laws which affect the rights of certificate holders.

The defendant is a fraternal beneficiary association, organized under the laws of Massachusetts in 1877, and now subject to the provisions of Rev. Laws, chap. 119, and the acts in amendment thereof. The plaintiffs are certificate holders, who bring this bill for themselves and in behalf of others. From the time of its organization the defendant issued certificates to members, agreeing to pay to a designated beneficiary a sum not exceeding a certain number of dollars on the death of the member, upon compliance by him with certain conditions therein stated. The by-laws provided that the death benefit should be for a definite amount, and payments of these definite amounts have always been made. The words "not exceeding" are inserted in the certificate to meet the possibility of a single full assessment not being equal to the amount stated. This limitation of the payment to the amount of an assessment, except when there is an emergency fund, was expressly called for by Stat. 1899, chap. 442, § 11, p. 471, which is now found in Rev. Laws, chap. 119, § 6. Until 1898 the assessments paid by members, from which the death benefits were derived, were certain sums dependent upon the age of the member at the time of receiving his certificate, which sums remained the same as the years went by. These sums were paid to meet assessments as members died, and the amount for the first year would equal the cost to the corporation of the insurance of these members. But, as the members grew older, the risk of their death increased; and as their payments remained constant, and as there was at no time a payment of any surplus beyond the amount required to meet losses, the payments by members of long standing were not nearly enough to equal the cost of their insurance to the corporation. So 7 L.R.A. (N.S.)

the only way in which the amounts required to meet losses could be obtained was from the payments made by new members.

In 1898 the by-laws were amended so as largely to increase the payments to be made by all members, and to require the payments monthly. These amendments went into effect on August 1, 1898, and it appears by the agreed facts that no objection thereto has ever been made by any member of the order. These payments, while much larger than those required by the original by-laws, were upon the same relative basis; that is, the increase upon all was in the same proportion, and they were all determined by the age of the member when he received his certificate, and were not to be afterwards changed as a member grew older.

When these amendments were made it was thought that the increase would provide for the future payments called for by the certificates, and that an adequate emergency fund would be created from this income. Under these amendments there was a surplus in 1898 from the excess of receipts above payments amounting to more than \$455,000, and afterwards there was annually a steadily diminishing surplus from the same cause to and including the year 1903. In the year 1904 the payments exceeded the receipts, and there was a deficit of \$271,540.50.

Before the session of the supreme council in May, 1905, the executive committee caused mortality tables of the order to be prepared, and made extended investigations and studies with the aid of competent actuaries, to devise some method, through a change of by-laws, which should enable the corporation to meet its obligations to members. The actuaries prepared for them new tables, each the mathematical equivalent of the others, the first being the regular rates, and three others optional alternatives. These were founded upon the payment by the order of the maximum value of each certificate, and the payment by the members of a rate adequate, without further modification or additional assessment, to pay the certificate at the maturity thereof. It is agreed that "competent actuaries would testify, and the case may be taken as though they had testified, that the old plan of assessments was faulty, according to the assumptions made by actuaries, and that the order could not meet the maximum face of its certificates permanently under it; that upon their assumptions a change was expedient or necessary; that the plans proposed, and adopted were mathematically correct; that, if the members paid the amounts fixed in these tables, the order could continue to pay the

maximum face value of its certificates at their maturity; that such amounts are no higher than necessary for this purpose, and that they fairly and equitably apportion among the members their contributions to the widows' and orphans' benefit fund, taking into consideration their age and risk." "The plaintiffs do not controvert this evidence in this case, but reserve the right to discuss its materiality, the basis and theories upon which it rests, and its application to this case." On January 1, 1905, the members of the corporation were 305,083 in number, and they held benefit certificates amounting to \$680,848,000.

Under these conditions, the changes recommended by the actuaries were adopted by an amendment of the by-laws by an almost unanimous vote of the members of the supreme council, and the question is whether the changes are legal and binding upon the members.

From the facts agreed, it is plain that a great corporation, managing and controlling important financial interests for hundreds of thousands of families, was conducting its business upon unsound principles, which, if followed without change, would ultimately lead to financial ruin. The first question is, Was the change adopted in excess of the defendant's corporate powers, or in violation of the statute governing such corporations? The statutes authorize the adoption of by-laws declaring "the manner in which . . . the purposes of its incorporation may be accomplished." Rev. Laws, chap. 125, § 6; Id., chap. 119, § 2. These by-laws may prescribe the "assessments and benefits in case of disability or death, and the conditions upon which the same shall be paid, . . . the method of the amendment of the by-laws, and such other provisions as the corporation may determine." Rev. Laws, chap. 119, § 2. Such a corporation "may make provision for the payment of benefits in case of death, or disability, or both. The funds from which the payment of such benefits shall be made shall be derived only from assessments collected from the members. . . . Such provisions, funds, assessments, and payments shall be as required in the by-laws of the corporation." Rev. Laws, chap. 119, § 6.

Plainly the statute contemplates that such corporations shall have power to establish by their by-laws a system of giving death benefits which shall be sound and equitable, and founded on principles which can reasonably be expected to furnish proper security for the performance of their contracts with members. The power to make proper changes in these particulars

by amendment of the by-laws from time to time is expressly given.

There is no ground for the contention that it is a violation of the statute, or of the defendant's chartered rights, to provide for such assessments as will be likely to insure the payment of the sums named in the certificates. The statute expressly authorizes, not only a death fund amounting to three full assessments upon the members, but also the accumulation of an emergency fund amounting to 5 per cent upon the face-value of all outstanding benefit certificates. The emergency fund is to be invested in safe securities, and all of these are to be deposited with the treasurer of the commonwealth. Rev. Laws, chap. 119, § 7. As the promise to pay the beneficiary is binding upon the corporation, it ought to make adequate provision to obtain the means of payment. *Newhall v. Supreme Council A. L. of H.* 181 Mass. 111, 63 N. E. 1.

The objection that the amendments are illegal by reason of the division of the members into classes cannot prevail. There is no objection to a classification of members according to age, and it would be unjust to disregard age in determining the rates that different persons shall pay for death benefits in an association of this kind.

The distinctive features of such organizations remain since the adoption of the amendments as well as before. The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries. It is not allowed to employ paid agents in soliciting or procuring business, except within very narrow limits prescribed by the statutes. Rev. Laws, chap. 119, § 16. Looking to the nature and purposes of fraternal beneficiary corporations, we see nothing in the amendments at variance with the law. It cannot have been intended that such corporations should be limited to a method of assessment that would be sure to bring about their early dissolution.

Another question is whether the amendments are in violation of the contract rights of members. It is stated in the record that "the agreements between the plaintiff and the defendant concerning assessments and benefits are not contained in any one specific instrument, but are found in the application for membership, the benefit certificate, the laws of Massachusetts constituting the charter, and the constitution and laws of the order." If there were no express stipulation in regard to the by-laws in the application

for membership or in the certificates, all members of such a corporation would be bound by by-laws regularly made or amended. *Durfee v. Old Colony & F. River R. Co.* 5 Allen, 230, 242; *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *Spilman v. Supreme Council*, H. C. 157 Mass. 128, 31 N. E. 776; *Wright v. Minnesota Mut. L. Ins. Co.* 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L.R.A. 409. 20 N. E. 479.

Every member of this corporation, at the time of joining it, enters into an express agreement to "conform to and abide by the constitution, laws, rules, and usages of the said council and order, now in force or which may hereafter be adopted by the same." The benefit certificates promise payment out of the widows' and orphans' fund only on condition that the member complies in the future "with the laws, rules, and regulations now governing the said council and fund, or that may hereafter be enacted by the supreme council to govern the said council and fund," etc. Here in the contract is full authority to amend the laws, rules, and regulations.

In regard to a similar provision under which a mutual fire insurance company changed its by-laws, so as to increase the assessments upon certain policy holders, the Supreme Court of the United States uses this language: "The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. 'We will abide by, observe, and adhere to the constitution, rules, and regulations which are already established, or may hereafter be established, by a majority of the insured . . . or which are or may hereafter be established by the president and directors of the society.' . . . As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds, and, whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being a party on both sides, insurer and in-

sured. Certainly the general submission which they have signed will cover their liability to submit to this alteration." *Korn v. Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195. This part of the present case is covered in principle by the decisions of this court in *Messer v. Grand Lodge*, A. O. U. W. 180 Mass. 321, 62 N. E. 252, and *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502, in which cases changes similar to those made by the defendant were upheld under like contracts. The same general doctrine has been stated in many cases in other courts. *Wright v. Minnesota Mut. L. Ins. Co.* supra; *Fullenwider v. Supreme Council*, R. L. 73 Ill. App. 321, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; *Bartram v. Supreme Council*, R. A. 6 Ont. W. R. 404; *Gaines v. Supreme Council*, R. A. 140 Fed. 978; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *Supreme Lodge, K. of P. v. Knight*, supra; *Haydel v. Mutual Reserve Fund Life Asso.* 44 C. C. A. 169, 104 Fed. 718; *Gaut v. Mutual Reserve Fund Life Asso.* 121 Fed. 403, 409; *Richmond v. Supreme Lodge O. of M. P.* 100 Mo. App. 8, 71 S. W. 736; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498; *Mutual Reserve Fund Life Asso. v. Taylor*, 99 Va. 208, 37 S. E. 854.

There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant cannot be cut down by an amendment of the by-laws. *Newhall v. Supreme Council A. L. of H.* 181 Mass. 111, 63 N. E. 1; *Langan v. Supreme Council A. L. of H.* 174 N. Y. 266, 66 N. E. 932; *Supreme Council A. L. of H. v. Getz*, 50 C. C. A. 153, 112 Fed. 119. But in many of these, as in the case from this court last cited, a distinction is made between the express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise, on one side, is set over against the promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated ex-

pressly, without mention of the by-laws. The member occupies a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise.

That the duties of members, prescribed by the by-laws, remain subject to modification when a power of amendment is reserved, has often been decided. *Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012; *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; *Lawson v. Hewell*, 118 Cal. 613, 49 L.R.A. 400, 50 Pac. 763; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 58 Atl. 223; *Ellerbe v. Faust*, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390.

Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person, and an amendment affecting his duties as a member of the corporation, bound to perform his part in providing means, or otherwise, as one of the association of insurers. *Hale v. Equitable Aid Union*, 108 Pa. 377, 31 Atl. 1066; *Fargo v. Supreme Tent, K. of M.* 96 App. Div. 491, 89 N. Y. Supp. 65; *Weber v. Supreme Tent, K. of M.* 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Sautter v. Supreme Conclave, I. O. of H.* 72 N. J. L. 325, 62 Atl. 529; *Tebo v. Supreme Council, R. A.* 80 Minn. 3, 93 N. W. 513; *Deuble v. Grand Lodge, A. O. U. W.* 66 App. Div. 323, 72 N. Y. Supp. 725, 172 N. Y. 665, 65 N. E. 1116; *Beach v. Supreme Tent, K. of M.* 177 N. Y. 100, 69 N. E. 281; *Starling v. Supreme Council R. T. of T.* 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340; *Peterson v. Gibson*, 191 Ill. 365, 54 L.R.A. 836, 85 Am. St. Rep. 263, 61 N. E. 127; *Wist v. Grand Lodge, A. O. U. W.* 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Roberts v. Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57, 173 N. Y. 580, 65 N. E. 1122; *Grand Lodge, A. O. U. W. v. Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840; *Hadley v. Queen City Camp No. 27*, W. O. W. 1 Tenn. Ch. App. 413; *Spencer v. Grand Lodge, A. O. U. W.* 53 App. Div. 627, 65 N. Y. Supp. 1146. Other cases cited by the plaintiffs are clearly adverse to the view which we take. See *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 110, 83 N. W. 506, 834, 84 N. W. 457; *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. 7 L.R.A. (N.S.)

St. Rep. 699, 36 S. E. 352; *Benjamin v. Mutual Reserve Fund Life Asso.* 146 Cal. 34, 79 Pac. 517.

On principle and on the weight of authority, we are of opinion that there is nothing in this contract that prevents the corporation from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number. The members who complain of its action are those who have had the benefit of insurance for themselves and their families for many years, at very much less than the cost of their insurance to the corporation. They have had the good fortune to survive, and therefore their contracts have brought them no money, but all the time they have had the stipulated security against the risk of death. If now they are called upon to pay for future insurance no more than its cost to the corporation, they ought not to think it unjust.

Bill dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plff. in Err.,

v.

THOMAS FERRENBACH, Exr. of Jacob Lambert, Deceased.

(75 C. C. A. 304, 144 Fed. 342.)

Second appeal—questions open.

1. A question once decided by the court of appeals will not be re-examined when the case again comes before that court upon the same facts and under the same conditions.

Insurance—wrongful cancellation—damages.

2. The amount of premiums paid, with interest, is not the measure of damages for

Case Note.—Measure of damages for wrongful cancellation of policy issued on assessment plan:—If the compensation for the injury done to the insured from the wrongful cancellation of his policy is to be the guide, and the award of damage is, in the language of the foregoing opinion, to "be precisely commensurate with the risk, neither more nor less," the above case undoubtedly enunciates the only proper and logical rule for the measure of damages resulting from such wrongful cancellation of a policy of life insurance issued upon the assessment plan, where the assessments levied upon the insured from time to time represent, or purport so to do, the actual cost to the insurer

the wrongful cancelation for alleged nonpayment of premiums of a life-insurance policy issued on the assessment plan.

Same.

3. The measure of damages for wrongful cancelation, for alleged nonpayment of premiums, of an assessment insurance policy upon the life of one who at the time of cancelation is no longer an insurable risk, is the amount of the policy, less cost of carrying it to maturity had it remained in force, all amounts entering into the calculation to be calculated upon the basis of the legal rate of interest as of the date of cancelation.

(March 20, 1906.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in plaintiff's favor in an action brought to recover damages for alleged wrongful cancelation of a life-insurance policy. Reversed on condition.

The facts are stated in the opinion.

of carrying the risk. If the insured is in such a state of health as to be unable to secure insurance in any other company, and the risk has attached, and he has had the benefit of the protection of the insurance while carrying the policy, it would seem that there could be no other adequate measure of damages than the value of his policy at the time of its cancelation. The reason, if not the weight, of authority would seem to support this rule, though the cases applying the same are few in number.

The fundamental principle involved in this rule received the approval of the Minnesota supreme court in *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, where it was held that the proper measure of damages in such cases would be the value of the policy at the date of its cancelation, though that tribunal expressly refrained from committing itself as to the precise method of estimating such value. To quote from the opinion: "Plaintiff can only recover such damages as naturally result from the act complained of. He had the benefit of several years' insurance, and that was a consideration for the money he paid. If death had occurred during that period, the beneficiary of the policy could have enforced payment. There are decisions to the effect that the measure of damages in such a case is the amount of the premiums paid, but the weight of authority is against that proposition. The sounder rule is that the damages are to be measured by the position the parties occupied at the time of cancelation. If at that time plaintiff's health had become impaired to such an extent as made it impossible to secure other insurance, the extent of his damages would be different than if new insurance could be had. If he could at that time have taken out other insurance in a similar company, 7 L.R.A. (N.S.)

Argued before Van Devanter and Hook, Circuit Judges, and Lochren, District Judge.

Mr. George Burnham, Jr., with Messrs. Jones, Jones, & Hocker, for plaintiff in error:

The premiums paid, with interest, are not the true measure of damages.

Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; *Mailhoit v. Metropolitan L. Ins. Co.* 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989; *Day v. Connecticut General L. Ins. Co.* 45 Conn. 480, 29 Am. Rep. 693; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Stanley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254; *Continental L. Ins. Co. v. Houser*, 89 Ind. 258; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 66; *Hancock v. New York L. Ins. Co.* 2 Ins. L. J. 903, Fed. Cas. No. 6,011; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Re English Assur. Co.* L. R. 14 Eq. 72; *Tyrie v. Fletcher*, 2 Cowp.

the measure of damages would be the difference between the cost of such new insurance for the term of his natural life, according to the mortuary tables, and the cost of carrying the canceled policy for such term, according to the rates established by the 1889 tables, as of the age of entry. But, if his health had become impaired, and new insurance could not have been procured, then the measure of damages would seem to be the present value of such a policy as of the date of death, according to the mortuary tables, less the estimated cost of carrying the same from the date of cancelation at his then age."

To the same effect is *Langan v. American Legion of Honor*, 34 Misc. 629, 70 N. Y. Supp. 663, Reversed upon other grounds in 174 N. Y. 266, 66 N. E. 932, where the measure of damages was held to be the present value of the policy, less the present value of the assessments which the insured would have had to pay under his contract of insurance, had it remained in force.

This rule seems, also, to have the support of the Wisconsin supreme court, for, in *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 109 Am. St. Rep. 931, 102 N. W. 593, it was held that a beneficiary might, during the life of the insured, recover the value of the policy at the time of its wrongful cancelation by the insurer, and the language quoted by the court from New York cases involving policies issued on the level premium plan would seem to indicate that it considered the loss to be the face value of the policy less what it would cost to carry it by payment of premiums during the insured's expectancy of life.

Plain and reasonable as this doctrine would seem to be, there are numerous cases which apply an altogether different rule as to the measure of damages for the wrongful

666; *Re Albert Life Assur. Co. L. R. 9 Eq. 702*; *Lorraine v. Thomlinson, 2 Dougl. K. B. 585*; *Speer v. Phenix Mut. L. Ins. Co. 36 Hun, 322*; *Brooklyn L. Ins. Co. v. Week, 9 Ill. App. 358*.

Messrs. R. P. Williams and C. B. Williams, for defendant in error:

The correct measure of damages in this case is the premiums or assessments paid by the assured, with interest from the date of each payment.

Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; *American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. 256*; *Strauss v. Mutual Reserve Fund Life Assn. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55*; *Braswell v. American L. Ins. Co. 75 N. C. 8*; *Lovick v. Provident Life Assn. 110 N. C. 93, 14 S. E. 506*; *Burrus v. Life Ins. Co. 124 N. C. 9, 32 S. E. 323*; *Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51*; *McCall v. Phoenix Mut. Life Ins. Co. 9 W. Va. 237,*

27 Am. Rep. 558; *Van Werden v. Equitable Life Assur. Soc. 99 Iowa, 629, 68 N. W. 892*; *Suess v. Imperial L. Ins. Co. 64 Mo. App. 1*; *Dickey v. Covenant Mut. Life Assn. 82 Mo. App. 372*; *Puschman v. Hartford Life & Annuity Ins. Co. 92 Mo. App. 640*; *Smallwood v. Life Ins. Co. 133 N. C. 15, 45 S. E. 519*; *Gwaltney v. Provident Sav. & Life Assur. Soc. 132 N. C. 925, 44 S. E. 659*; *Black v. Supreme Council, A. L. of H. 120 Fed. 580, 59 C. C. A. 414, 123 Fed. 650*; *Daix v. Supreme Council, A. L. H. 127 Fed. 374, 64 C. C. A. 435, 130 Fed. 101*; *Lippincott v. Supreme Council, A. L. H. 130 Fed. 483*; *McAlarney v. Supreme Council, A. L. H. 131 Fed. 538*; *Meade v. St. Louis Mut. L. Ins. Co. 51 How. Pr. 1*; *Helme v. Philadelphia L. Ins. Co. 61 Pa. 107, 100 Am. Dec. 621*; *Piedmont & A. L. Ins. Co. v. Fitzgerald, 1 Tex. App. Civ. Cas. (White & W.) § 784*; *Thompson v. New York L. Ins. Co. 21 Or. 488, 28 Pac. 628*; *National L. Ins. Co. v. Tullidge, 39 Ohio St. 240*; *Fischer v. Hope Mut. L. Ins. Co. 69 N. Y. 161*; *McKee v.*

the company has paid nothing, and the plaintiff has received nothing." The foregoing case was followed, and the recovery of premiums allowed for the wrongful cancellation of an assessment policy, in the following cases; but the question as to what was the proper measure of damages does not seem to have been raised, and it was not discussed by the court: *Supreme Council, A. L. H. v. Daix, 64 C. C. A. 435, 130 Fed. 101, Affirming 127 Fed. 374*; *Lippincott v. Supreme Council, A. L. H. 130 Fed. 483, Reversed on other grounds in 69 L.R.A. 803, 67 C. C. A. 650, 134 Fed. 824*; *McAlarney v. Supreme Council, A. L. H. 131 Fed. 538, Reversed on other grounds in 67 C. C. A. 546, 135 Fed. 72*. The rule enunciated by the *Black Case* was also recognized, but plaintiff's recovery was denied on other grounds, in *Clymer v. Supreme Council, A. L. H. 138 Fed. 470*; while in *Blakely v. Fidelity Mut. L. Ins. Co. 143 Fed. 619*, the recovery of the amount of the assessments was permitted, but the right of the insured to recover interest thereon was denied. So, in *People's Mut. Ins. Fund v. Bricken, 92 Ky. 297, 17 S. W. 625*, a recovery of premiums was permitted upon the cancellation of an assessment policy by the insurer, but there was no discussion of the question, and no authorities were cited in support of the court's conclusion. That such is the established measure of damages for the wrongful cancellation of such a policy in other jurisdictions appears from the following cases, where recovery of the assessments paid by the insured, with the interest from the date of the payments, was permitted, without any discussion of the question: *Dickey v. Covenant Mut. Life Assn. 82 Mo. App. 372* (though the plaintiff's petition prayed for the recovery of the value of his policy at the time the

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That such is the established measure of damages for the wrongful cancellation of such a policy in other jurisdictions appears from the following cases, where recovery of the assessments paid by the insured, with the interest from the date of the payments, was permitted, without any discussion of the question: *Dickey v. Covenant Mut. Life Assn. 82 Mo. App. 372* (though the plaintiff's petition prayed for the recovery of the value of his policy at the time the

Phoenix Ins. Co. 28 Mo. 383, 75 Am. Dec. 129; 2 Joyce, Ins. § 1408; Bacon, Ben. Soc. 3d ed. § 376; Niblack, Ben. Soc. 2d ed. § 280.

The company, having partly performed this contract between itself and Lambert, and having, without fault on the part of Lambert, abandoned its further performance, is not entitled to any compensation for such part performance.

Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384; Murphey v. Barron, 1 Harr. & G. 258; Husted v. Craig, 36 N. Y. 221; Gillet v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; Meade v. St. Louis Mut. L. Ins. Co. and Alabama Gold L. Ins. Co. v. Garmany, supra; Mallory v. Mackaye, 34 C. C. A. 653, 92 Fed. 749; Rockwell v. Newton, 44 Conn. 333; Cutter v. Powell, 6 T. R. 320; Ballou v. Billings, 136 Mass. 307; Supreme Council, A. L. H. v. Black, 59 C. C. A. 414, 123 Fed. 650.

Hook, Circuit Judge, delivered the opinion of the court:

This is the second appearance of this cause in this court. When it was first tried in the circuit court, a verdict was directed in favor of the association, upon the ground that the policy of insurance had been lawfully declared to be forfeited for the failure of the insured to pay a premium when due, and judgment was rendered accordingly. The judgment was reversed, and it was held that the position of the association was un-

tenable. *Ferrenbach v. Mutual Reserve Fund Life Asso.* 59 C. C. A. 307, 121 Fed. 945. The facts of the case appear in the opinion reported as above, and we need not again recite them further than to say that the forfeiture was declared during the lifetime of Lambert, the insured. The action was brought by Lambert, and upon his death during its pendency it was revived in the name of Ferrenbach, as executor. The petition is in two counts; the first seeks a recovery of all premiums paid, with interest added, and the second asks generally for damages in the sum of \$5,000 for wrongful forfeiture. In the second trial the circuit court directed a verdict in favor of the executor for the full amount of the premiums paid, and interest thereon.

The association now contends: First, that, under the conceded facts in the case, which are the same as at the first trial, it lawfully declared a forfeiture of the policy, and the plaintiff is therefore not entitled to recover; second, that, even if its first position be not sustained, the measure of damages applied by the circuit court, and which controlled the verdict of the jury, is not the correct one.

The law of this case, so far as it concerns the right of the association to forfeit the policy, was announced by this court upon the return of the first writ of error, and we will not re-examine the question when the cause again comes before us upon the same facts and under the same conditions.

association canceled it); *Puschman v. Hartford Life & Annuity Ins. Co.* 92 Mo. App. 640; *Lovick v. Providence Life Asso.* 110 N. C. 93, 14 S. E. 506; *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, Rehearing denied in 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55; *Gwaltney v. Provident Sav. Life Assur. Soc.* 132 N. C. 925, 44 S. E. 659; *Supreme Council, A. L. of H. v. Batte*, 34 Tex. Civ. App. 456, 76 S. W. 629; and *True v. Bankers' Life Asso.* 78 Wis. 287, 47 N. W. 520.

The same measure of damages seems to have been adopted in *Mutual Reserve Fund Life Asso. v. Taylor*, 99 Va. 208, 37 S. E. 854, for in that case the court said that the insured could "elect to consider the policy at an end and to bring an action to recover the just value of the policy;" citing 2 Bacon, Ben. Soc. § 376, where the clause just quoted also appears immediately followed by these words: "In which case, the measure of damages is the amount of the premiums paid, with interest on each, from the time it was made."

But this principle was denied in *Keyser v. Mutual Reserve Fund Life Asso.* 60 App. Div. 297, 70 N. Y. Supp. 32, and it was said that, while the insured was entitled to recover the damages sustained by the can-

celation of his policy of insurance, upon no principle would he, under such circumstances, be entitled to recover the amount that he had paid during the years that he had been a member of defendant's society, but that he would be entitled to, and the rule of damages was held to be, the cost of replacing the policy on the same terms in a sound company at the time of its cancellation. The court said that the insured had received from the defendant association the benefit of an insurance upon his life while the contract was in force. "If he had died during these seventeen years the company would have been obliged to pay to the beneficiary the amount named in the certificate or policy; and at least to the extent of the reasonable value of that insurance during this period the defendant was entitled to retain the amount that it had received." Of course, no criticism can justly be made of this rule if the insured is in such health as to be able to get other insurance.

Whether or not the same rules as to the measure of damages would apply to the wrongful cancellation of a policy of life insurance issued on the level-premium plan is not within the scope of this note, which is confined to cases involving policies issued on the assessment plan.

Guarantee Co. of N. A. v. Phenix Ins. Co. 59 C. C. A. 376, 124 Fed. 170.

As to the measure of damages: The judgment now under review is for all premiums paid by Lambert between the time his policy was issued and the time of its wrongful cancellation, with interest. The word "premiums" is used in aid of brevity, and it includes the admission fee and all annual dues and mortuary assessments. The peculiar features of this case withdraw it from the operation of the rules which most frequently find application. In a policy issued upon what is termed the level-premium plan, the insured has an equity arising from an excess of premiums paid above the current cost of insurance to the company. Under such a plan, the natural premiums for the respective years, which steadily and progressively increase as the insured advances in age, are so adjusted and averaged among the years of his expectancy of life that they become flat or level, the same in amount in the beginning as at the end. In such a case it is apparent that the earlier level premiums contain an appreciable excess over the actual cost of insurance, which decreases, however, with the progress of the years. So it is said that in a level-premium policy the insured has an equity, the excess of payment above cost of insurance, which constitutes an element of damage resulting from wrongful cancellation. Such was the policy in the case of *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390. But the Lambert policy is of an entirely different character. It was issued upon the assessment plan, and each year's premiums represented the actual current cost to the association of carrying the insurance risk. There was no excess over cost out of which an equity or value could arise. *Mutual Reserve L. Ins. Co. v. Roth*, 59 C. C. A. 63, 122 Fed. 853.

Modern times have witnessed the addition of many new features to policies of life insurance, resulting in premiums of greater amount and consequently in an increased equity or value in the policies themselves; and the particular rules for ascertaining the loss sustained by policy holders through the wrongful cancellation of their policies must vary as the characters of the policies themselves vary. In some cases much may also depend upon the physical condition of the insured, whether he remains an insurable risk or not, and whether insurance of like character and value to that canceled can be obtained in some other responsible company, and what the cost may be. But in every case of this character the dominant idea is compensation,—reimbursement for the actual loss sustained,—and the measure of recovery which fits nearest and

most closely thereto is the one that should be adopted. The award should be precisely commensurate with the injury suffered, neither more nor less. *Dow v. Humbert*, 91 U. S. 294, 299, 23 L. ed. 368, 369.

There are presented in the case at bar all the data essential for an accurate ascertainment of the damage sustained. We have the character of the policy and its date and amount; the dates and amounts of all premium payments to the association during the sixteen years in which the policy was in force; the date of the breach of contract by the association; the physical condition of the insured at the time of such breach and the fact that he was not then an insurable risk, and that he could not then obtain insurance elsewhere; the date of his subsequent death; and, finally, the amounts and dates of maturity of all premiums he would have been required to pay to the association between the time of the cancellation of his policy and the time of his death, had the policy continued in force. And the question is, What rule of admeasurement of damage sustained by the wrongful cancellation should be adopted to give just, full, and adequate compensation, and nothing more or less?

It should be observed that the asserted ground of forfeiture,—failure to pay a premium when due,—is not one that struck at the validity of the policy at the date of its issue. It is not claimed that the policy was void from its inception because of fraud or other reason. Its validity when issued was recognized, and continued so for sixteen years. During all of that period the insured received benefit from his payments and enjoyed the protection afforded by the policy. It was at the end of that period that the association repudiated the further existence of its obligation. Again, it should be observed that both parties have treated the policy as having been terminated on May 1, 1899; the insured claiming that it was then wrongfully done, and the association that it was done rightfully. The action being for damages, the time as of which they should be ascertained is the day the wrong was done and the damage inflicted.

There are quite a number of authorities which announce the rule applied by the circuit court in the case at bar, and allow a recovery of all of the premiums paid by the insured prior to the time of the wrongful cancellation. *Supreme Council, A. L. H. v. Black*, 59 C. C. A. 414, 123 Fed. 650; *Supreme Council, A. L. H. v. Daix*, 64 C. C. A. 435, 130 Fed. 101; *Van Werden v. Equitable Life Assur. Soc.* 99 Iowa, 621, 68 N. W. 892; *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 17 S. W. 625; *American L. Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256; *Union*

Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Thompson v. New York L. Ins. Co. 21 Or. 466, 28 Pac. 628; Braswell v. American L. Ins. Co. 75 N. C. 8; Lovick v. Providence Life Assn. 110 N. C. 93, 14 S. E. 506; Burrus v. Life Ins. Co. 124 N. C. 9, 32 S. E. 323; Strauss v. Mutual Reserve Fund Life Assn. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352; McKee v. Phoenix Ins. Co. 28 Mo. 383, 75 Am. Dec. 129; McCall v. Phoenix Mut. L. Ins. Co. 9 W. Va. 237, 27 Am. Rep. 558; Niblack, Ben. Soc. § 280.

Some of these proceed upon the assumption that, prior to the time of wrongful cancelation, the insured or beneficiary never received any benefit from the policy, and, on the other hand, that the insurance company gave nothing of value for the premiums paid to it. There is involved in this a misconception of the theory and business of life insurance. Not only is the protection of insurance of actual, positive value while it endures, but the cost to the insurer of carrying the risk can be ascertained almost to a mathematical certainty. There is no more reason for saying that an insured has nothing of value until he dies, than there is for saying that one is not benefited by a policy of fire insurance unless his house is destroyed by fire. An insurance company that conducts its business upon the plan that the assumption of a risk costs it nothing before death of the insured will likely meet with speedy and disastrous insolvency.

Once conceding value in insurance protection to the insured, and also cost to the association in carrying the risk, the recovery of all of the premiums paid for such protection is obviously inadmissible. In this aspect the case is analogous to one in which a gas company has contracted to furnish gas to a householder for a period of years. Surely no one would contend that a breach by the company of its contract would authorize a recovery by the consumer of rates paid in the past. Suppose one is let into the possession of a house under a contract of lease, with a purchase clause, providing that he should pay to the owner \$15 per month for a specified term of years, of which \$10 should be considered as rental, and the remaining \$5 with interest accumulations as applicable to a fixed purchase price which would be satisfied by the monthly payments if made during the entire period. Could it reasonably be said that, if the lessor wrongfully canceled the contract and resumed possession, the lessee, upon electing to sue for damages instead of for specific performance, could recover the entire amount of payments made by him, notwithstanding he had peace-

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ably enjoyed the use and occupancy of the premises for the period during which his payments were made? It seems to us that such questions should be viewed from an entirely different standpoint.

The rule in North Carolina, announced in *Braswell v. American L. Ins. Co.* supra, is that "the measure of damage would be the amount necessary to enable the plaintiff to obtain another policy, if so minded, which, of course, would be much higher in respect to the premium, inasmuch as he is several years older than he was when he first obtained the policy; but the case need not be complicated by this consideration, as the plaintiff is content to take back his money with interest, and be quits of all further connection with defendants."

The first part of this quotation announces the proper rule in some cases, especially where the insured is able to obtain other insurance; but the observation concerning the recovery of the premiums does not seem to us to sustain any legal or definite relation to the measure first announced. What a plaintiff would be content to receive should not be established as a legal measure of damage in any case. The premiums paid and interest might be altogether inadequate to compensate, and again they might be largely in excess of full compensation, and naturally that measure would be rejected by the plaintiff in the former case and accepted in the latter, if he were given the choice. A measure of damage is a rule of law, and should not be determined by the option or self-interest of a party to a controversy.

There are several reasons which we think demonstrate that the rule of the above cases is inadmissible, bearing in mind that the end desired is compensation to the insured for loss sustained, and not the punishment of the company. Under some circumstances, such a rule would work great injustice to the insured, and, under others, great injustice to the insurer. An example of the former would be presented if the insured, having paid but one year's premium upon a policy issued for his entire life, should become so affected with disease that he could not procure insurance elsewhere. It would be manifestly unjust to restrict his recovery for a wrongful cancelation of his policy to the amount of the single premium paid. On the other hand, if a policy upon the assessment plan has endured for many years, the assessments or premiums might, with interest, aggregate a sum largely in excess of the principal sum of the policy. It is true that the injured party may have a choice of remedies,—an action for damages, or a suit to prevent a wrongful cancelation; and he might thereby be enabled

to protect himself against an inadequate admeasurement of his loss. The illustrations show, however, that the rule is not a true one. When the insured elects to sue for damages, he should not be given a choice of measurements leading to widely different results. There are other authorities which are fully in harmony with the views we have expressed, and which reject the rule allowing a recovery of all premiums paid. *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Ebert v. Mutual Reserve Fund Life Assn.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; *Mailhoit v. Metropolitan L. Ins. Co.* 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989; *Continental L. Ins. Co. v. Houser*, 89 Ind. 258, 111 Ind. 266, 12 N. E. 479; *Standley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Day v. Connecticut General L. Ins. Co.* 45 Conn. 480, 20 Am. Rep. 693; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 66; *Speer v. Phoenix Mut. L. Ins. Co.* 36 Hun, 322; *Brooklyn Ins. Co. v. Week*, 9 Ill. App. 358; *Bliss, Life Ins.* § 415; *May, Life Ins.* § 569; *Cooke, Life Ins.* § 104; *Re Albert Life Assur. Co. L. R.* 9 Eq. 707, 716; *Re English Assur. Co. L. R.* 14 Eq. 72.

In the *Lovell Case*, supra, Mr. Justice Bradley, in speaking of the complainant's claim, said: "He demands a return of all the premiums paid by him, with interest, less the amount of his premium note; and that said note shall be delivered up to be canceled. But we do not think that he is entitled to a return of the full amount of his premiums paid. He had the benefit of insurance upon his life for five years, and the value of that insurance should be deducted from the aggregate amount of his payments."

In some of the cases sustaining a recovery for all of the premiums paid, the *Lovell Case* was distinguished and held inapplicable. Counsel also seek to distinguish it from the case at bar. But the fact remains that there was in that case a wrongful cancellation of the policy by the company, and the insured, as is the case here, regarded it as terminated, and sued for damages. We regard the doctrine there announced as precluding a recovery, for the wrongful cancellation of a policy, of that portion of the premiums paid which represents the actual cost of the insurance during the years of its uncontested validity. It is true that the policy there involved was of the level premium character, but it is also true that that portion of the premiums paid by *Lovell* which was excluded by the Supreme Court from the recovery is precisely like all of

the premiums paid by *Lambert*. Recovery of the part of the premiums representing the cost to the company of carrying the risk was denied *Lovell*, because he had received the benefit thereof. If the contention now made is admitted, this anomalous result will ensue: If an insured has paid, as *Lambert* did, premiums representing only the actual cost of the insurance, he may, upon wrongful cancellation of his policy, recover all of the premiums so paid; but, if the premiums included, as in the *Lovell Case*, an excess over actual cost, he can recover only such excess.

At the time his policy was canceled *Lambert* was seventy-two years of age, a paralytic, and unable to obtain other insurance in any responsible company. For this reason, the method adopted in some cases for estimating damages by ascertaining the increased cost of insurance obtained elsewhere cannot be employed. And, as his policy had no net value, the measure of recovery in the *Lovell Case* cannot be used. But the insurance was for the term of *Lambert's* life, and he had a right to have it remain in force subject to the continued payment of the premiums.

In view of all the special circumstances of the case, the character of the policy, the physical condition of the insured, and the absence of any measure promising more accurate compensatory results, we are of opinion that the recovery should be for the amount of the policy, less the cost of carrying it to maturity had it remained in force; all amounts entering into the calculation to be valued upon a 6 per cent basis as of May 1, 1899, the date of cancellation. *Lambert* died January 25, 1902, before the trial of his action, but had he lived evidence would have been admissible to show the life expectancy of a man of that age and so afflicted. And it is presumable that such evidence would have established the very fact which afterwards appeared. At any rate, death has solved all uncertainty. The policy was for \$5,000 and was payable at death. Upon a 6 per cent basis, the value of that sum on May 1, 1899, the day of the wrongful act of the association, was \$4,295.55. The various premiums that would have been paid, had the policy remained in force, similarly discounted and brought back from their respective due dates, aggregate \$1,822.25.

The difference between these sums, with interest from May 1, 1899, when the damage was sustained, to October 17, 1904, when the judgment was rendered, aggregating \$3,283.70, is the proper amount of recovery. The judgment entered was for \$4,495.49.

The judgment of the Circuit Court is therefore reversed, and the cause remanded

for a new trial, unless the defendant in error, by a proper remittitur filed in the Circuit Court, shall remit from the judgment there entered the sum of \$1,211.79 with interest accrued upon the amount so remitted since the date of the judgment, and shall also file a certified transcript of such remittitur in this court within forty days from the filing of this opinion. If such remittitur and transcript be filed, the judgment as so reduced will be affirmed, at the cost of the defendant in error.

COLORADO SUPREME COURT.

MINNIE WILLIAMS, Plff. in Err.,
v.
SLEEPY HOLLOW MINING COMPANY.

(— Colo. —, 86 Pac. 337.)

Trial—directing verdict.

1. A question of negligence cannot be taken from the jury, although the facts are not disputed, if they are such that from them different minds might honestly draw different conclusions.

Mine owner—care with respect to safety of mine.

2. A mine owner, upon learning of the existence of water in a neighboring mine in such quantities as to be dangerous to his employees, is bound to make such investigation as would suggest itself to one using ordinary care and prudence, and, upon learning that there is danger of his mine becoming flooded, to make such provision for the safety of his employees as would occur to a person of ordinary prudence, or inform his employees of the impending danger.

Trial—contributory negligence—question for jury.

3. It is only in the clearest cases that the court can take from the jury a question of contributory negligence.

Same—knowledge.

4. The burden of showing lack of knowledge or information on the part of a mine employee killed by the flooding of the mine, of conditions in an adjoining mine which were likely to result in such flooding, does not rest upon one seeking to recover for his death, but the mine owner has the burden of showing such knowledge; and therefore the court cannot direct a verdict for defendant merely because the evidence tending to show absence of knowledge is not conclusive.

Note.—A search has failed to disclose any other cases involving the specific question as to the duty of a master to guard his servants against dangers originating from conditions on neighboring property. A question somewhat analogous sometimes arises in cases where a railroad company fails to fence its tracks, and, in consequence, live

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Same—question for jury.

5. The jury must determine whether or not an employee in a mine, knowing of water in a neighboring mine, knew, or ought to have known, the danger to himself therefrom.

Evidence—unsafe condition of mine.

6. Evidence of lack of ladders and bulkheads where they should have been in a mine in which an employee was drowned by an inrush of water cannot be excluded in an action for his death merely because he knew of their absence, unless he had knowledge of the danger arising from the presence of the water in an adjoining mine in connection with the absence of such appliances.

Same.

7. Evidence of absence of ladders and bulkheads at places where they should have been in a mine is admissible, in an action against the mine owner for the death of an employee drowned by the flooding of a mine through an adjoining one, as tending to show that, if the defendant knew of the danger from the water, he failed to use reasonable precautions for the safety of his employees.

Same—stenographer's transcript.

8. A stenographer's transcript of testimony given by witnesses at a former trial who have since died is not admissible in the absence of any evidence that the evidence was correctly transcribed, other than the certificate of the stenographer.

(June 4, 1906.)

ERROR to the District Court for Gilpin County to review a judgment in favor of defendant in an action to recover damages for the alleged negligent killing of plaintiff's husband. Reversed.

The facts are stated in the opinion.

Messrs. Clinton Reed, H. A. Hicks, and J. Warner Mills, for plaintiff in error:

The sufficiency of the plaintiff's evidence is something the court had no jurisdiction to decide.

Cunningham v. Union P. R. Co. 4 Utah, 206, 7 Pac. 795; Conely v. McDonald, 40 Mich. 158; Solly v. Clayton, 12 Colo. 30, 20 Pac. 351; Colorado C. R. Co. v. Martin, 7 Colo. 592, 4 Pac. 1118; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705; West Chester & P. R. Co. v. McElwee, 67 Pa. 315; Empson Packing Co. v. Vaughn, 27 Colo. 66, 59 Pac. 749; Lord v. Pueblo Smelting & Ref. Co. 12 Colo. 390, 21 Pac.

stock enter thereon and derail a train, injuring an employee. Cases of this kind, however, generally turn upon the general question as to the duty of a railroad company to fence its tracks, and not, as in the above case, upon the duty of the master to guard against specific danger, and are, therefore, of little value on the latter point.

148; *Thomp. Neg.* 1236; *Colorado C. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Shearm. & Redf. Neg.* § 11; *McDonald v. Union P. R. Co.* 42 Fed. 579; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507; *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 315, 61 L.R.A. 121, 61 Pac. 606; *Buehanan v. Chicago, M. & St. P. R. Co.* 75 Iowa, 393, 39 N. W. 663; *Denver Tramway Co. v. Owens*, 20 Colo. 109, 36 Pac. 848; *Allen v. Florence & C. C. R. Co.* 1 Colo. Dec. 765; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 120.

It is the duty of the master to furnish and maintain a reasonably safe place for the servant to work in.

Grant v. Varney, 21 Colo. 329, 40 Pac. 771.

A far higher degree of care and diligence is demanded of the master who places his servant at work in a mine than of him who places his employee on the surface of the earth.

Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Gowen v. Bush*, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349; *James B. Clow & Sons v. Boltz*, 34 C. C. A. 550, 92 Fed. 572; *Van Dusen v. Letellier*, 78 Mich. 502, 44 N. W. 572; *Gates v. State*, 128 N. Y. 221, 23 N. E. 373; *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743; *Balhoff v. Michigan C. R. Co.* 106 Mich. 606, 65 N. W. 594; *Petaja v. Aurora Iron Min. Co.* 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; *Trihay v. Brooklyn Lead Min. Co.* 4 Utah, 468, 11 Pac. 612; *Perry v. Rogers*, 91 Hun, 243, 36 N. Y. Supp. 208; *Anderson v. Michigan C. R. Co.* 107 Mich. 591, 65 N. W. 585; *Carlson v. Northwestern Teleph. Exch. Co.* 63 Minn. 428, 65 N. W. 914; *Sanborn v. Madera Flume & Trading Co.* 70 Cal. 261, 11 Pac. 710; *Jensen v. The Joseph B. Thomas*, 81 Fed. 578; *Union Gold Min. Co. v. Crawford*, 29 Colo. 512, 69 Pac. 600; *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54.

The primary duty of using care to furnish a reasonably safe place for others is higher than the duty of the servant to use reasonable care to protect himself.

Union P. R. Co. v. Jarvi, supra; *Burton v. Missouri P. R. Co.* 32 Mo. App. 455; *McNamara v. Logan*, 100 Ala. 187, 14 So. 175; *Gowen v. Bush* and *James B. Clow & Sons v. Boltz*, supra; *Patterson v. Pittsburgh & C. R. Co.* 76 Pa. 393, 18 Am. Rep. 412; *Trihay v. Brooklyn Lead Min. Co.* supra.

Ignorance of defects is no defense to an action by the employee when, by the exercise of proper care and inspection, the master could have discovered and remedied 7 L.R.A.(N.S.)

the defects, or avoided the danger incident thereto.

Benzing v. Steinway & Sons, 101 N. Y. 552, 5 N. E. 449; *Perry v. Rogers*, 91 Hun, 243, 36 N. Y. Supp. 208; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Crowell v. Thomas*, 90 Hun, 193, 35 N. Y. Supp. 936; *Gutridge v. Missouri P. R. Co.* 105 Mo. 520, 16 S. W. 943; *Gowen v. Bush*, supra; *Southwestern P. R. Co. v. Aylward*, 79 Tex. 675, 15 S. W. 697; *Kansas P. R. Co. v. Lundin*, 3 Colo. 99; *Van Dusen v. Letellier*, 78 Mich. 506, 44 N. W. 572; *Burton v. Missouri P. R. Co.* 32 Mo. App. 458; *Chicago & E. R. Co. v. Branyan*, 10 Ind. App. 570, 37 N. E. 193; 5 *Rapalje & Mack's Digest of Railway Law*, 104; *Harris v. Union P. R. Co.* 4 McCrary, 454, 13 Fed. 591; *Pittsburgh, C. C. & St. L. R. Co. v. Woodward*, 9 Ind. App. 169, 36 N. E. 442.

It is enough to prove that the master knew, or might have known by the exercise of proper care.

Deane v. Roaring Fork Electric Light & P. Co. 5 Colo. App. 521, 39 Pac. 346; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Denver v. Dean*, 10 Colo. 378, 3 Am. St. Rep. 594, 16 Pac. 30; *Lehigh Valley R. Co. v. Kiszal*, 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470; *New York Electric Equipment Co. v. Blair*, 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896; *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368; *Lake Erie & W. R. Co. v. McHenry*, 10 Ind. App. 525, 37 N. E. 186; *Linton Coal & Min. Co. v. Persons*, supra; *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651; *Potter v. Knox County Lumber Co.* 146 Ind. 114, 44 N. E. 1000; 1 *Shearm. & Redf. Neg.* §§ 185, 203; 2 *Bailey, Master's Liability for Injuries to Servant*, § 2645; *Wharton, Neg.* § 237; 2 *Thomp. Neg.* 992, 996; Exhaustive note in 41 L.R.A. pp. 33-153; *Wood, Mast. & S.* § 114; *Lake Erie & W. R. Co. v. McHenry*, 10 Ind. App. 525, 37 N. E. 186.

There is no assumption of risk where danger is extraneous.

Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Gates v. State* and *McNamara v. Logan*, supra; *McGowan v. La Plata Min. & Smelting Co.* 3 McCrary, 393, 9 Fed. 861; *Baxter v. Roberts*, 44 Cal. 188, 13 Am. Rep. 160; *Bailey, Master's Liability for Injuries to Servant*, p. 122; *Western Coal & Min. Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737.

Where the defect or danger is known to the master, and the servant does not have equal knowledge of the same, it is the duty of the master to warn the servant.

Gates v. State, supra; *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764; *Crowell v. Thomas*, supra; *Elledge v. National City & O. R. Co.* 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720; *Linton Coal & Min. Co. v. Persons*, supra; *Kliegel v. Aitken*, 94 Wis. 432, 35 L.R.A. 249, 59 Am. St. Rep. 900, 69 N. W. 67; *Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 47, 41 C. C. A. 535, 101 Fed. 623; *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74, 44 Pac. 766; *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271, 51 S. W. 559; *Thompson v. Chicago, M. & St. P. R. Co.* 4 McCrary, 629, 14 Fed. 564.

Mr. Percy Werner, with Mr. Milton Smith, for defendant in error:

The presumption is that the employee has sufficient intelligence to comprehend the dangers incident to his employment.

Jones v. Florence Min. Co. 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207; *Whittaker's Smith*, Neg. 133.

The presumption is that the company has done its duty toward its employees.

Deane v. Roaring Fork Electric Light & P. Co. 5 Colo. App. 524, 39 Pac. 346; *Murray v. Denver & R. G. R. Co.* 11 Colo. 125, 17 Pac. 484; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Cooley, Torts*, 661; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770.

The plaintiff, then, must have overcome these presumptions by proof.

Brazil Block Coal Co. v. Young, 117 Ind. 520, 20 N. E. 425; *Louisville, N. A. & C. R. Co. v. Sandford*, supra; *Allen v. Augusta Factory*, 82 Ga. 76, 8 S. E. 69; *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 374; *Chicago & O. Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405; *Georgia R. & Bkg. Co. v. Nelms*, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049; *Deane v. Roaring Fork Electric Light & P. Co.* supra.

The general doctrine in relation to the inspection of premises does not extend to inspection of premises over which no control is had.

Perry v. Marsh, 25 Ala. 667; *Haskins v. Stewart*, 32 N. Y. S. R. 962, 10 N. Y. Supp. 833; *Strahlendorf v. Rosenthal*, 30 Wis. 675; *Fairbank v. Haentzsch*, 73 Ill. 236; *McGowan v. La Plata Min. & Smelting Co.* 3 McCrary, 393, 9 Fed. 861; *Kelly v. Shelby R. Co.* 15 Ky. L. Rep. 311, 22 S. W. 445; *Burke v. Witherbee*, 98 N. Y. 562; *Hoehmann v. Moss Engraving Co.* 4 Misc. 160 23 7 L.R.A. (N.S.)

N. Y. Supp. 790; *Fairmount Cemetery Asso. v. Davis*, 4 Colo. App. 574, 39 Pac. 911.

The proximate cause of this death was the breaking of the water through from the Mabee Fisk into the Americus mine.

Denver, T. & G. R. Co. v. Robbins, 2 Colo. App. 317, 30 Pac. 261, 434; *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702; *Pullman Palace Car Co. v. Barker*, 4 Colo. 345, 34 Am. Rep. 89; *Burlington & M. River R. Co. v. Budin*, 6 Colo. App. 278, 40 Pac. 503; *Davis v. Graham*, 2 Colo. App. 214, 29 Pac. 1007; *Chicago, R. I. & P. R. Co. v. Crisman*, 19 Colo. 32, 34 Pac. 286; *Acme Coal Co. v. McIver*, 5 Colo. App. 271, 38 Pac. 596; *Fitzgerald v. Timoney*, 13 Misc. 327, 34 N. Y. Supp. 461; *Brown v. Laurens County*, 38 S. C. 282, 17 S. E. 21; *Haskins v. Stewart*, supra; *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 405; *Wallace v. Standard Oil Co.* 66 Fed. 260; *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 317, 57 Am. Rep. 723, 8 N. E. 529; *Murphy v. American Rubber Co.* 159 Mass. 266, 34 N. E. 268; *Keenan v. Edison Electric Illuminating Co.* 159 Mass. 379, 34 N. E. 366; *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 359, 40 Am. St. Rep. 724, 28 Atl. 777.

The direction of the verdict was proper.

Colorado C. R. Co. v. Martin, 7 Colo. 592, 4 Pac. 1118; *Murphy v. Cobb*, 5 Colo. 281; *Savage v. Pelton*, 1 Colo. App. 148, 27 Pac. 948; *Chivington v. Colorado Springs Co.* 9 Colo. 597, 14 Pac. 212; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556; *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828; *Pendleton v. Smissaert*, 1 Colo. App. 508, 29 Pac. 521; *Campbell v. Clay*, 4 Colo. App. 551, 36 Pac. 909; *Carico v. Fidelity Invest. Co.* 5 Colo. App. 56, 37 Pac. 29.

On petition for rehearing.

Mr. Charles R. Brock, also for defendant in error:

If the plaintiff himself, by his own pleading, or by his own testimony, discloses that he has been guilty of contributory negligence, he thereby puts himself out of court.

Platte & D. Canal Co. v. Dowell, 17 Colo. 376, 30 Pac. 68.

The doctrine of safe place can have no application to the case at bar.

Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; *Poorman Silver Mines v. Devling* (Colo.) 81 Pac. 252.

Bailey, J., delivered the opinion of the court:

Defendant was the owner of the Sleepy Hollow mine, situate in Gilpin county. The shaft was about 625 feet deep. The Ameri-

cus mine, with a shaft about 500 feet deep, joined the Sleepy Hollow on the west. The Mabee-Fisk mine, with a shaft more than 700 feet deep, joined the Americus on the west. The owners of the Americus ran a level, known as the "390-foot level," eastward into the territory of the Sleepy Hollow. The Americus also ran a level, known as the 490-foot level, westward to within about 50 feet of the Mabee-Fisk line and opposite the point on the Mabee-Fisk property where the ore had been stoped out to the line between the Americus and the Mabee-Fisk, leaving 50 feet between the end of the 490-foot Americus level and this stoped ground. There had been a level known as the "Fraser drift" run from the Mabee-Fisk property to the eastward, extending into the Americus property at a point below the Americus level, running parallel with it. A body of ore had been taken from this Fraser drift upon the Americus property, so that the distance between the upper portion of the stope from which the ore was taken to the bottom of the Americus tunnel was only about 4 feet, and the character of this rock in the intervening space appears to have been loose, veinous matter. The defendant made an upraise from its 400-foot level to connect with the end of the 390-foot level of the Americus which extended into the Sleepy Hollow property, so that the Sleepy Hollow and the Americus mines were connected at a point about 400 feet from the surface of the ground, and the Americus and Mabee-Fisk properties were connected with the exception of the few feet of veinous matter lying between the Fraser drift and the 490-foot level of the Americus property. The Mabee-Fisk mine became filled with water. The superintendent and manager of defendant company was warned of the presence of this water, and he caused his foreman and one of the employees, Williams by name, who was a brother of decedent, to visit the Mabee-Fisk shaft for the purpose of determining the extent to which it was filled with water. This foreman and Williams went down the Mabee-Fisk shaft to the Fraser drift and at that time found that the water was some 16 feet below the drift. They saw the Fraser drift, but made no investigation as to how far it extended eastward. The water continued to rise in the Mabee-Fisk shaft and the superintendent of that property continued to inform the superintendent of the Sleepy Hollow property of the extent of the water. This continued from time to time until the water in the Mabee-Fisk shaft had reached a point about 200 feet above the Americus 490-foot level, at the place where there were only a few feet of rock between that level and the Fraser drift. At about 7 L.R.A.(N.S.)

this time the superintendent of defendant was again cautioned by the superintendent of the Mabee-Fisk property, and was told by such superintendent that the defendant's employees would be drowned shortly unless some precautions were taken. In none of these conversations was there any mention made of the fact that the Fraser drift extended into the Americus property, and had been stoped out so closely to the Americus 490-foot level. It appears that this defendant's superintendent rested under the belief that there were 50 feet of matter between the Mabee-Fisk property and the Americus, so that the water would have to break through this 50 feet of stone before it could reach the Americus property, and before it could reach defendant's employees. It nowhere appears in the testimony that defendant's agents knew that the Fraser drift had extended into the Americus property. It does appear, however, that Carbis, defendant's foreman, who went into the Mabee-Fisk shaft for the purpose of measuring the water, saw the Fraser drift, and saw that it extended in the direction of the Americus property, but made no investigation to determine its extent. Williams, the deceased, talked with his brother, who was defendant's timber boss,—that is, had charge of the timbering in defendant's property,—and told him that he had heard at Black Hawk, a town nearby, that the lives of employees in the Sleepy Hollow property were in danger by reason of this water. The brother did not think so, because of the distance existing, as he supposed, between the Americus workings and the Mabee-Fisk workings. A few days after this conversation the water broke through from the Fraser drift, running through the Americus property and into the Sleepy Hollow property, and Williams was drowned. This action was brought by Minnie Williams, the widow of deceased. At the trial, after plaintiff had proved the foregoing facts, the trial court directed the jury to return a verdict for the defendant, and in doing so stated that before plaintiff could recover she would have to prove that there was danger; that it was known to the defendant; that it was not known to deceased; and that defendant had not warned the deceased of this danger; that, if there is a failure or want of proof upon either of these conditions, then a verdict should be directed for the defendant. A writ of error was prosecuted, assigning the direction of the verdict as error, as well as some other alleged errors occurring in the course of the trial.

We cannot say that, as a matter of law, the defendant was or was not negligent in failing to make such examination of the adjoining premises as would lead it to a full

understanding of existing conditions. There is no dispute as to the facts in this case, but it is over the conclusions to be drawn from the facts that the controversy arises; and it is the rule in this state that, if the facts are such that honest men might honestly differ as to the conclusions to be drawn therefrom, then the matter should be left to the jury. *Empson Packing Co. v. Vaughn*, 27 Colo. 71, 59 Pac. 749; *Solly v. Clayton*, 12 Colo. 33, 20 Pac. 351; *Colorado C. R. Co. v. Martin*, 7 Colo. 599, 4 Pac. 1118. The same rule is announced by the United States Supreme Court in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 665, 21 L. ed. 749, wherein it is held that, even though the facts are not disputed, but are such that different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination. Negligence in a particular case is generally a matter for the jury to determine, and it is always so when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is variable. *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *West Chester & P. R. Co. v. McElwee*, 67 Pa. 315.

Defendant seems to argue that, because the water was located at some distance from this property, and was an extraneous cause of danger, defendant was under no obligation to make an investigation as to the extent of this danger. To this we cannot agree as a legal proposition. The employer must exercise ordinary care to provide a reasonably safe place in which the employee may perform the services required of him. It is his duty to use diligence to keep his place in reasonably safe condition so that the servant may not be exposed to unnecessary risks. The care and diligence required differ as circumstances differ, but in all cases it is such as a reasonably prudent man would exercise under like circumstances in order to protect the persons of his employees from destruction or injury. A far higher degree of care is necessary in the case of an employer whose employees are far underground with but scant means of escape in case of danger than where the employees are not subject to unseen dangers, or are in such a position that escape may be readily effected. The master is bound to use such care as circumstances demand from a reasonably prudent man. If he fails to do so, he is negligent. In actions like the present one, questions of negligence are for the jury. The ordinary care which the parties are to use in the discharge of their respective duties so varies with the situation of the parties, their knowledge or means of knowledge, the surrounding circumstances of each particular

case, the measurement of which depends so much upon the knowledge and experience of practical men in practical affairs, that it has long been the policy of the law to submit the question of reasonable care to the judgment of a jury. It is only when the facts are undisputed, and are such that reasonable men can honestly draw but one conclusion from them that the court should consider the question of negligence one of law, and not of fact. *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 68. It is the duty of the master to furnish a safe place in which the servant is to perform his labor. It must not alone be safe from such dangers as are patent, but also from such as are latent; not alone from those in the place, but from such extraneous matters as menace its safety, and which could be ascertained upon reasonable inquiry.

Appellee, knowing of the existence of the water in the neighboring mine in such quantities as to become dangerous to its employees, was in justice bound to make such investigations as would suggest themselves to one using ordinary care and prudence; and if, upon making such investigation, it learned that there was danger of the mine becoming flooded, it then became its duty to make such provision for the safety of its employees as would occur to a person of ordinary prudence, or to inform the employees of the impending danger so that they might assume the risk or waive the negligence of the master. The standard of duty in cases of this character is variable. It cannot be determined as a matter of law what is, and what is not, a compliance with the duty of one who is bound to exercise ordinary care under the circumstances. What may be negligence under some circumstances and conditions may not be under others. It is not a fact to be testified to, but can only be inferred from the *res gesta*,—from the facts given in evidence; hence it may generally be said to be a conclusion of fact to be drawn by the jury upon proper instructions from the court. It is always so where the conclusion is fairly debatable, or rests in doubt. It is only where there is an entire absence of testimony tending to establish the case that a nonsuit may properly be ordered or a verdict directed. *Langhoff v. Milwaukee & P. du Ch. R. Co.* 19 Wis. 489; *Dorsey v. Phillips & C. Constr. Co.* 42 Wis. 600. In the case of *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 120, it was said by Chief Justice Cooley: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility; for, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the stand-

ard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that, if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. The judge, it is said in one case, is not bound to submit to a jury the propriety of a particular course, when it is perfectly notorious that all prudent men conduct their own affairs differently. The uniformity of the conduct of business men becomes a rule of law. But, while there is any uncertainty, it remains a matter of fact for the consideration of the jury. *Briggs v. Taylor*, 28 Vt. 183. The difficulty in these cases of negligent injuries is that it very seldom happens that injuries are repeated under the same circumstances; and, therefore, no common standard of conduct by prudent men becomes fixed or known. In *North Pennsylvania R. Co. v. Heileman*, 49 Pa. 63, 88 Am. Dec. 482, it is said: "That what constitutes negligence in a particular case is generally a question for the jury, and not for the court, is undoubtedly true, because negligence is want of ordinary care. To determine whether there has been any involves, therefore, two inquiries: First, What would have been ordinary care under the circumstances? and second, whether the conduct of the person charged with negligence came up to that standard. In most cases the standard is variable, and it must be found by a jury. But when the standard is fixed—when the measure of the duty is defined by the law—entire omission to perform it is negligence. In such a case the jury have but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure and pronounces it negligence." The facts in this case being such that reasonable men might honestly disagree on the question as to whether or not the defendant was guilty of negligence in failing to exercise ordinary care 7 L.R.A.(N.S.)

and prudence, it should have been submitted to the jury.

It is also contended by defendant in error that the deceased was guilty of contributory negligence. The foregoing reasoning to a large extent applies to the doctrine of contributory negligence. It is only in the clearest cases that the court should usurp the functions of the jury in determining questions of negligence or contributory negligence. *Moffatt v. Tenney*, 17 Colo. 191, 30 Pac. 348. The record in this case does not disclose such a state of affairs as would warrant us in saying, as a matter of law, that the deceased was guilty of contributory negligence.

We now come to the proposition as to whether or not it must affirmatively appear from the plaintiff's testimony that deceased did not know of the existence of the danger, and that it must affirmatively appear from plaintiff's testimony that defendant had not informed the deceased of the impending danger. The doctrine announced by the learned judge who tried this case below is supported by eminent authority. It is reasoned that the negligence of the employer does not alone consist in failing to provide a safe place, but that the negligence consists in providing an unsafe place in which the employee shall work without being informed as to the danger. The doctrine as laid down by *Wood on Master and Servant*, § 808, is that a servant, in order to recover, is called upon to establish three propositions: First, that the appliance was defective; second, that the master had notice thereof, or knowledge, or ought to have had; third, that the servant did not know of the defect. In *Bailey on Master's Liability for Injuries to Servant*, at page 112, note 1, it is said: "To show negligence in the master, it must appear that the danger was such that the plaintiff would not be presumed to know it, and that the master did not give him information of it." The doctrine as laid down by these two authors appears to be the rule adopted in the following cases: *Pittsburgh, C. C. & St. L. R. Co. v. Woodward*, 9 Ind. App. 169, 36 N. E. 442; *Lynch v. Chicago, St. L. & P. R. Co.* 8 Ind. App. 516, 36 N. E. 46. There are many more Indiana cases to the same effect. While the earlier ones regarded the employee's knowledge of a defect as an element of contributory negligence, the latter case fixed it as an independent factor of plaintiff's case, the want of which must be alleged and proved, separate and distinct from one of contributory negligence. The same rule appears to have been adopted in Missouri: *Musick v. Jacob Dold Packing Co.* 58 Mo. App. 322, and cases there cited. Also in West Virginia: *Johnson v. Chesapeake & O. R. Co.*

36 W. Va. 77, 14 S. E. 432. On the other hand, it is said in 14 American & English Encyclopedia of Law, at page 844, that the burden of proving that an injured servant had knowledge of an obstruction or defect is on the employer. This rule is adopted in the following cases: *Hulehan v. Green Bay, W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529; *Gulf, C. & S. F. R. Co. v. Royall*, 18 Tex. Civ. App. 86, 43 S. W. 815, and cases cited; *Alexander v. Central Lumber & Mill Co.* 104 Cal. 533, 38 Pac. 410; *Connolly v. Waltham*, 156 Mass. 370, 31 N. E. 302; *Thompson v. Great Northern R. Co.* 70 Minn. 219, 72 N. W. 962; *Lexington & C. C. Min. Co. v. Stephens*, 104 Ky. 502, 47 S. W. 321. In *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114, it is said: "A complaint for such injuries need not state that the defects causing the accident were unknown to plaintiff, as such fact is matter of defense."

In *Greenleaf v. Illinois C. R. Co.* 29 Iowa, 46, 14 Am. Rep. 181, it is said: "If it is claimed that the injured employee also knew it [of the danger], this knowledge by the employee, and that the service was commenced or continued with such knowledge by him, must be shown by defendant. The burden in such cases is put upon the employee, but he is not bound to show, in the first instance, his lack of knowledge." In *Balhoff v. Michigan C. R. Co.* 106 Mich. 606, 65 N. W. 594, it is said: "The intestate's actual knowledge can neither be proved nor disproved conclusively, as he is dead. All that is left is to show the surroundings, and from them we cannot say that he knew, or ought to have known, that there was a low place in the track at that point. He may have known it. We might, perhaps, say that he probably did know it; but it would still be for the jury to determine the fact." In *Dallemand v. Saalfeldt*, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645, it is said: "In an action to recover for injuries received by using an appliance, the burden is on the master to show that the servant knew the danger incident to its use. Where the servant shows that the injury he received was in consequence of an increased risk,—one not ordinarily incident to the employment,—growing out of the master's negligence, the burden of proof is upon the master to show that the servant knew of, and understood, the increased dangers." *Swoboda v. Ward*, 40 Mich. 424, citing *Cooley on Torts*, 661. So, in *Lee v. Reliance Mills Co.* 21 R. I. 322, 43 Atl. 536, it was held that, where an employee was injured by reason of defective machinery, the fact that plaintiff knew of the danger and continued to work without objection, assuming the risk, was a matter of 7 L.R.A. (N.S.)

defense. In *Buckley v. Port Henry Iron Ore Co.* 17 N. Y. S. R. 436, 2 N. Y. Supp. 133, it was held that no negligence was imputed to the deceased, except that he knew all about the mine and took the risk. It was held that deceased only assumed such risk as is usual to mining, and not such as the mine owner might have avoided by proper inspection. It was for the jury to determine whether the deceased came to his death from the risks which he assumed, or from those which the defendant should have protected him against. It is thus seen that the weight of authority upon where the burden of proof lies as to the knowledge or lack of knowledge of the employee as to latent dangers is that, it is upon the defendant. We therefore think that in this particular case the court went too far in taking the question away from the jury. The question of assumption of the risk and knowledge or lack of knowledge of the deceased should have been left to the determination of the jury under appropriate instructions.

There was some evidence which tended to show that the deceased knew of the existence of the water, but as to whether he knew, or ought to have known, all of the conditions connected with the existence of this water which together produced the danger, is a matter which should have been determined by the jury as a matter of fact, and not by the court as a matter of law.

There are two other questions raised by the plaintiff in error which are not material to the determination of this case, but, inasmuch as it may be retried, we will allude to them. Error is assigned because evidence of the lack of ladders and bulkheads, at places where plaintiff contends they should have been, was excluded. This was error. The rule is, if a servant, knowing the hazard of the employment and the manner in which the business is conducted, is injured while employed in such business, he cannot maintain an action against the master on account of such injury merely because he may be able to show that there was a safer mode in which the business might have been conducted, and if it had been conducted in that manner he would not have been injured. *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 664, 11 N. W. 24; *Sullivan v. India Mfg. Co.* 113 Mass. 396. In order to justify the court in excluding this testimony it would have to appear affirmatively that deceased had knowledge of the danger occasioned by the presence of the water as well as the absence of ladders and bulkheads. The rejected testimony was admissible for the purpose of showing that if it is found that defendant knew, or in the exercise of ordinary care should have

known, of the existence of danger, it further neglected to exercise reasonable care to make the place ordinarily safe.

It appears that this is the second trial of this action, and at the former trial testimony of witnesses was taken by a stenographer and by him reduced to writing, and certified to as correct. At the time of the last trial some of those witnesses were dead, and some were absent. The plaintiff offered to prove by the transcript made by the stenographer the testimony given by deceased and absent witnesses at the previous trial. There was no proof that the testimony was correctly taken or correctly transcribed, or that the paper offered was a correct copy of the testimony of the witnesses as actually given, other than the certificate of the stenographer. This offer was rejected. There was no error in the ruling of the court in this respect. It is true that in *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752, a transcript of the testimony taken by the stenographer was permitted to be used; but in that case it was agreed that the testimony had been correctly transcribed. In this case it was not agreed that the testimony was correctly transcribed. In *Chicago, St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 365, the transcript was admitted, but in that case it was confessedly correct. The cases which hold that the transcript of the testimony at a previous trial may be introduced in a subsequent trial are those where the stenographer is called and testifies to the accuracy of the transcript, where the testimony has been preserved by a bill of exceptions, settled by the trial court, or where it is agreed by the parties that the transcript is correct. We have been unable to find any authority for the admission of testimony of this character when the verity of the transcript has not been determined.

For the above reasons, the judgment of the District Court will be reversed, and the cause remanded.

The Chief Justice and Goddard, J., concur.

Petition for rehearing denied July 2, 1906.

GEORGIA SUPREME COURT.

GEORGIA RAILWAY & ELECTRIC COMPANY, Plff. in Err.,

v.

BLANCHE McALLISTER.

(126 Ga. 447, 54 S. E. 957.)

Street car—negligent calling of street—injury of passenger.

1. The negligent conduct of a street-car 7 L.R.A.(N.S.)

conductor in calling a street crossing before his car had arrived at the street announced, thereby inducing a lady passenger to alight, at night and during a severe rain storm, at a strange place remote from her destination, is to be regarded as the proximate cause of injuries sustained by reason of her slipping and falling upon a curbstone which she was unable to see, because of the darkness, while endeavoring with due care to make her way homeward along a street with which she was unfamiliar.

(a) The passenger was under no legal duty to apply for shelter at houses in the vicinity of the place where she was induced to alight from the car, rather than attempt to reach her destination on foot over a highway which was in a reasonably safe condition for travel by pedestrians.

(b) If she could not, by the exercise of ordinary care, have discovered that she was invited by the conductor to disembark at a point short of her destination, she was entitled to recover damages because of illness brought about by exposure to the weather after leaving the car; the burden being upon her to show that her illness was caused by such exposure, rather than by other causes for which the defendant company was not responsible.

Same—presumption of negligence.

2. In such case, no presumption of negligence is raised by law against the defendant from the bare fact that the plaintiff sustained an injury, and the burden rests upon the plaintiff to prove the allegations of fact upon which she relies for a recovery.

(August 13, 1906.)

Headnotes by EVANS, J.

Case Note.—What injuries may be deemed the proximate result of discharging passenger at improper place, or one not his destination:—This note does not include cases where the passenger was ejected or compelled to leave the train on account of a collision or other accident. It is limited to those in which the passenger was expressly or impliedly invited to alight at a point other than his destination, or at an unsafe place; nor have cases in which the decisions turned on the question of contributory negligence been included.

The general principles in relation to the proximate cause of injuries are well settled by the authorities. The difficulties encountered by the courts arise in applying them to the varied facts of each particular case.

The authorities all declare that, if an injury results from the negligent act of a wrongdoer, that act will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. Thus, the fall of a passenger through an unguarded opening in a platform approaching the station, which was unlighted and not generally used because of the existence of another

ERROR to the City Court of Atlanta to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Rosser & Brandon and Walter T. Colquitt, for plaintiff in error:

The fall was not the proximate cause of alighting from the car before the destination was reached.

Augusta R. Co. v. Glover, 92 Ga. 133, 18 S. E. 406; Macon R. & Light Co. v. Vining, 120 Ga. 513, 48 S. E. 232; Macon v. Dykes, 103 Ga. 848, 31 S. E. 443.

The street car company is under no duty to keep the sidewalk or street in proper repair. The negligence of the city in not

properly repairing its streets is the predominating cause of the fall.

Perry v. Central R. Co. 66 Ga. 746.

The act of a street car company in negligently carrying a passenger one block beyond her destination has been held not to be the proximate cause of the injury sustained by her from a fall on an icy sidewalk while returning to the point of original destination.

Haley v. St. Louis Transit Co. 179 Mo. 30, 64 L.R.A. 295, 77 S. W. 731; Wood's Mayne, Damages, § 53, p. 72; Conway v. Lewiston & A. Horse R. Co. 90 Me. 199, 38 Atl. 110; Central R. Co. v. Dorsey, 116 Ga. 719, 42 S. E. 1024; Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Central R. Co. v. Price, 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep.

walk which she was unable to see, was a contingency which might have been foreseen, and was proximately due to the negligence of the railroad company. Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968.

That a child six years of age, accompanied by her father, was taken to a station next beyond her destination, was not the proximate cause of injuries sustained by her, when she broke away from her father and ran in front of a train, the approach of which frightened her, since this was a result which could not have been anticipated (Benson v. Central P. R. Co. 98 Cal. 45, 32 Pac. 809); nor was the discharge of a passenger at a point a mile from his destination the proximate cause of his subsequently being assaulted and robbed by two footpads, which could not have been reasonably expected (Atkinson v. Pacific R. Co. 90 Mo. App. 489); nor was the discharge of a young woman passenger, about seventeen years of age, at a point preceding her destination, the proximate cause of a criminal assault upon her by a man who left the train when she did (Sira v. Wabash R. Co. 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905); nor was erroneous information by a ticket agent as to train connections the proximate cause of delay and inconvenience suffered by a female passenger who was compelled to procure a buggy in which she rode to her destination, in a rain storm, over a rough road, and who became ill from the exposure and jolting of the vehicle, and suffered a miscarriage; since these consequences could not have been foreseen or anticipated by the agent (Fowlkes v. Southern R. Co. 96 Va. 742, 32 S. E. 464).

Injuries resulting from pure accident cannot be reasonably anticipated, and, where this element intervenes, the carrier's preceding negligence is not considered the real or proximate cause of the injury. Thus, injuries sustained by one carried some distance past a station on a dark night, and who, being misinformed as to the exact location at which he alighted, fell into a cattle guard while walking along the track, were not the proximate result of being carried L.R.A.(N.S.)

ried past the station, or of the erroneous information given him, where he knew of the existence of the cattle guard and was watching for it, but fell into it because misled by visual deception combined with an accidental slipping of the foot (Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744); nor was the sudden stopping of a train after it had run past a station the proximate cause of an injury sustained by a passenger waiting to alight, whose hand was caught in the car door, which closed violently when the train stopped (Hardwick v. Georgia R. & Bkg. Co. 85 Ga. 507, 11 S. E. 832); nor was the failure to stop a street car at the crossing the proximate cause of an injury sustained by a passenger from stepping on a rolling stone as she alighted (Conway v. Lewiston & A. Horse R. Co. 90 Me. 199, 38 Atl. 110); nor of an injury sustained by a passenger who sprained the muscles of her leg in stepping upon a slight embankment in the unmade street, and which presented a horizontal, but not entirely smooth, surface (Lynch v. St. Louis Transit Co. 102 Mo. App. 630, 77 S. W. 100); nor of the fall of a passenger on a slippery pavement while attempting to return to the point where he should have been permitted to leave the car (Haley v. St. Louis Transit Co. 179 Mo. 30, 64 L.R.A. 295, 77 S. W. 731).

No difficulty arises in determining whether a negligent act is the proximate cause of an injury, when the damage directly follows the wrong; when they are so proximately cotemporaneous that no time or occasion is afforded for the operation of another instrumentality. The perplexing cases are those where there is an intervening cause, or several causes contributing to the result. Generally in such case the law will attribute the injury to the last cause, if it is independent of the original act or conduct of the defendant. If the intervening causes are merely incidental, having been set in motion by the first cause, and are not new and independent forces sufficient of themselves to cause the disaster, the law passes these, and traces the injury to the wrongful act which puts them in operation.

246, 32 S. E. 77; Central R. Co. v. Edwards, 111 Ga. 534, 36 S. E. 810; Henderson v. Dade Coal Co. 100 Ga. 568, 40 L.R.A. 95, 28 S. E. 251; Southern Transp. Co. v. Harper, 118 Ga. 672, 45 S. E. 458; Belding v. Johnson, 86 Ga. 177, 11 L.R.A. 53, 12 S. E. 304; Gaskins v. Atlanta, 73 Ga. 746; Brimberry v. Savannah, F. & W. R. Co. 78 Ga. 641, 3 S. E. 274; Georgia R. & Bkg. Co. v. Eskew, 86 Ga. 648, 22 Am. St. Rep. 490, 12 S. E. 1061; Hardwick v. Georgia R. & Bkg. Co. 85 Ga. 507, 11 S. E. 832; Roedecker v. Metropolitan Street R. Co. 87 App. Div. 227, 84 N. Y. Supp. 300; Lynch v. St. Louis Transit Co. 102 Mo. App. 630, 77 S. W. 100; White v. West End Street R. Co. 165 Mass. 522, 43 N. E. 298; Simmons v. Seaboard Air-Line R. Co. 120 Ga. 227, 47 S. E. 570;

Watson v. Georgia P. R. Co. 81 Ga. 476, 7 S. E. 854; Jarrett v. Atlanta & W. P. R. Co. 83 Ga. 348, 9 S. E. 681; Atlanta & W. P. R. Co. v. Dickerson, 89 Ga. 455, 15 S. E. 534; Western & A. R. Co. v. Goodwin, 105 Ga. 238, 31 S. E. 157.

If a person claims that a conductor negligently called a street, the burden of proof is on such person to show that the street was improperly called.

Atlanta R. & Power Co. v. Johnson, 120 Ga. 912, 48 S. E. 389; Central R. Co. v. Weathers, 120 Ga. 479, 47 S. E. 956.

A conductor of a street car company is under no duty to give a person notice that a car is approaching a certain street.

Robinson v. Northampton Street R. Co. 157 Mass. 224, 32 N. E. 1; Nunn v. Georgia

Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 So. 337.

If the result of an injury is such as might have been expected to occur in the ordinary or natural course of events, the carrier is not relieved from responsibility, although there may have been some intervening agency contributing to the result, as where a passenger permitted to alight from a train which ran by the station and was stopped at night on a trestle bridge fell to the bed of the stream beneath and sustained a concussion of the brain, which confined him to his bed and so depressed his system that he contracted malarial fever, which resulted in a hemorrhage, from which he died. *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168.

Calling a station, opening the car doors, and stopping a train while yet 40 rods from the station, are the proximate cause of an injury sustained by a passenger who, while attempting to alight, is thrown to the ground by a sudden jerking of the train. *Cincinnati, H. & I. R. Co. v. Worthington*, 30 Ind. App. 663, 96 Am. St. Rep. 355, 65 N. E. 557, rehearing denied, in 30 Ind. App. 660, 66 N. E. 478. So, the cause of an injury sustained by a passenger accompanying stock on a freight train, who, on being told they were at a certain station, started to alight, and was thrown by a jerk of the train off the car steps, and fell 30 feet from a trestle on which the train was standing, was the negligence of the carrier. *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190.

The act of some person is often an intervening agency. It has been held that the negligence of a railroad company in carrying a passenger beyond the point of her destination was not the proximate cause of an injury sustained by her from the explosion of a defective kerosene lamp at the hotel to which she had been taken by the conductor, who agreed to pay her expenses until she could be carried back to her station in the morning (*Central R. Co. v. Price*, 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep. 246, 32 S. E. 77); nor of an injury sustained by a passenger in alighting from the

train after it had stopped half a mile beyond her station, due to the fact that she jumped from the car steps at the suggestion of a fellow passenger (*Texas & P. R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416); nor of an injury sustained by a child which, at the request of its mother, was put off the train by someone, while it was in motion (*Texas & P. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347).

But where a female passenger, accompanied by her infant child, attempted to disembark without assistance from a train late at night, and handed her child to one standing upon the unlighted platform of the station, who followed along with the child as the train began to move, and, encountering a truck left on the platform, dropped the child, which was crippled by the train, the negligence of the carrier was held to be the proximate cause of the injury, in *Achison, T. & S. F. R. Co. v. Calhoun* (Okla.) 89 Pac. 207. In this case the court considered that the direct and proximate cause of the injury was the presence of the truck, which the servants of the railway company negligently permitted to remain upon the platform; that, had the platform been free from obstruction, or had it been lighted so that passengers could have observed the obstruction by the exercise of reasonable care, the accident would have been avoided.

An injury sustained by one who left a train when erroneously informed by a brakeman that they had reached a point where refreshments were served, and who after the prompt departure of the train was left in darkness, and, while under the guidance of a railroad employee, who failed to warn him, fell down the step leading from the platform on which he had left the train, was due to the negligent direction of the brakeman as the sole cause of the injury (*Laub v. Chicago, B. & Q. R. Co.* 118 Mo. App. 488, 94 S. W. 550); and the proximate cause of an injury sustained by a passenger in alighting at night from a train which stopped short of the station, and who was precipitated into a ditch or ravine along the track at that point, when the brakeman, who was assisting her to alight, fell,

R. Co. 71 Ga. 710, 51 Am. Dec. 284; Seaboard Air-Line R. Co. v. Rainey, 122 Ga. 308, 106 Am. St. Rep. 134, 50 S. E. 88; Western & A. R. Co. v. Earwood, 104 Ga. 129, 29 S. E. 913.

Messrs. Napier, Wright, & Cox, for defendant in error:

If plaintiff was deceived by the announcement, it was the company's act.

Central R. Co. v. Thompson, 76 Ga. 777.

Plaintiff would be entitled to recover such damages as were the proximate result of the act of defendant.

Dorsey v. Central R. Co. 113 Ga. 567, 38 S. E. 958; Brown v. Georgia, C. & N. R. Co. 119 Ga. 90, 46 S. E. 71; Macon R. & Light Co. v. Vining, 120 Ga. 513, 48 S. E. 232.

One who places a man in such a position

that he must adopt a perilous alternative is responsible for all the consequences.

Jones v. Boyce, 1 Starkie, 492; Western & A. R. Co. v. Bryant, 123 Ga. 81, 51 S. E. 20.

A passenger has right to rely on the information given by conductor.

Louisville & N. R. Co. v. Jenkins, 15 Ky. L. Rep. 239; Pennsylvania Co. v. Hoagland, 78 Ind. 203; Houston & T. C. R. Co. v. Smith (Tex. Civ. App.) 32 S. W. 710; Warden v. Missouri P. R. Co. 35 Mo. App. 631; Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; Chesapeake & O. R. Co. v. Smith, 103 Va. 326, 49 S. E. 487; Winkler v. St. Louis, I. M. & S. R. Co.

was the negligence of the company rather than the fault of the brakeman, which was but an incident in the chain of causation (Louisville, N. A. & C. R. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107).

Failure to provide a reasonably safe place in which to alight from a train is the proximate cause of an injury to a passenger required to alight at a steep embankment after the train runs past the station, and who slips down the declivity into the ditch at its foot (Minor v. Lehigh Valley R. Co. 21 App. Div. 307, 47 N. Y. Supp. 307); and of an injury sustained by a female passenger permitted to leave the train at night, at a point beyond her destination, and who falls into a ditch while attempting to reach the highway, and seriously injures her foot and ankle (Houston & T. C. R. Co. v. Smith [Tex. Civ. App.] 32 S. W. 710); also of an injury sustained by a female passenger laboring under the disability of an artificial limb, who is permitted to step down some 20 inches upon the frozen ground without warning, although she expects to step upon the platform (Kral v. Burlington, C. R. & N. R. Co. 71 Minn. 422, 74 N. W. 166); and of an injury suffered by a woman allowed to step down 3 feet from the lower step of the car, at an unlighted place, away from the station platform (Ellis v. Chicago, M. & St. P. R. Co. 120 Wis. 645, 98 N. W. 942); also of an injury sustained by a passenger discharged on a narrow strip of ground between the tracks of the carrier and those of another company, and who is struck by an engine as he starts to leave the premises (Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714); and of an injury sustained by a passenger permitted to alight during a snowstorm, near a side track, instead of upon the station platform, and who falls when he steps upon a snow-covered rail (Mensing v. Michigan C. R. Co. 117 Mich. 606, 76 N. W. 98); as well as of an injury sustained by a shipper of stock, who is led to suppose that he is at the regular station, and is permitted to alight at night, without warning of danger, at a point where he falls into an uncovered waterway be- 7 L.R.A. (N.S.)

tween the tracks (Griffith v. Missouri P. R. Co. 98 Mo. 188, 11 S. W. 559); also of an injury suffered by a woman carried about 80 rods beyond the station, and who, while attempting to walk back along the tracks, which is the only practicable route, falls into a cattle pit (New York C. & St. L. R. Co. v. Doane, 115 Ind. 435, 1 L.R.A. 157, 7 Am. St. Rep. 451, 17 N. E. 913); and of an injury sustained by one carried past his destination about one fourth of a mile, on a dark, rainy night; and who falls through a bridge while attempting to reach the station (Indianapolis & E. R. Co. v. Barnes, 35 Ind. App. 485, 74 N. E. 583); so of an injury received by one carried some 300 yards beyond his destination, at a late hour, on a dark night, who falls through a trestle while attempting to walk back to the station (Winkler v. St. Louis, I. M. & S. R. Co. 21 Mo. App. 99); also of an injury sustained by a passenger permitted to alight on a dark night at a coal trestle, some 500 feet from the station, and who falls over a cross sill at the end of a coal shed and breaks his leg (Burnham v. Wabash Western R. Co. 91 Mich. 523, 52 N. W. 14).

Illness or physical suffering.

In a leading English case, *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111, 11 Moak, Eng. Rep. 181, it was held that one who, with his wife and two children, was left by a train, which had taken a branch other than that on which his destination was located, at a point some 5 miles distant, where he was unable to procure a conveyance or accommodations, so that the party were compelled to walk to their destination in a drizzling rain, may recover for the inconvenience thereby caused, but not for the resulting illness to the wife due to cold and exposure.

But this case was disapproved in *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, where the negligence of a carrier in setting down in the nighttime in the country, at a place 3 miles short of his destination, a passenger accompanied by his child and by his wife,

21 Mo. App. 99; Pecos & N. T. R. Co. v. Williams, 34 Tex. Civ. App. 100, 78 S. W. 5.

Evans, J., delivered the opinion of the court:

The plaintiff below, Mrs. Blanche McAllister, brought a suit for damages against the Georgia Railway & Electric Company, setting forth in her petition the following allegations of fact respecting the manner in which she received a personal injury for which she sought to hold the company responsible: On February 14, 1903, she boarded one of the company's cars at Riverside about 8 o'clock at night, and paid her fare to Atlanta. The night was dark and stormy. Desiring to leave the car at the

nearest point to her home, she requested the conductor to stop the car for her when it should arrive at Thurmond street. After a time the conductor called out that street and beckoned to plaintiff to notify her to alight. Upon leaving the car the plaintiff found the night to be bewilderingly dark, the rain was falling heavily, and for some moments she could see nothing. After the car had sped away, she found to her horror that she was not at Thurmond street crossing, and she did not know where she was. The intense darkness and blinding rain which was blown against her by powerful gusts of wind, bewildered her. She did not know on what street she was nor what direction to take, but managed to reach the sidewalk, and then undertook to grope her

who was pregnant, was held the proximate cause of the subsequent illness and miscarriage of the wife, due to exhaustion caused by walking along the track to their destination. These cases are distinguishable on the ground that the first was tried as an action upon contract, and the latter as an action in tort, in which the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. This would seem to be the better rule, since this class of cases, in all their essential features, are actions for tortious misconduct.

A carrier's failure to stop at a station, and permitting two female passengers to alight at a point 3 miles beyond their destination, are the proximate cause of illness resulting from the walk which they are compelled to take (Kentucky C. R. Co. v. Biddle, 17 Ky. L. Rep. 1363, 34 S. W. 904); and negligently discharging a passenger at an intermediate station may be deemed the proximate cause of suffering and sickness due to exposure during a buggy ride at night back to her point of destination (Pittsburgh C. C. & St. L. R. Co. v. Klitch, 11 Ind. App. 290, 37 N. E. 560); and of discomfort, inconvenience, and sickness suffered by a woman passenger accompanied by two children, who is negligently left off from a train at night, 2 miles from her proper destination, which she attempts to reach with the aid of strangers, but, the conveyance procured breaking down, she is compelled to walk most of the distance over muddy roads, which brings back a bronchial affection with which she has been afflicted (Texas & P. R. Co. v. Hartnett [Tex. Civ. App.] 34 S. W. 1057); and of pneumonia contracted by one carried 3 miles beyond his destination without his consent, and required to leave the train at a water tank in the darkness of the early morning in inclement weather (International & G. N. R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529); also of neuralgia contracted by a middle-aged woman, thinly clad, who is carried past her station to another, on a dark night, and compelled to take a train at a very early hour in the morning to return to her destination 7 L.R.A.(N.S.)

(Missouri, K. & T. R. Co. v. Hennessey, 20 Tex. Civ. App. 316, 49 S. W. 917).

It is the duty of a passenger discharged at a point other than his destination, to minimize his damage; and an injury which he might have averted will not be deemed the proximate result of the carrier's negligent act. Thus, the hardship and illness resulting to a woman from a journey on foot on a hot day, in the rain and over a rough mountain road, for about 11 miles, was not the proximate result of the failure of the railway company to permit her to alight at a station at which the train was not scheduled to stop, where the conductor offered to let her off at the station preceding it, from whence she might have proceeded on the following local train, but she preferred to go to the station beyond, where her sister lived, whom she did not find at home upon her arrival, thereby necessitating the long walk undertaken by her (Carter v. Southern R. Co. [S. C.] 55 S. E. 771); nor was sickness suffered by a passenger left about dark on a rainy evening, at an intermediate station a few miles from her destination, due to the negligence of the carrier, where she walked to her destination and suffered exposure to the elements, when there were places near at hand where she could have been cared for during the night (Childs v. New York, O. & W. R. Co. 77 Hun, 539, 28 N. Y. Supp. 894); nor was physical suffering sustained by a woman accompanied by an infant child and a daughter fourteen years of age, in walking 2 miles on a cold night and after having been carried to the station next beyond her destination, the proximate result of the carrier's negligence, where she chose to walk rather than to seek comfortable quarters at the place where she left the train (Texas & P. R. Co. v. Cole, 66 Tex. 582, 1 S. W. 629); nor was the recurring illness of a convalescent female passenger, who was carried 500 yards beyond the depot, and had to walk back from that point, when due to her walking home from the station after declining the assistance of friends. (Gulf, C. & S. F. R. Co. v. Head [Tex. Civ. App.] 15 S. W. 504).

way in the direction in which she supposed she should go, guided only by the sense of touch along the fronts of the houses. The street was deserted, and her cries for help brought no succor. She was not enabled to keep her way, because of the impenetrable darkness, and at a street crossing she fell upon the curbing and struck the lower part of her back and side with such force as to be for a time unable to rise. When able to continue her wanderings, she proceeded along the street until she came within call of a police officer, who accompanied her until she got within sight of a light near her home. From the exposure to the storm she contracted a severe illness, and the injuries sustained by her fall are of a permanent character. She was herself faultless and the injuries sustained were proximately caused by the wanton carelessness and indifference of the company's conductor in putting plaintiff off the car a long distance from her destination and into a rain storm. By demurrer the defendant company presented the contention that the plaintiff's petition disclosed that the alleged negligent act of its conductor was not the proximate cause of the plaintiff's fall and resultant injuries. The court ruled to the contrary. The case was tried on its merits, and the jury returned a verdict in favor of

the plaintiff. The company's motion for a new trial was denied.

1. Taking as true the assertion of the plaintiff that she was without fault, her injuries are directly traceable to the negligence of the company's conductor in inducing her to alight from the car at a street crossing far removed from the point near her home at which she had signified her wish to have the car stopped for her. *Macon R. & Light Co. v. Vining*, 120 Ga. 511, 48 S. E. 232. It was naturally to be expected that the plaintiff, after being put off at a strange place, in the dark and during a severe storm, should seek a place of refuge or undertake to make her way home; and, though the streets of the city may have been free from any dangerous defects, yet if the plaintiff, while acting with due caution, suddenly stepped off a curbstone, which on account of the darkness she was unable to see, and stumbled or slipped and fell, her injuries are to be regarded as proximately flowing from the default of the company in placing her in a situation where she was forced to make her journey homeward through the storm, subjecting herself to all the hazards which a prudent pedestrian who might undertake to grope his way in the darkness along a street with which he was unfamiliar would necessarily

Nor was the act of a carrier in setting down from an omnibus on a main street of the city, during the daytime and at a point about a mile from her home, a young woman in good health and warmly clad, and accompanied with an intimate friend, the proximate cause of an injury to her health resulting from a cold contracted by her in walking home, where the point at which she was left was on the line of a street railway which passed close to her residence. *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7.

Fright or mental suffering.

Fright occasioned by the loud talking of negroes, who, for a time, followed a woman carried past her destination at night, was not considered a proximate result of the carrier's tortious act, in *Central R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024, in view of Ga. Civ. Code, § 3912, declaring that, if contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote.

And in *Chicago, R. I. & T. R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247, mental suffering endured by a woman carried past her destination to the next station, and who was thereby prevented from going on to another point on that day, at which she expected to meet her father and to obtain medical treatment for her sick child, of which facts the carrier had no knowledge, was not regarded as a direct

result of the breach by the carrier of its contract.

But where the fright or mental suffering leads to sickness or impairment of health, it may be regarded as a proximate result of the carrier's negligence, as where a female passenger, encumbered by a baby and valise, was carried some 300 yards beyond the station, and permitted to alight at a point where there were no lights and amid surroundings well calculated to cause her fright (*Houston & T. C. R. Co. v. McKenzie* [Tex. Civ. App.] 41 S. W. 831); and where a passenger in poor health, carried half a mile beyond his station on a dark night, had to crawl over two trestles in going back to the station, and while on one of them was frightened by an approaching train, and contracted a severe cold and cough from the exposure and the dampness of the ground (*Texas & P. R. Co. v. Mansell* [Tex. Civ. App.] 23 S. W. 549); also where a female passenger left with her four small children at a point 600 yards from the station about 5 o'clock in the morning of a cold day in December, suffered physical pain from the cold and walk, and mental anguish from her embarrassing situation (*Fordyce v. Dillingham* [Tex. Civ. App.] 23 S. W. 550); so a woman carried 3 miles beyond her destination and compelled to walk back may recover for mental suffering as well as for illness proximately caused by the carrier's negligence (*Kentucky C. R. Co. v. Biddle*, 17 Ky. L. Rep. 1363, 34 S. W. 904).

encounter. The court therefore properly declined to sustain the defendant's demurrer. The evidence introduced by the plaintiff tended to show that she fell under the circumstances alleged, notwithstanding she was at the time exercising all possible caution. The defendant company complains that the trial judge, instead of instructing the jury that the plaintiff's fall was not the natural and proximate result of the negligent act of its conductor in causing her to alight at the wrong place, submitted to the jury the question whether or not the alleged negligence of the conductor was the proximate cause of her injuries. The charge of the court was as favorable to the company as it had any right to expect. The court properly declined to instruct the jury, at the defendant's request, that "if, at the place where Mrs. McAllister alighted from the car, there were lighted stores or houses in which she could have taken shelter; and if, instead of so taking shelter, she chose to go on immediately home, even though she may have fallen on her way home,—the defendant would not be liable for the effects, if any, produced by such fall." Certainly the court would not have been warranted in holding, as matter of law, that the plaintiff was guilty of negligence in undertaking to make her way home, instead of seeking tem-

porary shelter in some lighted store or house in the immediate vicinity. It was not *per se* negligence for the plaintiff to attempt to travel through the storm along a street which was in a reasonably safe condition for pedestrians, nor did she owe the railway company any legal duty to seek the hospitality of strangers under the circumstances. The liability of the defendant depended, of course, upon whether its conductor did in fact call Thurmond street before the car reached the point where the plaintiff wished to alight. The charge of the court fully covered the contention of the defendant that Thurmond street was not called by the conductor, and that the plaintiff must have misunderstood him and alighted under the mistaken belief that he had announced the arrival of the car at that street. As to whether or not she could, by the exercise of ordinary care, have discovered that the car was not at Thurmond street, counsel for the company concedes that its written request to charge on this subject was sufficiently covered by the instructions which the court, of its own motion, gave to the jury. It appeared that during the day the plaintiff had pursued her calling as a canvasser, and had been exposed to the prevailing inclement weather. The court undertook to state to the jury

Question for jury.

What is the proximate cause of an injury is ordinarily a question for the jury, and not a question of science or legal knowledge, and is to be determined as a fact in view of the circumstances of the particular case. *Houston & T. C. R. Co. v. McKenzie*, supra.

The question whether the negligence of the railroad company was the proximate cause of an injury has been held one of fact for the jury, where a carrier announced the name of a station, and opened the doors of the car without giving any information that the first stop would be at a crossing instead of the station, and a passenger carrying a bundle and valise went upon the steps of the car, which were slippery by reason of snow and ice, and fell by reason of fright or dizziness when the train started to pull up to the station (*Larson v. Minneapolis & St. L. R. Co.* 85 Minn. 387, 88 N. W. 994); also whether carrying a twelve-year-old girl past her destination was the proximate cause of injuries sustained by her in falling through a cattle guard on her way back to the station (*Rawlings v. Wabash R. Co.* 97 Mo. App. 511, 71 S. W. 535); and whether the injury sustained by one of two female passengers who were requested to alight from the train at a considerable distance from the depot, and fell into a cattle guard, which they failed to see in the dark, was due to her own fall, or to an effort to aid her companion (*Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657);

or whether the injuries sustained by a female passenger carried past her destination at night, received by falling while trying to walk back along the track to the station, were the proximate consequence of the carrier's negligence (*Case v. Delaware, L. & W. R. Co.* 191 Pa. 450, 43 Atl. 319); or whether the injury sustained by a man sixty-seven years of age was referable to the wrongful act of the carrier as a proximate cause in discharging him from a freight train $\frac{1}{4}$ of a mile from the station, towards which he proceeded, and, in alighting from a flat car on which he had climbed in order to cross a railroad bridge, broke his leg (*Adams v. Missouri P. R. Co.* 100 Mo. 555, 12 S. W. 637, 13 S. W. 509); also whether the increased sickness of a girl eight years of age, ill at the time, who was carried more than a mile beyond her destination and there dismissed in a strange place, with 20 pounds of baggage, and who, in great distress of mind and body, walked back to the station, was the proximate consequence of being carried past her station (*East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315); and whether the illness and eventual death of an old man carried several hundred yards beyond the station on a dark and rainy night, and compelled to walk home along muddy roads, which greatly exhausted him, was due to the negligence of the railroad company (*Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360).

the familiar rule of law that the company could not be held responsible save for the consequences of the negligent act of its conductor of which the plaintiff complained, and that she could not recover because of her illness unless it was brought about by exposure to the weather to which she was subjected after alighting from the car. In this connection, the defendant submitted two pertinent requests to charge, adjusted to the theory that, after the plaintiff had been exposed during the day and her clothing had become more or less wet, she was at night induced to leave the car far from her home during a heavy rain storm. These requests should have been given, as the instructions which the court gave to the jury were framed upon the primary contention of the defendant that the rain had ceased before the plaintiff got off the car, and that her illness was caused by exposure to the weather during the day and prior to the time she became a passenger.

2. The plaintiff relied upon her testimony alone to sustain her claim that the company's conductor had caused her to alight from the car before it reached Thurmond street. The company introduced a number of its conductors, including all who ran on schedules maintained during the period within which the occurrence testified to by the plaintiff could have taken place, each of whom swore he had no knowledge of the occurrence, and did not at the request of any lady passenger undertake to call out Thurmond street, or by mistake announce that street before his car arrived at that crossing. The case was not, therefore, one necessarily calling for a verdict in favor of the plaintiff, and she was not entitled to recover unless she successfully carried the burden of proving the act of negligence alleged in her petition. The trial judge, just before concluding his charge, instructed the jury as follows: "If the plaintiff shows that she was injured by the operations of a car of the defendant, as she alleges in her declaration, then the law would raise the presumption that the defendant was negligent, and the duty would be upon the defendant either to show that it was not negligent, or else that she could, by ordinary care on her part, have avoided the consequences to herself of the defendant's negligence, if that appears, or else that her injuries were due to some other cause than the negligence of the defendant, if she was injured. If the company shows such a state of facts to you, that would be a reply to the presumption, and it would be removed." This instruction was wholly inapplicable to the facts of this case. In such a case, no presumption of negligence

can arise against the defendant company. *Savannah, F. & W. R. Co. v. Flaherty*, 110 Ga. 335, 35 S. E. 677. To erroneously charge to the contrary is cause for setting aside the verdict. *Atlanta R. & Power Co. v. Johnson*, 120 Ga. 911, 48 S. E. 389. Let the plaintiff carry the burden which the law imposes upon her as a condition precedent to recovery.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

GEORGIA SUPREME COURT.

JONAS MENDEL, Plff. in Err.,
v.

L. F. MILLER et al.

(126 Ga. 834, 56 S. E. 88.)

Sale—refusal to accept—effect.

1. If the vendee in a sale of goods refuses to take and pay for them, the vendor may sell the property, acting for this purpose as agent of the vendee, and recover the difference between the contract price and the price of resale. When the vendee is notified by the vendor of the intention to resell, and after such notice a sale is properly made, the vendee is conclusively bound by the resale and the amount realized under it.

Same—reservation of title—deterioration.

2. When, in a contract for the sale of goods, the vendor reserves title, and delivery is not to be made until the purchase price is paid, and the vendee refuses to accept the goods and pay for them, while the vendor may exercise the right of resale, in order to charge the vendee under the rule indicated in the preceding note, it is the duty of the vendor to use ordinary care in the preservation of the goods between the date that the goods were to be accepted, and the date of the resale; and the vendor cannot hold the vendee responsible for deterioration during such time in the value of the goods, unless it appears that the

Headnotes by ATKINSON, J.

Note.—Research has failed to disclose any other decisions on the question of responsibility for deterioration of goods in the interval between the refusal of the purchaser to accept them and their resale by the vendor on the purchaser's account.

It has been held, however, that, where a vendor stands in the position of complete performance, he may abandon the property and sue the purchaser for the price, and is not bound to resell on the purchaser's account, although the property is perishable. See *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Darby v. Hall*, 3 Penn. (Del.) 25, 50 Atl. 64.

failure to exercise due care resulted from the conduct of the vendee.

Instructions.

3. Some of the instructions of the judge, which were subjects of assignments of error, submitted to the jury issues which were not authorized by the evidence; and the errors thus committed were of such a character as to require a reversal of the judgment.

(November 16, 1906.)

ARROR to the Superior Court for Chatham County to review a judgment in plaintiffs' favor in an action brought to recover damages for breach of contract to purchase corn. Reversed.

Statement by Atkinson, J.:

Miller & Sons sued Mendel, alleging that on February 4, 1904, the defendant gave to the plaintiffs, through their agent at Savannah, Georgia, an order for one car load of No. 2 white corn in sacks, and, on February 18, 1904, the plaintiffs shipped the corn to the defendant, charging therefor \$369, and the corn arrived in Savannah on February 23, 1904. It was shipped, "Order notify Jonas Mendel." A draft for the purchase money was attached to the bill of lading. The effect of this was to make the purchase money payable on the arrival of the corn, which is the usual method of shipment in grain transactions. When the corn arrived at Savannah the defendant was notified, and he caused an inspection of the grain to be made by the official inspector of the Savannah board of trade, and the grain was classed as No. 2 white corn, and the defendant notified of this fact. Notwithstanding this, the defendant delayed payment of the draft, requesting that it be held for later payment. During this delay the corn remained on the wharves at Savannah, and was exposed to dampness arising from the river and the fogs prevalent at that season; all of which was known to defendant. The plaintiffs, expecting each day that the defendant would comply with his agreement to pay and remove the corn, permitted it to remain on the wharves, but would not have done this had not the defendant assured the plaintiffs that payment would be made in a short while; and the defendant knew that the reason why the plaintiffs permitted the corn to remain on the wharves was his repeated promises to pay the draft, and take possession of the corn. The corn could not be removed by the plaintiffs without great trouble and expense, as they had no warehouse in Savannah; all of which was known to the defendant. On April 7, 1904, the defendant notified the plaintiffs that he would not pay 7 L.R.A.(N.S.)

the draft and accept the corn. At the time of this notice the corn, through exposure to dampness, had deteriorated in value. On May 10, 1904, the plaintiffs elected to sell the corn, as agent of the defendant, and recover the difference between the contract price and the price of the resale. Notice to this effect was given to the defendant, and his consent requested that the corn be sold, and the amount realized be held subject to any judgment which the plaintiffs might obtain against the defendant. The defendant consented that the corn be sold to the best advantage for the benefit of all concerned, but this consent was given without prejudice to any rights of the defendant. On May 31, 1904, having secured bids from every grain dealer in Savannah who cared to submit a bid, the plaintiffs sold the corn to the highest bidder for \$200.20. This amount being deducted from the amount of the purchase money leaves the defendant due the plaintiffs \$168.80, as damages. The defendant is indebted to plaintiffs the further sum of \$12, storage charges paid to the transportation company owning the wharves. The defendant demurred to the petition generally, and on the ground that it did not set forth the correct measure of damages, that it did not show what the market price of the corn was on the day the defendant should have received the corn or rejected it, and that it did not show the difference in price between the contract price and market price on the day the defendant should have received it. The demurrer was overruled, and the defendant excepted *pendente lite*. The defendant filed an answer, which in effect denied all the allegations imposing liability upon him, and especially pleaded that the plaintiffs shipped him a car of corn, but it did not come up to the specifications of the order; also that the corn was not of the kind, character, or quality ordered, and for this reason he rejected it. The jury returned a verdict for the plaintiffs for the full amount sued for. A motion for a new trial was overruled. Error is assigned upon the judgment overruling the motion for a new trial, and upon the exceptions *pendente lite*.

Messrs. Osborne & Lawrence, for plaintiff in error:

Time was of the essence of the contract. Savannah Ice Delivery Co. v. American Refrigerator Transit Co. 110 Ga. 145, 35 S. E. 280; Emery v. Atlanta Real Estate Exchange, 88 Ga. 325, 14 S. E. 556.

"Immediate shipment" meant without any delay.

Inman v. Barnum, 115 Ga. 119, 41 S. E. 244.

Where a contract for the sale of goods is made, the title being reserved in the seller, the loss, if any, falls upon the seller.

Code, § 3543; *Randle v. Stone*, 77 Ga. 503; *Sparrow v. Tate*, 67 Ga. 352; *Gunn v. Knoop*, 73 Ga. 510; *Erwin v. Harris*, 87 Ga. 336, 13 S. E. 513.

Messrs. *Twiggs & Oliver*, for defendants in error.

Atkinson, J., delivered the opinion of the court:

1. When one sells goods to another, and the vendee refuses to take and pay for the same, the vendor has three remedies: He may retain the goods and recover the difference between the contract price and the market price at the time and place of delivery; he may sell the property, acting for this purpose as the agent of the vendee, and recover the difference between the contract price and the price of resale; or he may store and retain the goods for the vendee, and sue for the entire price. Civil Code 1895, § 3531. If the vendor elects to take the second remedy and resell, due notice of the intention to resell must be given to vendee. It is not necessary that this notice should contain information as to the time and place of sale, but there must be a notice of the intention to sell for the benefit of the vendee. If, after such notice, a sale is properly made, and the goods bring less than the contract price, the vendee is conclusively bound by the resale and the amount realized by it. *Davis Sulphur Ore Co. v. Atlanta Guano Co.* 109 Ga. 607, 34 S. E. 1011. The remedies above referred to, each and all of them, are available even in a case where the goods are shipped to be paid for on delivery, and where payment of a draft is a condition precedent to the delivery of the goods by the carrier to the purchaser. *McCord v. Laidley*, 87 Ga. 221, 13 S. E. 509. See also, in this connection, *Seaboard Lumber Co. v. Cornelia Planing Mill Co.* 122 Ga. 370, 50 S. E. 121. The demurrer was properly overruled.

2. The contract was for the sale of corn of a certain quality. The corn was to be shipped, and to be paid for before delivery; that is, the vendor retained the title until the corn had been paid for. If the corn was of the quality ordered, the vendee was bound to pay the purchase price on demand, and accept the corn when offered. There is no conflict in the evidence as to the terms upon which the corn was sold, or as to the quality of corn to be delivered. There is a conflict as to the time of delivery, and also a conflict as to what transpired between the defendant and the agent of the plain-

tiffs after the corn reached Savannah. The agent of the plaintiffs testified that the corn was purchased for prompt delivery, which, as explained by him, meant that the corn should be shipped at any time within fifteen days. He also testified that the contract was made under the rules of the Savannah board of trade, and one of the rules of that board was that prompt delivery meant shipment and delivery within five days. The defendant testified that the corn was bought for immediate shipment. Under the rule of the Savannah board of trade, this meant shipment within two days. But the defendant denied that the contract was made under the rules of the board of trade. There was no special plea setting up that the goods were not promptly shipped, the only special defense pleaded being that the corn which reached Savannah was not of the quality ordered. Under the view we take of the case, it is not necessary to determine whether, under the averments of the petition and the general denial by the answer, the question of whether the failure to ship in due time, as contended by the defendant, was available as a defense. For the purposes of this case, it will be conceded that the corn was shipped in due time. There is little or no conflict in the evidence as to the condition of the corn at the time it reached Savannah, and that it was then of the character and quality ordered. There is also little or no conflict with the evidence that at the time of resale it had deteriorated in value, and that this had been brought about by the fact that it had remained upon the wharf in Savannah, subject to the action of the moist atmosphere resulting from the proximity to the river and fogs.

If the corn was not of the quality ordered, of course, the defendant was not bound to accept it at any time. If the corn was of the quality ordered, the defendant was bound to accept and pay for it on demand. The plaintiffs had the right, after due notice of nonacceptance, to treat the corn as the property of the vendee, sell it, and charge the vendee with the difference between the contract price and the price of resale. But, in order to exercise this right and bind the defendant by the price at resale, it was incumbent upon the plaintiffs to exercise due care in preserving the corn in the condition it was at the time it reached Savannah, until a resale was made. If the plaintiffs allowed a condition of affairs to continue which would cause a deterioration in the value of the corn, and which it could have prevented by the exercise of due care, the defendant could not be held responsible for the deterioration in value, unless the failure of the plaintiffs to exercise due care resulted from the con-

duct of the defendant. Whether the corn being allowed to remain on the wharf in Savannah was due to the conduct of the defendant is a question about which the evidence is conflicting. Evidence for the plaintiffs authorized a finding that the defendant, upon notice that the corn had arrived in Savannah, asked for a delay of a few days before paying the draft and accepting the corn, and that the defendant's conduct was such, from time to time, as to leave the impression that the draft might be paid any day, and the corn accepted. The defendant denied that he was responsible at all for the delay in removing the corn from the wharf. The jury were authorized to find, as stated, that the delay in removing the corn was due to the dilatory method adopted by the defendant in reference to the payment of the draft. If this is the truth of the case, it would not lie in the mouth of the defendant to claim that he should not be charged upon the basis of the value of the corn at the time it was received in Savannah, when the delay and deterioration was the direct result of his conduct. On the other hand, if the truth of the case was that the defendant promptly refused to accept the corn and the failure to remove it from the wharf resulted in its deterioration in value, the defendant would not be responsible for this deterioration, if it should appear that the plaintiffs, in the exercise of ordinary diligence, should have removed it to a place of deposit where such deterioration would not have taken place. The defendant may have given an untenable reason for refusing the corn; that is, that the corn was not shipped promptly; but without reference to this, pending the period that elapsed from the time the corn reached Savannah to the date of resale, the vendor was under obligation to exercise due care in the preservation of the corn until it could be resold. We do not think that the charge of the court distinctly submitted this issue to the jury, and some of the exceptions to the charge as given were well taken, for the reason that the instructions as given excluded this issue from the consideration of the jury.

3. Some of the instructions of the judge which are assigned as error submitted to the jury the question of delivery in cases of sale, explaining the difference between actual and constructive delivery, etc. We have been unable to find any evidence which authorized the submission of this issue to the jury. There was no delivery, either actual or constructive, as we apprehend the evidence. It is true that there was a rule of the Savannah board of trade, which was in evidence, as follows: "Number of lay days allowed after arrival of goods before

rejecting or accepting; five days after being discharged from car or vessel, as case may be." But we do not think it a proper construction of this rule that a delay of more than five days before accepting or rejecting would, after a lapse of that time, amount to a constructive delivery of the goods. Other portions of the charge upon which error was assigned contained instructions upon what would be the law in the event that there had been a change of the contract to an ordinary sale of goods. We do not see any evidence authorizing an instruction upon this subject. As we apprehend the evidence, a jury would not be authorized to find that there had been any change in the terms of the contract. The plaintiffs steadfastly maintained their position as a seller of goods with the purchase price payable before delivery. The defendant, with equal vigor, maintained that he was not bound to receive the goods, because they were not of the quality ordered, and that they were not shipped in due time. In addition to this, there was nothing in the plaintiffs' petition to authorize a recovery on any other theory than that the goods were shipped with title reserved, purchase price to be paid on demand before delivery. The submission of these two issues to the jury, which it seems to us was entirely unauthorized by the evidence, was prejudicial to the defendant; and a reversal of the judgment must result. In reference to those assignments of error which complain of the judge allowing certain evidence in rebuttal, which should have been offered in chief, we only have to say that these fall within the rule that the judgment will not be reversed on this ground, unless a manifest abuse of discretion appears, which is not true in this case.

Judgment reversed.

All the Justices concur.

MICHIGAN SUPREME COURT.

TOWN OF BANGOR et al., Appts.,

v.

BAY CITY TRACTION & ELECTRIC COMPANY.

(— Mich. —, 110 N. W. 490.)

Equity—street railway—removal of tracks.

1. Equity has jurisdiction of a bill to require the removal from a public highway

Case Note.—The effect of acquiescence or consent by a town or municipality to construction or use of a railroad in street or highway to estop it from objecting thereto: — That the principle of estoppel

of street-railway tracks placed there without the consent of the proper authorities.

Street railway—estoppel to object to.

2. Municipal authorities cannot become estopped to require the removal from a street of the rails of a street railway by standing by and seeing the rails laid without objection.

(February 5, 1907.)

A PPEAL by complainants from a decree of the Circuit Court for Bay County in defendant's favor in a suit to require the removal of rails from a street of the corporation. Reversed.

The facts are stated in the opinion.

Messrs. Pierce & Kinnane, for appellants:

The encroachment statute does not apply in this case.

will be applied to municipal corporations in reference to ordinary contracts, which do not relate to such property as streets, highways, public parks, and other property held in trust by them for the benefit of the people, is clear. As applied to property of the class mentioned, however, the decisions of the courts are in conflict, some of them holding that the only way that any rights can be acquired in such property is by such action on the part of the officers of a municipality as complies with the statute which authorizes such contracts. Another line of authorities recognizes no distinction between the ordinary contracts of a municipality and contracts relating to what may be termed "trust" property. Accordingly, it has been held by these last-mentioned decisions that a municipality or township may be estopped to object to the operation of a railroad along its streets and highways by the acquiescence of its officers.

Such was the holding in the case of *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430, where the officers of a municipality had acquiesced for a period of upwards of twenty years in the construction and operation of a railroad along certain streets in that municipality, and the company had, in obedience to the commands of the municipal authorities, expended considerable sums of money in improvements at the street crossings in constructing and repairing culverts, planking the crossings, erecting and maintaining safety gates and electric lights, constructing plank and cement walks, and other improvements beneficial to the general public and to the municipality, as well as to the railroad itself. Because of these facts, it was held that the municipality was estopped from questioning the right of said railroad company to use such streets, and from directing the removal of the railroad therefrom.

The same principle was announced in the case of *Pembroke Twp. v. Canada C. R. Co.* 3 Ont. Rep. 503, but in this case the company had been given the right by statutory enactment to construct its road along the streets and highways of municipalities with 7 L.R.A. (N.S.)

Grand Rapids v. Hughes, 15 Mich. 57; *Gorham v. Withey*, 52 Mich. 51, 17 N. W. 272.

Complainants had no adequate remedy at law.

5 Pom. Eq. Jur. 1905 ed. p. 851; *Wheclock v. Noonan*, 108 N. Y. 184, 2 Am. St. Rep. 405, 15 N. E. 67; *Baron v. Korn*, 127 N. Y. 229, 27 N. E. 804; *Rhoades v. McNamara*, 135 Mich. 645, 98 N. W. 392; *Hall v. Nester*, 122 Mich. 141, 80 N. W. 982; *Taylor v. Bay City Street R. Co.* 80 Mich. 77, 45 N. W. 335; *Merritt Twp. v. Harp*, 131 Mich. 174, 91 N. W. 156; *Bay County v. Bradley*, 39 Mich. 166, 33 Am. Rep. 367; *Freud v. Detroit & P. R. Co.* 133 Mich. 418, 95 N. W. 559.

their consent. The municipality, besides raising no objection to the construction of the railroad along its streets and highways, by resolution, required the railroad company to fill up ditches on both sides of its track and have proper crossings put down at the cross streets. The company conformed to these requirements. This acquiescence on the part of the officers of the municipality, and the resolution in question, were held to amount to the consent required by statute.

And in the case of *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210, where the legislature of the state had given a railroad company the right to use and occupy streets in the city of Philadelphia by and with the consent of the common council, and the surveyors of the city approved the plan for the construction of such railroad along the streets of said city, and such road was constructed and operated by a double track for about seven years, after which the double track was torn up and removed and a single track laid and used for upwards of ten years, it was held that the municipality was estopped from objecting to the use of such streets by said railroad company, and that said company had the right to take up its single track and lay and use a double track in said streets.

And the same principle was applied in the case of *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072, in which case the city council had, by ordinance, authorized said company to lay its tracks along certain streets. It, however, with the knowledge of the city officials, laid its tracks along other streets not mentioned in said ordinance, and the road was assessed by the city for this very property. This was held to estop the city from claiming that it did not consent to the construction of such railroad.

And in the cases of *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, and *Chicago & N. W. R. Co. v. People*, 91 Ill. 251, where the officers of the municipality had acquiesced in the use of certain of its streets by a railroad company, and had levied taxes upon its property on said streets, they were

Complainants are not estopped from interfering with defendant's railway.

Wood v. Michigan Air Line R. Co. 90 Mich. 334, 51 N. W. 263; Huyck v. Bailey, 100 Mich. 226, 58 N. W. 1002; Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 12, 70 N. W. 319; Nowlin Lumber Co. v. Wilson, 119 Mich. 412, 78 N. W. 338; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002.

Messrs. T. A. E. Weadock and J. C. Weadock, for appellee:

The construction and operation of a street railway on a public highway do not constitute an additional servitude thereon.

Grand Rapids v. Hughes, 15 Mich. 57.

It is a proper and legitimate use thereof.

Olney v. Wharf, 115 Ill. 519, 56 Am. Rep. 178, 4 N. E. 366; Smith v. Jackson & B. C. Traction Co. 137 Mich. 20, 100 N. W. 121; Austin v. Detroit, Y. & A. A. R. Co. 134 Mich. 149, 96 N. W. 35; Mannel v. Detroit, Mt. C. & M. C. R. Co. 139 Mich. 106, 102 N. W. 633; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; People ex rel. Kunze v. Ft. Wayne & E. R. Co. 92 Mich. 522, 16 L.R.A. 752, 52 N. W. 1010.

When the owner of land over which a railway was constructed stood quietly by and neglected to insist upon compensation at the time his land was taken, and waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation.

High, Inj. § 643; Hentz v. Long Island

held estopped to claim that they had not consented to such use of the streets by said railroad company.

So, also, it was held in the case of City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, where, by an invalid ordinance, the franchise of a railroad company was extended for a period of twenty years, with the knowledge upon the part of the municipality that such extension was going to be used as a basis for negotiating a loan for said railroad company, that such city, having the power to grant the extension, was estopped from denying the validity of the ordinance upon the ground that it was without legal consideration.

In Detroit v. Detroit City R. Co. 56 Fed. 867, it was held that an ordinance extending the time of a franchise to a railroad company was invalid, and conferred no rights upon the railroad company; and the facts that such extension ordinance was accepted and acquiesced in by both parties for a period of ten years, and that, on the faith thereof, the railroad company expended large sums of money in the improvement of its tracks on said streets, did not alter the rule. The decision of this case, however, was based upon the fact that the municipality did not have the power to grant the extension in question.

To the same effect is Detroit v. Detroit City R. Co. 60 Fed. 161.

The doctrine of BANGOR v. BAY CITY TRACTION & ELECTRIC Co. was declared and applied in the case of Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352, in which case the railroad company, without any complaint on the part of the city of Newark, laid its tracks along certain of the streets in that municipality, improved the same, and expended large sums of money thereon. It was not claimed by the railroad company that they had either a parol or written consent from such municipality to the occupancy of its streets. Under this state of facts, it was held that such acquiescence did not amount to a license; neither could there be any fraud inferred from the fact that the city did not interfere, but

stood by in silence while the railroad company expended its moneys in the construction of this road upon a public street.

The principle of estoppel as applied to the acquiescence or consent of a municipal corporation to the use of its streets by a railroad company has been denied in many cases upon the theory that such consent or acquiescence is beyond the power of such corporation, of which fact the railroad company is charged with notice, and therefore cannot, by reason thereof, gain any rights to such streets as it may use in reliance upon such consent. This principle was applied in the case of Rice v. Chicago, B. & N. R. Co. 30 Ill. App. 481, in which case a railroad company laid its tracks along a highway, with the consent of the commissioners of highways, and with an understanding with such commissioners that, in consideration thereof, said railroad company would be at its own expense to build another highway in lieu of the one so used by the railroad company. Such agreement was held to be beyond the power of said commissioners, and the fact that said company had expended large sums of money in reliance upon it was held not to amount to an estoppel as against the township.

And where a railroad company was authorized by a legislative enactment to use certain streets in the city of New York for its tracks, and by and with the consent of that city; and such railroad company did not use such streets as provided by this law, but did construct its tracks in a different manner, but with the consent of such city,—these facts were held not to estop the city from annulling the ordinance by which such rights had been conferred upon the company. People v. New York & H. R. Co. 45 Barb. 73.

And in the two cases of Detroit v. Detroit City R. Co. supra, it was held that a municipality, by an invalid ordinance, could not estop itself, or confer any rights upon a railroad company, even though such ordinance was acted upon by such company, where such municipality did not have the power to make the contract, as attempted by such ordinance.

R. Co. 13 Barb. 646; *Sherlock v. Louisville, N. A. & C. R. Co.* 115 Ind. 22, 17 N. E. 171; *Griffin v. Augusta & K. R. Co.* 70 Ga. 164.

A license will be implied.

Northern P. R. Co. v. Burlington & M. R. Co. 2 McCrary, 203, 4 Fed. 298.

The owner will be estopped, after the license has been given, from recovering possession of the land appropriated.

Snyder v. Chicago, S. F. & C. R. Co. 112 Mo. 527, 20 S. W. 885; *Omaha Bridge & Terminal R. Co. v. Whitney*, 68 Neb. 389, 94 N. W. 513, 99 N. W. 525; *Indiana R. Co. v. Morgan*, 162 Ind. 331, 70 N. E. 368; *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. 642; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Hinnershitz v. United Traction Co.* 206 Pa. 91, 55 Atl. 841.

Complainants' remedy is in an action at law.

Lebanon Twp. v. Burch, 78 Mich. 641, 44

N. W. 148; *Attorney General v. Bay State Brick Co.* 115 Mass. 431; *Greenfield Twp v. Norton*, 111 Mich. 53, 69 N. W. 95; *New Albany & S. R. Co. v. Connelly*, 7 Ind. 32; *Parham v. Inferior Ct. Justices*, 9 Ga. 341.

Hooker, J., delivered the opinion of the court:

The defendant purchased a street railway constructed in a highway, within the township of Bangor, in Bay county. It files this bill alleging that the railway was built without the consent, and against the repeated protests, of the township authorities, and has been so maintained and operated ever since. It prays the removal of the road. A hearing was had upon the merits, on pleadings and proofs taken in open court, and the bill was dismissed upon the ground that the court of chancery has no jurisdiction in such a case, unless given by statute; that the only statute upon which jurisdiction can be predicated

And the fact that a railroad company began to construct its tracks upon a public street, and expended large sums of money in reliance upon a consent to the use of the street by the municipality, which consent was void, was held to confer no right to such street upon such railroad company. *Underground R. Co. v. New York*, 116 Fed. 952.

So, also, in the case of *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376, 12 N. E. 680, where a committee of the common council and the city attorney consented to the exclusive use of a certain street in said city by said railroad company; and the city, by an invalid ordinance, had offered such rights, and, in reliance upon such conduct, promises, and ordinance, the company constructed and operated its tracks on the streets of said city,—these facts were held not to estop the city from removing said company and its tracks from said street, on the theory that such railroad company was charged with notice of the invalidity of said ordinance and the want of authority of such city attorney and such committee.

And in *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 673, it was held that the construction and operation of a railroad on the streets of a city without a valid ordinance authorizing the same amounted to a public nuisance.

And in Pennsylvania it is held that consent given by a municipality to a railroad company to construct its tracks on a public street will confer no rights upon such railroad company, unless it first has legislative authority. *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471.

And the same rule was declared in the case of *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271, 2 S. E. 636, where a municipality attempted to confer upon a railroad company the right to use a street without a

legal vote of the inhabitants of such municipality, as provided by law.

So, also, in the case of *Logansport R. Co. v. Logansport*, 114 Fed. 688, where the city sought by ordinance to repeal an ordinance by which it attempted to grant the perpetual use of a street to a railroad company, upon a proceeding by the railroad company to restrain the city from enforcing its repealing ordinance, it was held that the original ordinance was beyond the power of the city to enact; and that, therefore, it was not to be estopped or prevented thereby from repealing the same, and depriving such railroad company of the rights thereby granted it.

And in *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186, it was held that, as it was not within the power of a municipality to confer upon a railroad company the right to use a street, it could not, therefore, be estopped by the conduct of any of its officers.

So, also, in the case of *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101, the fact that a railroad company had expended considerable money in reliance upon an agreement by a city to vacate a certain street and allow such railroad company the use of the same, which agreement was *ultra vires* as to such city, will not estop the city from claiming said street.

And, where a city, by ordinance, authorized and empowered a railroad company to construct and operate its tracks upon all the streets and alleys of said city, and also such streets and alleys as might thereafter be opened for a given period, it was held that it had no authority to surrender its control over its streets, or to tie up its hands by an exclusive contract, so as to preclude a subsequent council from exercising the trust vested in it over its streets for the benefit of the public. *Florida C. &*

is Comp. Laws, § 433, and that such statute applies only where an encroachment is shown, that this statute was not intended to modify the rule that, where the law affords a plain, speedy, and adequate remedy, such remedy should be sought, instead of a remedy in equity; and that an adequate legal remedy is provided by Comp. Laws, §§ 4121-4126. As a further ground, the learned circuit judge said that the case was within the rule followed in the cases of *Lebanon Twp. v. Burch*, 78 Mich. 641, 44 N. W. 148, and *Greenfield Twp. v. Norton*, 111 Mich. 53, 69 N. W. 95.

We infer from the defendant's brief that the testimony sustains the bill upon the point that the railway was built without obtaining authority from the township in the way pointed out by statute, but defendant seems to rely on an estoppel, based on the acquiescence of the officers of the township, or failure to take steps to prevent the construction of the railway.

P. R. Co. v. Ocala Street & Suburban R. Co. 39 Fla. 306, 22 So. 692.

And it is also held that, where a city had consented to the use of a street by a railway company, which consent both the railroad company and the city had recognized as a license, the fact that thereafter the railroad company made extensive and lasting improvements upon such street, and held possession of the same for over forty-five years without objection from such city, did not estop the city from exercising its right to revoke the license originally granted to said railroad company. *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 93 Fed. 113.

Neither will the fact that a city has granted to a railroad company a general consent to occupy all the streets of the city for railway purposes take away from it the right, before the railroad constructs a railway on an unoccupied street, to require it to obtain the consent of the common council of said city to location, survey, and construction. *Citizens' Street R. Co. v. City R. Co.* 64 Fed. 647.

And where a railway company constructs its tracks on the streets of a city in accordance with an agreement with such city, and it afterwards abandons such tracks, such original consent upon the part of the city will not estop it from conferring upon another company the right to use such street without first taking any steps at law to forfeit the right granted to the first company. *Galveston City R. Co. v. Galveston City Street R. Co.* 63 Tex. 529.

Neither will the fact that a city has consented to the use of certain streets by a railway company for the carrying of passengers prevent it from restraining such railroad company from using said streets in the transportation of freight. *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L.R.A. 300, 60 S. W. 110. 7 L.R.A. (N.S.)

The testimony shows that the construction of the railway began in 1889. The highway commissioner was informed that work was being done in the highway, and a meeting of the township board was held soon after to consider what should be done, and the board looked over the premises where the work was being done. The record of this meeting shows:

"Before calling the meeting to order the board proceeded to examine the highway between sections 9 and 10, town 14 north, range 5 east, pursuant to the request of the highway commissioner of the township of Bangor, and ascertaining the following facts, viz.: The West Bay City Railway Company is constructing a street railway on the highway running north and south between said sections, using dirt from near the center of the highway for the construction of said railway, and grading on the east side of said highway, and whereas said railroad proposes to secure lands

The principle of estoppel has also been applied where a railroad company has held possession of a street in a city for the period required by the statute of limitations to gain title to property by adverse possession. Such was the case of *New Castle v. Lake Erie & W. R. Co.* 155 Ind. 18, 57 N. E. 516, in which state the municipalities have the authority to allow railroad companies to lay their tracks upon streets and highways, which use, however, must not destroy or unreasonably impair the use of the streets by the general public. The railroad company constructed its tracks along a street of such municipality without its consent, but without objection on its part. It had, however, used this street for railway purposes for upwards of twenty years, and, while the court found no estoppel by conduct, no concealment or misrepresentation upon the part of the town, nor any other elements of estoppel, yet, it held that the railroad company had gained the right to use the street by prescription, and that if, in the first instance, the use of the street was unlawful and subject to revocation, yet it had now become irrevocable by reason of the expenditures of such railroad company with the knowledge of the municipality.

But it has also been held that a railway company cannot, by the use of a portion of a street for any length of time, thereby gain an absolute ownership of that portion of the street. *Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 25.

As to effect of consent or acquiescence to estop an abutting owner to complain of the construction of a track in the street, see the case note to *Wolfard v. Fisher*, ante, 991. As to estoppel of municipality to complain of encroachments upon street by improvements made by abutting property owners, see case note to *Oliver v. Synhorst*, ante, 243.

on the west side of the said highway to widen the highway, and the people adjoining said highway are satisfied, therefore it is

"Resolved, that the board take no action at the present, and leave the consideration for some future date.

"Carried."

The supervisor had some talk with officers of the company, and was informed that it was its intention to buy as much land on the west side of the highway as it was using of the highway on the east side, and to widen the highway to that extent, and this project was talked over at the meeting. Action was purposely deferred to see if that should be done. The railway company proceeded to complete the railway. It neither bought the land, nor widened the street. The township officers complained several times about the condition of the highway, but could get nothing done. The township board took no further action until some years after. In June, 1902, notice was served by the township authorities on the receivers of the railway company demanding a removal of the road from the highway, for reasons enumerated in the notice. On August 14, 1902, Mr. Weadock, the managing receiver of the railway company, and in charge and control of the business of the company, had some negotiations with the township officers upon his application, and was present at one or more meetings of the township board, and these negotiations resulted in the granting of a franchise for a railroad along the highway in question, to the United Traction Company, its successors and assigns, upon terms and conditions stated therein. The record of the township treats this as an application of the Bay Cities Consolidated Street Car Company "for a franchise of its road through Bangor township, on the east side of the line between sections 9 and 10 and 3 and 4." The record states the fact of the arrival of Mr. Weadock, the examination of the premises upon the question of a proposed doubling of the track, and that Mr. Weadock paid the expenses of the meeting. The record of August 16, 1902, shows a meeting on that date, and an adjournment of the meeting to August 20th, "to meet Mr Weadock, the receiver." The record of the meeting held on August 20th is significant. It states that the township board met on that date pursuant to adjournment, to consider the terms and conditions on which "a franchise might be granted to the United Traction Company, formerly known as the 'Bay Cities Consolidated Street Railway Company' running its cars on the line of the

highway" (describing it). It continues: "This road was first built in 1899, by Fisher, Aplin, & McGill without acquiring any right to lay their track in the highway. The first mile was then an established highway, and the second mile was private property; and now, when the township had entered an action to oust them, they apply for a franchise." It shows that Weadock, receiver, and E. S. Dimmock, general manager, were present representing the United Traction Company, and that Mr. Weadock presented "the request of his company" for a franchise for thirty years and a right to lay a single or a double track, and to charge a 5-cent fare on these 2 miles. The substance of the negotiations follows. Again, Mr. Weadock paid the costs of the meeting, and the franchise was agreed upon and was entered in the record. At that time it was contemplated that the road would soon be sold at receiver's sale, and the purpose of asking for the franchise was understood to be to give the purchaser a franchise under which it could operate the road, and it was given in the name of a company not then in existence, to avoid giving another later, it being expected that it would be transferred to such company as should purchase the road. The road was sold to the Bay Cities United Traction Company, a company organized for the purpose of purchasing it, and this franchise was assigned to it, without any consideration, other than reimbursing the receiver for the expense incurred in procuring it. The Bay Cities United Traction Company was afterwards consolidated with the Traction & Power Company, under the statute, taking the name of the Bay City Traction & Electric Company. It is said that, either before or after such consolidation, it was determined not to operate the road under this franchise, and the new company has refused to comply with its terms.

The points relied on by defendant seem to be: (1) That the court has no jurisdiction of this cause, because there is an adequate remedy at law, if complainant's claim is valid. (2) That it is estopped from asking the relief sought, because of the acquiescence of its officers in the building and maintenance of the road, it being contended, also, that the proceedings of 1902 have no force as against this defendant. A railway which is built in a highway without authority of law is not rightfully there, and the public has a right to have it removed, whether it be called an encroachment, an obstruction, or a nuisance. Defendants appear to contend that this is neither an obstruction nor a nuisance, for the reason that we have held that the use

of public highways, by street railway companies, is a legitimate use of the highway, and does not create an additional servitude upon the land of the adjoining proprietor, and that it must, therefore, be an encroachment or a trespass; if the former, not the subject of equitable relief, and, if the latter, waived by the conduct of the officers. While a railroad lawfully constructed on a highway, and rightfully there, cannot be held to be an unlawful obstruction of, or encroachment upon, the highway, it is an obstruction in the sense that any structure or new use may be an obstruction to its use by the public generally to a greater or less extent. Thus, in the case of *Atty. Gen. v. Bay State Brick Co.* 115 Mass. 431, it was held that a track laid across the highway by the owner of lands adjacent, by the consent of the township authorities, might be an obstruction, and, if the surveyors should so determine (the surveyors being public officers authorized to determine such questions), a court of equity would not review their action, notwithstanding the consent of the township authorities. The inference deducible is that, though the person who built the track owned the fee of the highway, and might use it so long as his use did not interfere with the public use (though they reserved that question), when it should appear, as matter of repair, that the railway interfered with public travel and the proper use of the highway, it was an obstruction. The case contains an intimation that such tracks might be considered inconsistent with the use of the public, but, as already said, that question was not decided. This defendant was not an adjacent landowner, and has no color of right to occupy the street, except such as the statutes then in force conferred, and, in building its line, placed an obstruction in the way, of which the township authorities had a right to complain and to take measures to remove; and we hesitate to say that it may not have been a nuisance which they might ask equity to abate, for we think that it does not follow, from the recognition of a lawful street railroad as a proper adjunct to a highway, that an unlawfully constructed one cannot be a nuisance. See *Elliott, Roads & Streets*, §§ 644, 802, and cases cited. If it is so claimed, equity has jurisdiction to try the question, and the township may bring the suit, as we held in *Merritt Twp. v. Harp*, 131 Mich. 174, 91 N. W. 156. The cases of *Lebanon Twp. v. Burch*, 78 Mich. 641, 44 N. W. 148, and *Greenfield Twp. v. Norton*, 111 Mich. 53, 69 N. W. 95, upon which defendant rests its contention that equity is not the proper forum to seek redress in a case of this kind, were 7 L.R.A. (N.S.)

cases of encroachment, by adjacent proprietors. The opinion in the former case indicates that the court was considering cases where the landowner seeks to extend his adjacent occupancy beyond the highway line, and the discussion applied to cases where the proceeding is to settle highway lines, cases there said to be peculiarly within the jurisdiction of highway officers, and in which class of cases it was held there was no occasion for resort to equity, unless, possibly, under some peculiar circumstances which cannot generally exist. See also *Grand Rapids v. Hughes*, 15 Mich. 54, defining encroachment. The case of *Greenfield Twp. v. Norton*, supra, was a similar case, a barn being erected partly in the highway. We are of the opinion that, if this cause can be said to be within the general rule stated in those cases, it is also within the exception suggested; and that equity may entertain a bill to determine and enforce the rights of the parties.

The defendant's alleged estoppel cannot be sustained. If private persons can create easements by estoppel, under our statute of frauds, and our decisions; or if a license may be implied from the acquiescence of a private person, who stands by and sees, without protest, his land used for a railway,—the same cannot be said of township officers, who have no authority except such as the statute gives; and, if it could be, the testimony does not justify such a finding. See *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002. We must hold that the only authority that the defendant has is traceable to the action of the board in 1902, and it must submit to a decree in accordance with the prayer of complainant's bill, unless, within thirty days after service of a copy of this opinion, it file an election to take a decree adjudging such relief, conditioned upon its failure to accept and comply with the terms imposed by the township board in said resolution or franchise. The complainant will recover costs of both courts.

NORTH CAROLINA SUPREME COURT.

RE WILL OF ELIJAH POPE.

(139 N. C. 484, 52 S. E. 235.)

Will—attestation.

A proper attestation of a will by a witness is effected, the other requirements

Case Note.—Does ability to write invalidate signature made by mark or by aid of other person guiding the pen: — It is declared in 2 Greenleaf on Evidence, 14th

being present, if he holds the end of the pen while it is guided by another in the writing of his name; and it is immaterial that such aid is not necessary because the witness can write.

(November 15, 1905.)

APPEAL by proponent from a judgment of the Superior Court for Iredell County in favor of contestants in a proceeding to determine the validity of a writing propounded as the will of Elijah Pope, deceased. Reversed.

The witness whose signature was disputed testified that testator was her father, and that he asked her to sign the will. It appeared that she asked the other attesting witness to write her name, and that he complied, but she testified: "I had hand on the pen. I signed it. Nobody held my hand. When I signed it I was standing at Martin's [the other attesting witness's] back. He had the pen. I held the pen at the end. In this way my name was put to the will."

Further facts appear in the opinion.

Messrs. L. C. Caldwell and Z. V. Long, for appellant:

A signature of a witness's own name, when his hand is guided by another, is sufficient.

Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 694; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; 1 Wms.

ed. § 674, that a signature by mark is now held sufficient, even though the testator was able to write; and that the signature may be made by another person guiding his hand with his consent. The same doctrine is declared in 1 Jarman, Wills, 69.

The first case that seems to have passed on this question is that of Baker v. Denning, 8 Ad. & El. 94, reported as Taylor v. Denning, 3 Nev. & P. 228, also reported in 1 W. W. & H. 148, and 2 Jur. 775. In this case, holding that a mark is a sufficient signature to a will though the testator could write, one of the judges said that to hold otherwise would throw upon the court a strange inquiry in all cases of marksmen as to whether they could write or not.

The same doctrine is declared in Main v. Ryder, 84 Pa. 217, under the Pennsylvania act of 1848, where it appeared that the testator knew how to write. *Dicta* to the same effect are found in Finlay v. Prescott, 104 Wis. 617, 47 L.R.A. 695, 80 N. W. 930, and St. Louis Hospital Asso. v. Williams, 19 Mo. 609; but in these cases that question was not involved, and in the latter it appeared that the testator was too ill to write. Likewise, in Bailey v. Bailey, 35 Ala. 687, the same rule is declared, though in that case it did not appear whether the testator could write or not.

In Brown v. Butchers' & D. Bank, 6 Hill, 443, 41 Am. Dec. 755, the figures 1, 2, 8, in 7 L.R.A.(N.S.)

Exrs. 146; Campbell v. Logan, 2 Bradf. 90. Where a witness joins in the physical act of attesting, it is sufficient.

Riley v. Riley, 36 Ala. 496.

The name of a witness to a will may be written in his presence, and by his authority, and is a valid attestation.

Jesse v. Parker, 6 Gratt. 57, 52 Am. Dec. 102; Pridgen v. Pridgen, 35 N. C. (13 Ired. L.) 260; Smythe v. Irick, 46 S. C. 299, 32 L.R.A. 77, 57 Am. St. Rep. 684, 24 S. E. 69.

Messrs. J. B. Connelly and R. B. McLaughlin for appellees.

Hoke, J., delivered the opinion of the court:

The point which the parties desired and intended to present, and which the record does present, is thus stated in the case on appeal: "The only question is as to the attestation of the will by one of the subscribing witnesses, C. L. Pope; her name appearing thereon in the normal handwriting of the other subscribing witness, M. L. Miller, and nothing appearing on the face of the paper to show that Miller had authority to sign her name, or that the subscription is not in her handwriting, except from the evidence which is set forth in the case." On that question the court is of opinion that there was error in the ruling of the judge below; and on the testimony presented, if believed by the jury, the paper

dorsed by a person with a lead pencil on the back of a note, without writing his name, were held to constitute a valid indorsement if he wrote them as a substitute for his name.

Several cases have sustained signatures made by mark, or otherwise than by writing one's own name, when the person could actually write, but without the court's seeming to attach any special importance to that fact.

Thus, in Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412, a signature to a will, made by the aid of another person guiding the testator's hand, was held valid. It appeared that he could write; but this fact was not discussed. So, in Flannery's Will, 24 Pa. 502, a signature by mark, made to a will by one who knew how to write, was held good; but his ability to write was not discussed by the court.

In Carroll v. McGee, 25 N. C. (3 Ired. L.) 13, a signature made by holding a pen which another person guided was held good; but it did not appear whether the signer could write or not.

The fact that a person knows how to write seems to be immaterial if for any reason he is unable to do so. It is stated in Watson v. Pipes, 32 Miss. 451, in a case where a testator's hand was guided by another, that this is good whether his incapacity to write was due to ignorance, or

writing was properly proved as the last will and testament of Elijah Pope. In construing the statute as to written wills, with witnesses, it is accepted law that the witness must subscribe his name to the paper writing *animo testandi*, in the presence of the testator, and after the testator has himself signed the same. *Ragland v. Huntingdon*, 23 N. C. (1 Ired. L.) 563; *Re Cox*, 46 N. C. (1 Jones, L.) 321; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687. And it has been long established that the witness may properly subscribe by making his mark. *Pridgen v. Pridgen*, 35 N. C. (13 Ired. L.) 259; *Devereux v. McMahon*, 108 N. C. 134, 12 L.R.A. 205, 12 S. E. 902. Some of the courts have also decided that the witness may subscribe by causing a third person to write the name of the witness in his presence and that of the testator, and without such witness taking any physical part in the act. *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Smythe v. Irick*, 46 S. C. 299, 32 L.R.A. 77, 57 Am. St. Rep. 684, 24 S. E. 69. And the courts of New Hampshire, Kentucky, Kansas, and some recent decisions in New York are to the same effect. There is strong authority to the contrary. *Riley v. Riley*, 36 Ala. 496; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *McFarland v. Bush*, 94 Tenn. 538, 27 L.R.A. 662, 45 Am. St. Rep. 760, 29 S. W. 899; *Horton v. Johnson*, 18 Ga. 396. Our own court does

was caused by accident or disease. The same was held where one's hand was aided because it was unsteady from palsy. *Vandruft v. Rinehart*, 29 Pa. 232. Likewise, in *Long v. Zook*, 13 Pa. 400, where the testator's right hand was disabled, though he knew how to write; and in *Re Field*, 3 Curt. Eccl. Rep. 753, where the testator was so badly paralyzed that he had lost the use of speech, and almost of his limbs. Similar decisions are those where the incapacity was because of illness. *Wilson v. Beddard*, 12 Sim. 28; *Cozzen's Will*, 61 Pa. 196.

On the other hand, the prerogative court, in *Re Kileher*, 6 Notes of Cases, 15, declined administration under a will where the names of attesting witnesses who could write were written by another, while they merely touched the top of the pen. Yet the court did not expressly declare that such a signature would not in any case be good where the persons could write, but regarded it as a suspicious fact that their names were signed in this way while they were fairly written to an affidavit, and when it further appeared that the widow asking for administration with this will annexed was thereby proceeding to disinherit herself, and get only a shilling. It seems that the decision was based on the fact of the suspicious circumstances taken all together. The court said: "I cannot decree administration with this will annexed under the circumstances 7 L.R.A. (N.S.)

not seem to have passed on this question directly, and it is not necessary to do so in the case before us; for the evidence is to the effect that Candace Pope held the pen during the entire time her name was being written. The witness took part in the physical act of writing her name *animo testandi* in the presence of the testator, at his request, and thus fulfils every requirement for an effectual subscribing witness to a will. Such requirement is stated by an approved writer as follows: "A person, to become a subscribing witness to a will, must sign his name, or make his mark, or do some physical act, toward affixing or recognizing his name, which he intends as a subscription." *Martindale*, Conv. 2d ed. p. 554. And in *Underhill on Wills*, vol. 1, p. 274, it is said that not only a mark with the name of the witness attached, but anything that the witness shall write with intent that it shall stand for his name, shall be a valid signing by him. It has also been held that, if the witness puts his name to the paper *animo testandi*, he may subscribe by affixing his initials, and his hand may be even guided by another. If the witness can effectually subscribe in the many modes suggested, it would seem that he could do so when he holds the pen while his entire name and full signature is written.

The only reason suggested against the validity of this attestation is the fact that the

without a great deal more explanation than appears on the face of the paper."

One Pennsylvania case also seems to be out of harmony with the majority of the decisions. This is *Cavett's Appeal*, 8 Watts & S. 21, 42 Am. Dec. 262. Under a statute in general terms providing that a will shall be signed by a testator at the end, or by some person in his presence and by his express direction, the court held, in accordance with comments of commissioners, who had revised the statute, that the right to sign by mark, and have some other person write his name, was limited to testator's inability to sign by his own hand. The court, while admitting that this was not explicitly declared by the statute, held that it should be so construed, as it was not a supposable case that the legislature meant to subvert a wholesome principle of the law of evidence under which the writing of the person himself was better evidence of authenticity than that of anyone else; but the authority of this case in that state is abrogated by later statutes under which the other Pennsylvania cases, above cited, were decided.

The authorities are well nigh unanimous, therefore, in support of the decision of the above reported North Carolina case of *RE POPE*.

On the subject of signature by mark generally, see note to *Re Guilfoyle*, 22 L.R.A. 370.

witness was able to write herself, and it is contended that this kind of signature is only sanctioned when the witness is unable to write, or, at most, when temporarily disabled. But the authorities do not support this position. As a matter of fact, in most cases where the witness has been permitted to subscribe in this way, he was unable to write; but this fact was not regarded as essential, and should not be controlling. One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument, and to prevent the fraudulent substitution of another document at the time of its execution. Taking part in some physical act in the presence of the testator by which the name of the witness is affixed to the instrument *animo testandi* is the essential feature of the requirement. *Re Cox, supra*. It is always desirable that a witness who can write his name should be selected, and that he should write the signature in his own hand; but this is a matter of convenience in the probate of the paper, more particularly in case of the death of the witness, and does not bear with special force on the act of execution,—the *res gesta*. Thus, in *Harrison v. Elvin*, 3 Ad. & El. N. S. 117, where it was urged upon the court that only a witness who could write should be allowed as a subscribing witness, because otherwise the signature could not be proved after his death, Lord Denman rejected the suggestion as controlling, saying that this was only an inconvenience and likely to arise in any kind of an attestation. It is not of the first importance, therefore, whether the witness could or could not write, and the authorities are to the effect that to become an effectual subscribing witness by making a mark, or in the other ways suggested, it is not necessary to show as a prerequisite that the witness was unable to write. In *Martindale, on Conveyancing*, § 190, it is said: "It may be observed that it is not necessary that the party should write his own name; his mark is sufficient, though he be able to write." In 3 *Washburn on Real Property*, 286, we find it stated as follows: "Affixing a mark by the grantor against his name, though written by another, is a signing, although it do not appear that he could not write his own name." These authorities are cited with approval in *Devereux v. McMahon*, 108 N. C. 142, 144, 12 L.R.A. 205, 12 S. E. 902. In 1 *Williams on Executors*, 134, it is said that the decisions on the construction of the statute of frauds appear to make it clear that in case of the witness, as well as the testator, the

subscription by mark is sufficient, notwithstanding the witness is able to write. In *Jesse v. Parker, supra*, it is not stated that the witness could not write; and in *Smythe v. Irick, supra*, it expressly appears that the witness could write, and it was held that this fact did not affect the principle. It will be noted that these two last cases are from courts which maintain the position that a subscription can be made without any physical or manual act by the witness at all; but they are apt as authorities on the position now being maintained. The point is expressly decided against the position of the caveators in *Baker v. Dening*, 8 Ad. & El. 94. The witness Candace Pope having taken part in the physical act of writing her name as witness, and this having been done *animo testandi*, at the request of the testator, and in his presence, the court is of opinion that she is an effectual subscribing witness to the will, and that this result is not affected by the fact that such witness was, at the time, able to write her own name.

There was error in the ruling of the court, and a new trial is awarded.

OHIO SUPREME COURT.

DAVID T. DAVIES, JR., Plff. in Err.,
v.
STATE OF OHIO EX REL. JAMES L. BOYLES.

(75 Ohio St. 114, 78 N. E. 955.)

Tax—public purpose.

1. The legislative power of this state is delegated to the general assembly. This comprises the taxing power; but the power of the state to take the property of its citizens by a tax is not broader than the purpose for which the state is formed, and so is not wholly within the discretion of the legislature, but, without express prohibition, is subject to the inherent limitation that it may be exercised only for a public purpose.

Same—relief of blind.

2. The act entitled "An Act to Provide Relief for Worthy Blind," passed April 25, 1904 (97 Ohio Laws, p. 392), which provides that all male blind persons over the age of twenty-one years, and all female blind per-

Headnotes by the COURT.

Case Note.—Validity of statute providing for governmental assistance of individual members of certain classes of unfortunate or afflicted persons: — While there appear to be no other decisions in which the validity of statutes of the kind considered in *DAVIES v. STATE* has been under review, the question of the extent to which public aid may be given other than through public

sons over the age of eighteen years, who have been residents of the state for five years and of the county for one year, and have no property or means with which to support themselves, shall be entitled to and receive not more than \$25 *per capita* quarterly from the county treasury, is unconstitutional, for the reason that it requires the expenditure for a private purpose of public funds raised by taxation.

(October 16, 1906.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas granting a writ of mandamus to compel payment of an allowance to relator under

institutions has arisen in relation to various other statutes, the decisions as to which may properly be taken in connection with the case reported as illustrating the same fundamental principles. It should be noted, however, that these decisions are affected to some extent by various constitutional provisions.

In *Patty v. Colgan*, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133, a legislative appropriation for the benefit of sufferers from a flood was held to be in violation of the constitutional prohibition of the gift of any public money or thing of value to any individual.

And in *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, a statute authorizing a city to issue bonds and lend the proceeds on mortgage to the owners of land the buildings upon which had been destroyed by an extensive conflagration was held unconstitutional as authorizing the use of public funds for the promotion of the interests of individuals, although the public welfare might incidentally be advanced thereby.

But in *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067, it was held that the legislature might lawfully appropriate the public moneys to pay a debt incurred by a municipality, which was stricken by a cyclone, for burying its dead, removing debris, and caring for the injured and homeless; the court taking the view that the common interest and well-being of the people of the state were thereby subserved.

In *State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99, a statute authorizing townships to issue bonds for the purpose of procuring funds to provide the destitute citizens of such townships with provisions and with grain for seed and feed as a loan was held invalid as not being for a public purpose; and it was said that the obligation of the state to help the needy is limited to those who are unable to help themselves, and that such legislation was not sustainable upon the theory that the persons assisted would thereby be prevented from becoming a public charge.

In *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568, an appropriation of 7 L.R.A. (N.S.)

the statute providing for the relief of blind persons. Reversed.

The facts are stated in the opinion.

Messrs. James S. Martin and Holland C. Webster, for plaintiff in error:

The purpose of this statute is not public, but purely private.

Judson, Taxn. p. 405; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Curtis v. Whipple*, 24 Wis. 350, 1 Am.

money from the public treasury for seed-grain loans to farmers whose crops had been destroyed was held unlawful as appropriating public money for a private purpose, since the statute by which the appropriation was made did not confine its benefits to those who were a public charge and those in imminent and immediate danger of becoming such.

But in *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33, an act authorizing counties to issue bonds to procure seed grain for needy farmers who might be unable to procure the same was held valid as authorizing taxation for a public purpose; the court taking the view that such statute was to be interpreted in the light of the public danger, which was the occasion of its passage, that many citizens, unless succored by some comprehensive measure of relief, would become a public burden; saying: "The case of *State ex rel. Griffith v. Osawkee Twp.* supra, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision, and the most sincere admiration for the distinguished jurist, now upon the supreme bench of the nation, who wrote the opinion in that case. Nevertheless we cannot yield our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poorhouse, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the West, that the court of last resort in the state of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the Western states has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those states. Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to

Rep 187; *Dodge v. Mission Twp.* 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; *Booth v. Woodbury*, 32 Conn. 118.

The public purpose, to warrant the exercise of the power of taxation, must be one which appeals to all the people, and is not in any sense partisan.

Judson, Taxn. p. 423; *Story*, Const. 692; *Philadelphia Asso. v. Wood*, 39 Pa. 82; *State v. Bargas*, 53 Ohio St. 108, 53 Am. St. Rep.

628, 41 N. E. 245; *Board of Education v. State*, 51 Ohio St. 539, 25 L.R.A. 770, 46 Am. St. Rep. 588, 38 N. E. 614; *Chicago & E. R. Co. v. Keith*, 67 Ohio St. 290, 60 L.R.A. 525, 65 N. E. 1020.

If a statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is a denial of the equal protection of the laws.

be an expansion of the legal meaning of the term 'poor' sufficient to embrace a class of destitute citizens who have not yet become a public charge."

In *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, a statute appropriating public moneys for the maintenance of free scholarships in a state university for the support of students dependent upon their own exertions for their education, and financially unable to obtain it otherwise, was held to violate a constitutional provision prohibiting the legislature from granting public money to any individual.

In *Re House*, 23 Colo. 87, 33 L.R.A. 832, 46 Pac. 117, an act providing for the treatment of habitual drunkards financially unable to pay therefor, at the expense of the county of which they are residents, was held valid; the court saying: "The object sought to be attained by this act is to provide for a class of its poor who have become helpless and unable to care for themselves, and is clearly within the governmental functions of the state, and a proper exercise of legislative power, unless inhibited by some constitutional limitation. The duty of the state to make provision for the care and maintenance of those who, through misfortune or disease, are unable to take care of themselves, has been too long recognized and established by the legislation of this country to admit of question. The indigent poor and infirm, the insane, orphaned and dependent children, and all destitute and helpless persons within its sovereignty, have ever been recognized as legitimate recipients of its bounty, and their welfare as a proper subject of its solicitude and care." And it was further held that a constitutional provision declaring that "no appropriation shall be made for charitable, industrial, educational, or benevolent purposes, to any person, corporation, or community not under the absolute control of the state, nor to any denominational or sectarian institution or association," was not contravened thereby, since such prohibition refers to state money only, and not to county money.

In *Webster v. Police Jury*, 51 La. Ann. 1204, 25 So. 988, similar legislation was sustained upon the theory that the treatment and cure of habitual drunkards or inebriates was as much the duty of the parish as the care of sick, disabled, or insane paupers.

So, also, in *Baltimore v. Keeley Institute*, 81 Md. 106, 27 L.R.A. 646, 31 Atl. 437, a statute authorizing any habitual drunkard to

be sent for treatment and cure to an institution within the state maintained for such persons at the expense of the county or city of his residence, if neither he nor his petitioning kin is financially able to incur the expense, was held not to make an unconstitutional use of money raised by taxation.

On the other hand, in *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68, it was held that a county cannot be compelled by statute to pay for the treatment in a private institution of habitual drunkards merely because they are pecuniarily unable to procure and pay for such treatment, since such use of the public money is not for a public purpose. This decision turns largely upon the construction given by the court to the act in question, that it is applicable to persons without the ready means or money to pay for treatment, and is not restricted to persons who have become helpless and destitute, and hence the subject of public charity. In commenting upon the Maryland and Colorado decisions above stated, the court said: "The Maryland act was broadly distinguishable from the one at bar, and was held valid. *Baltimore v. Keeley Institute*, supra. The Colorado act was more like ours, and it was held, in effect, that one 'who is financially unable to pay for the treatment of such disease' belongs to a class of 'poor who have become helpless and unable to care for themselves,' and hence 'within the governmental functions of the state;' and the act was valid. *Re House*, supra. The case is not made to turn upon the question we have considered, and we cannot regard it as an authority in the case at bar."

And in *State ex rel. Garrett v. Fröhlich*, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50, it was held that the legislature could not appropriate money from the public funds to redeem warrants issued under an invalid law providing for the treatment of inebriates at public expense, which are in the hands of innocent purchasers, where the Constitution provides that taxation shall be uniform, and requires the legislature to provide the tax sufficient to defray the estimated expenses of the state; since these provisions require taxes to be for a public, and not for a private, purpose.

For note on public purposes for which money may be appropriated or raised by taxation, see 14 L.R.A. 474.

Nashville, C. & S. L. R. Co. v. Taylor, 86 Fed. 168; 1 Cooley, Taxn. p. 78; Claybrook v. Owensboro, 16 Fed. 297; Atchison, T. & S. F. R. Co. v. Clark, 60 Kan. 826, 47 L.R.A. 77, 58 Pac. 477.

Mr. William G. Ulery also for plaintiff in error.

Messrs. Whitlock, Milroy, & Mallow for defendant in error.

Summers, J., delivered the opinion of the court:

In 1904 the general assembly passed an act entitled "An Act to Provide Relief for Worthy Blind" (97 Ohio Laws, p. 392). The act provides that all male blind persons over the age of twenty-one years, and all female blind persons over the age of eighteen years, who have been residents of the state for five years, and of the county for one year, and have no property or means with which to support themselves, shall be entitled to and receive not more than \$25 *per capita* quarterly from the county treasury on warrant of the county auditor, authorized by the probate judge; and that, under no condition or circumstance shall the beneficiary lose his or her benefits or residence by or through removal to any home or institution for the blind not maintained by said state or county. The probate judge of Lucas county, proceeding under the act, authorized the auditor of that county to issue a warrant on the treasurer for the payment of \$25 to the relator. The auditor refused, and thereupon the relator filed a petition in mandamus in the court of common pleas of that county. The court of common pleas overruled a general demurrer to the petition and allowed a peremptory writ, and the circuit court affirmed.

The care of the state for its dependent classes is considered by all enlightened people as a measure of its civilization, and it is not doubted that the legislation under consideration was inspired by beneficent, if not enlightened, motives. This state has provided institutions for the education of the blind; for feeble-minded youth; for honorably discharged soldiers, sailors, and marines; a home for soldiers' and sailors' orphans; for the care and treatment of the insane; an asylum for epileptics and epileptic insane; a boys' industrial school; a girls' industrial home; for the establishment of homes of the friendless; a sanitarium for consumptives; and an institution for the treatment and education of deformed and crippled children. The object of these institutions is sufficiently indicated by their designation, and may be stated to be, generally, to provide places and means where their afflictions may be relieved, or where

they may be taught and trained so that they may be self-supporting, or less likely to become a burden on the state, or where their physical wants may be supplied at the public expense. But it does not follow that it would be either wise or constitutional to select out a class having some particular physical infirmity, and then confer a bounty upon individuals of that class. If a bounty may be conferred upon individuals of one class, then it may be upon individuals of another class, and, if upon two, then upon all. And, if upon those who have physical infirmities, then why not upon other classes who for various reasons may be unable to support themselves? And, if these things may be done, why may not all property be distributed by the state?

The principal contention on the part of the auditor is that the law is unconstitutional, because the purpose for which the public funds are appropriated is not public, and because § 1 of article 7, which provides: "Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly,"—is a limitation upon the legislative power. And, upon the part of the relator, that the act is within the legislative power, and, in the absence of a specific prohibition in the Constitution, is wholly within the discretion of the general assembly, and that § 1 of article 7 is an express grant of power and sufficiently broad to comprise the act in question. Section 1 of article 2 provides that the legislative power of this state shall be vested in a general assembly. This comprises the power of taxation. But that extends only to the levying of taxes for the purpose of the state. Section 2 of the Bill of Rights declares that all political power is inherent in the people. Government is instituted for their equal protection and benefit. And § 1 declares that the right of acquiring, possessing, and protecting property is one of the inalienable rights of all men. And § 19 provides that private property shall ever be held inviolate, but subservient to the public welfare. So that the power of the state to take the property of its citizens by a tax is not broader than the purposes for which the state is formed, and so is not wholly within the discretion of the legislature, but, without express prohibition, is subject to this inherent limitation that it may be exercised only for a public purpose. This view of the law is supported by text writers and by well-considered cases. Story, Const. 699; Cooley, Const. Lim. 207; Black, Const. Law, 342; Judson, Taxn. 405; Gray, Limitations of

Taxing Power, 123, and cases there cited. Section 1 of article 7, which provides that institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state, is neither a grant nor a limitation of power, but a recognition of the fact that by enlightened people such classes are treated as wards of the state, and is an injunction upon the general assembly to foster and support institutions for their benefit; and it is in obedience to this constitutional mandate that the general assembly has provided for the institutions already enumerated.

The word "institution," as used in the Constitution, had a popular, if not a legal, signification, as exemplified in the legislation above referred to; and, if § 1 of article 7 should be held to be a grant of power as well as a mandate, the act in question would not come within its terms. The controlling question then is, whether the disbursement of the public funds provided by the act in question is for a public purpose. No rule sufficiently definite to be susceptible of certain application has been established. But in the leading case, *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, where the constitutionality of an act of the legislature of Kansas authorizing a municipality to issue and sell its bonds in aid of a manufacturing corporation was raised, Mr Justice Miller says: "In deciding whether [or not] in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." If that rule is applied here, it must be said that the act under consideration is without precedent in this state, and that no provision is made in the act to insure the application of the money to the support of the individual, or to prevent him from becoming a public charge, or in any manner to control its use by him. The act does not direct that the payments shall continue during the lifetime of the beneficiary; nor does it limit the time, nor provide that payments shall cease with the needs of the donee, or provide for any subsequent inquiry. It is an indeter-

minate, gratuitous annuity, a gift pure and simple; and, being so, the legislature is without authority to make it from the public funds. Other provisions of the act are open to criticism; but, as they go to the wisdom of the legislation, rather than to the power to enact it, they will not be noticed.

It may be said that funds used for the care of the poor are used for a public purpose, and that moneys used under the provisions of this act will subserve a public purpose for the reason that they will enable many blind persons, aided by their own efforts or those of their friends, to support themselves, and thus to escape becoming a public charge. The wisdom of the legislation is not questioned. The power of the legislature to so enact is the question presented here, and that an incidental public benefit is not sufficient to save the legislation has also been decided in the case just referred to. In that case it was claimed that the benefit conferred on the commerce and industry of the town was a sufficient public benefit to warrant the imposition of the tax. Mr. Justice Miller said: "If it be said that a benefit results to the local public of a town by establishing manufactures the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good and equally deserving the aid of the citizens by enforced contributions. No line can be drawn in favor of the manufacturer which would not open . . . the public treasury to the importunities of two thirds of the business men of the city or town."

If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge, then innumerable classes may clamor for similar bounties, and, if not upon equally meritorious ground, still on ground that is valid in point of law; and it is doubted that any line could be drawn short of an equal distribution of property. A few of the many cases more or less illustrative of the application of the rule may be noticed. In *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. E. 68, an act requiring any county to pay out of the public moneys of the county to a private party not to exceed \$170, for every inebriate found therein and treated upon the order and certificate of the county judge thereof, is declared unconstitutional. See also *Putney Bros. Co. v. Milwaukee County*, 108 Wis. 554, 84 N. W. 822; *State ex rel. Garrett v. Fröhlich*, 118 Wis. 129, 61 L.R.A.

345, 99 Am. St. Rep. 985, 94 N. W. 50. In State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, an act was held invalid that provided for the payment of certain sums of money in monthly instalments to certain students while attending the state university, who were dependent on their own
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efforts for an education, and financially unable to otherwise obtain the same.

The judgments are reversed, and petition dismissed.

Shauck, Ch. J., and Price, Spear, and Davis, JJ., concur.

RÉSUMÉ

GIVING a brief and comprehensive view of the points of special interest and importance in this volume.

- I. PUBLIC MATTERS AND RELATIONS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS: PERSONAL CAPACITY.
- VI. TORTS; NEGLIGENCE; NUISANCES.
- VII. PROPERTY RIGHTS; WILLS.
- VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC MATTERS AND RELATIONS.

Interstate commerce. Statutes requiring a carrier receiving baggage for transportation into another state over connecting lines to adjust the loss, inform the shipper where the loss occurred, produce a receipt from the connecting carrier, or prove its inability to trace the loss, are held not to be an unconstitutional interference with interstate commerce. 388.

Municipalities. A municipality is held estopped to assert a title to a street which will practically destroy the value of abutting property for residence purposes, and work irremediable injury to the owner, by failing to assert title, and permitting such owner to improve the property at large expense with reference to what he supposes in good faith to be the true boundary line. 243. A city permitting the maintenance of iron doors in a sidewalk, which may be opened without any guard to protect the hole, is held liable for an injury caused thereby, though it had no notice of the negligent use at the time of the accident. 424. The liability of a city for a fall on a sidewalk due to ice less than an inch thick, which the person injured knew was smooth and slippery when he went upon it, is denied in a Kansas case. 933. Municipal authorities are held not to be estopped to require the removal from a street of the rails of a street railway by seeing the rails laid without objection. 1187. For liability for electric shock, see *infra*, VI.

Municipal water supply. The power of the legislature to forbid the discharge of unpurified sewage into a river from which a public drinking-water supply is taken is sustained, though no injury to public health or comfort is actually shown. 322. 7 L.R.A. (N.S.)

Charitable institutions. The liability of trustees administering a fund solely for the education and maintenance of indigent boys without recompense, for injury to one servant through negligent orders given by another, is denied. 481. That a hospital is conducted as a public charity without expectation of profit is held not to render it immune from liability for negligent injuries to its servants. 496. For devise to, see *infra*, VII.

Eminent domain. A municipality was held not liable for injury to abutting property by altering the natural surface of a street in bringing it to the first established grade, where the change was not unreasonable or carelessly done. 108. Poles and wires of a long-distance telephone, strung along a public road, are held not to constitute an additional burden entitling the fee owner to compensation, unless actual and substantial injury to his property is shown. 87. The exercise of the power of eminent domain to secure power and operate a street railway is held not to be prevented by the fact that the company had not yet secured its right of way and necessary franchises, if it is proceeding diligently, and has progressed far enough to show that a public use is intended. 198. A pipe line in a rural highway for supplying the public with natural gas for heating and illumination is held not to impose an additional burden on the estate in fee. 506. A property owner is held entitled to show that the passage of a street-opening ordinance which would injure his property rights was obtained by fraud or other unlawful means, or for an unlawful purpose. 639.

Liability of officers. A public official is

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held liable for loss of public funds from the insolvency of the bank in which they are deposited, notwithstanding his mere inquiry of the general public, or the business men of the community, as to its solvency and the integrity of its officers. 1084.

Public money. A statutory provision for specified payments to blind persons from the county treasury is held void as requiring expenditure of public funds for a private purpose. 1196.

Labor unions. A statute prohibiting employers from exacting agreements from employees not to join a labor union is held to infringe the constitutional rights of liberty. 282.

Regulation of rates. A statutory requirement for the sale of mileage books at less than regular rates is held void as class legislation. 1086.

Depot grounds. Depot grounds are held to be the place where passengers get on and off trains, and where freight is loaded and unloaded, including all grounds reasonably necessary and convenient for such purpose, with necessary tracks, switches, and turnouts. 202.

Desecration of flag. The power of the state legislature to prohibit the desecration of the national flag is upheld in a Nebraska case. 1079.

Taxes. A fraternal beneficiary society conducted for the purpose of providing a

fund for payment of a specified sum, on the death of each member, to a designated beneficiary, is held not to be a charitable association whose property is exempt. 380. State bonds are held not to be impliedly exempted from taxation. 663. Personal property of a nonresident, which, for performance of a railway construction contract, is in the state on the day for assessing taxes, is held subject to assessment. 704.

Schools. The authority of a school board to debar members of high-school fraternities organized against its will, from connecting themselves with athletic teams, musical, literary, and military societies, and to deprive them of the customary graduation honors, is sustained, though the parents consented to the organization, and the meetings were held outside the school-house. 352. A prohibition against common-school teachers wearing a distinctively religious garb while engaged in teaching is held reasonable. 402.

Trading stamps. An ordinance forbidding merchants to give out trading stamps in their business is held unconstitutional. 1131.

Voting machines. The use of voting machines at elections is held not to violate a constitutional requirement that all elections shall be by ballot. 621.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Reward. A reward for the arrest of a criminal is held not to be earned by giving information leading to his arrest. 216.

Carriers. The refusal of the conductor of a connecting car to honor an invalid transfer check given by the conductor of the first car on payment of fare is held not to entitle the passenger to remain in the car without paying a second fare, until forcibly expelled. 97. A street car company was held liable for the conductor's refusal to accept a transfer in which a mistake was made by the conductor of the first car, where the passenger gave him a reasonable explanation of such mistake. 103. The reasonableness *per se* of a requirement that a claim for damages to freight must be presented within ten days is denied as applied to live stock, where the character of the injury cannot be determined within that time. 1141. For mileage-book legislation, see *supra*, I.; for burden of proving negligence, see *infra*, VIII.

Insurance. The right of a mutual-benefit society to amend its by-laws so as to increase the assessments on its members is

upheld where the existing rate has proved inadequate. 1154. A by-law that mailing of notices of assessment may be conclusively shown by the certificate of an officer who is not required to be personally cognizant of the fact is held unreasonable and void. 238. The mere mailing of a notice properly addressed and stamped is held, in the absence of a statute or contract provision, not to be a compliance with the custom to give notice of the maturity of a premium note, where the letter does not reach its destination. 253. The rule of a benefit society that failure to pay assessments by the last day specified shall suspend the certificate is held waived by the frequent absence of the local secretary on the day for payment, and his custom of accepting payments at any time prior to transmission of assessments to the supreme body. 569. The right of one made beneficiary as a dependent to receive the insurance money is held to cease on her marrying and securing other means of support before the death of the insured. 393. One holding land under a conveyance in fee is held to be the sole and unconditional

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owner within the meaning of a fire-insurance policy, although he owes part of the purchase price, for which a statutory vendor's lien exists. 627. A single act of the clerk of a local lodge in promising representatives of an insane member to notify them of assessments is held not to prevent the society from claiming a forfeiture for nonpayment of dues, notice of which is mailed to the member. 973. Death from suicide springing from an insane impulse is held to be through external, violent, and accidental means. 223. One running to a base while playing indoor baseball is held not voluntarily to expose himself to unnecessary danger by merely overrunning his base and relying on the wall to stop him when placing his hands and feet against it. 938. For garnishment of indemnity insurer by employee, see *infra*, VIII.; for measure of recovery for wrongful cancellation of policy, see *infra*, VIII.

Parol contracts. For parol partnership to deal in land, see *infra*, III.

Parol mortgage. A parol mortgage to secure a loan for the purchase of a stock of goods, to attach to future additions, is held valid as between the parties. 418.

Overdraft. The right of a bank which pays an overdraft of a local agent of a nonresident principal without ascertaining the agent's authority, to assert the principal's failure to examine the pass book and vouchers, affecting balancing of the account, is denied. 752.

Promissory note. A note without consideration, payable to the children of the maker out of his estate after his death, was held void. 156. A payee's indorsement on a note, acknowledging himself as a part maker with one of the parties, is held insufficient to render him a joint maker. 400.

Checks. Whether a bank receiving and crediting to a depositor a check on another bank may enforce it as owner is held to depend on the intention of the parties as to whether the deposit should be treated as cash. 694. A bank depositor who intrusts the examination of pass books and returned vouchers to an agent who has raised its checks is held chargeable with

such knowledge as the agent had in making the examination. 744.

Bonds. The receiver of a bank is estopped to deny the authority of the assistant cashier to bind the bank by statements and representations inducing the issuance of a bond for the fidelity of the president of the bank. 548.

Public policy. A check given to secure the return of stolen property was held valid, so as to entitle an indorser paying the same to recover from the owner, who stopped payment of the check. 175. A contract relieving an employer from liability for injuries due to his negligence is held void as against public policy. 537. The statute of a state where an action for injuries to an employee is brought, making void unreasonable contracts for notice of injury as a condition to maintaining an action, is held not to affect a contract valid in the state where made and in that where the injury occurred, in the absence of anything to disclose an opposite legislative intent. 191. A contract by the president of a corporation for the construction of a building is held not enforceable against the corporation, even as to extra work, where a large bonus was included in the contract price, for division between the president and the contractor. 467.

Ratification. A husband's promise to pay for goods not necessities, ordered by the wife, is held not binding unless she purported to act as his agent in making the purchase, so that his promise is a ratification of her act. 1048. For ratification by married woman after discoveriture, see *infra*, IV.

Assignment. A decree for permanent alimony was held not assignable. 179.

Sale. Acceptance of an article after the agreed time of delivery is held not to constitute a waiver of damages for the delay, unless accompanied by circumstances manifesting an intent to waive such damages. 1114. The right of the seller to hold a purchaser refusing to accept the goods responsible for deterioration due to failure to exercise due care pending a resale by him of the goods is denied, unless such failure resulted from the purchaser's conduct. 1184.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations. Execution by the president, for the benefit of the corporation, of a guaranty which it has power to make, is held sufficient to establish the corporate liability, in the absence of anything to show that he did not act by its authority, although the execution of the instrument is put in issue by verified plea. 376. For 7 L.R.A. (N.S.)

corporate liability on contract by president, see *supra*, II.

Partnership. A parol agreement to purchase a single tract of land in partnership, one of the parties agreeing to pay the other one half of the purchase price on demand, is held void. 945.

IV. DOMESTIC RELATIONS.

Infants. A foundling hospital which, through mistake of its representatives, placed children in homes of filth and degradation in a distant state, is held not entitled to recover their custody from persons rescuing them therefrom and administering to their needs, who are willing to care for and educate them as their own. 306.

Breach of promise. The refusal of a son of consumptive parents to perform his promise to marry one afflicted with pulmonary consumption is held not to render him liable in damages, although he knew of her disease at the time of making his promise. 582.

Married woman's contract. The power of a woman, after discovery, to ratify a note executed during coverture, is denied, where the note was void because not for

a debt for payment of which she could contract. 1053. For ratification of wife's purchase, see *supra*, II.

Married women's rights. The wife's right to devise property held by her husband and herself as joint tenants is held not to be given by the married woman's act. 701.

Divorce. The right to a divorce from one who has been convicted of an offense involving moral turpitude, followed by sentence to the penitentiary for two years or more, is held not to be affected by an executive pardon granted after imposition of the sentence. 272. The courts of the state of the matrimonial domicile are held to have jurisdiction, although defendant is out of the jurisdiction, and is served with publication only. 1127.

V. FIDUCIARY RELATIONS; PERSONAL CAPACITY.

Trusts. Executors are held empowered to mortgage the trust estate, under a will authorizing them to use the income for the maintenance of the testator's son, to accomplish which they are empowered to manage the property, sell land, or convey the whole or any part thereof, where, without the mortgage, the income is sufficient only to maintain the estate. 263.

Executors and administrators. An administrator who deposits funds in a bank in good standing, and promptly distributes

the interest to the next of kin, is held not liable for losses from the failure of the bank in the absence of negligence on his part. 617.

Artists. The right of an artist to recover pay for a second portrait, painted from a photograph left with him to paint one portrait, and retained by the customer with whom he placed it for inspection, is denied because of the violation of the contract and breach of trust. 362.

VI. TORTS; NEGLIGENCE; NUISANCES.

Conspiracy. Injury to a retail merchant through a combination to maintain prices, to be rendered effectual by boycotting seller dealing with persons refusing to agree thereto, is held to give a right of action. 976. A combination to prevent rate cutting, by which associations bind themselves not to sell to aggressive cutters of price, on which list are placed all wholesalers selling to persons on lists furnished them as such aggressive cutters, is held within the Sherman anti-trust act. 984.

Deceit. Suspicion that a statement of facts made to effect the sale of a chattel may be false is held sufficient to sustain an action for deceit if it proves to be false. 646.

False imprisonment. An officer who, after receiving information that a mistake had been made, detains in custody a person whom he arrested in good faith under the honest belief that he was the person in-

tended by a warrant against a person of the same name, is held liable to an action for false imprisonment. 268. Words are held sufficient to constitute an imprisonment if they impose a restraint upon one who is actually restrained. 576. Threatening words or conduct, such as to induce a reasonable apprehension of force, are held to be effectual to deprive one of liberty, if the means of coercion are at hand. 580.

Nuisances. The maintenance of howling and barking dogs and whining puppies, to the great and continuous annoyance and discomfort of an adjoining property owner and his family, interfering with their sleep, rest, and reasonable use and enjoyment of their home, is held to be a nuisance. 349.

Fright. Whether plaintiff's illness was the proximate result of fright caused by the wrongful entrance of defendant's employees into her dwelling, and interference with the property therein, was held to be a

question for the jury. 93. One causing nervous excitement by wrongful trespass on one's home, inducing her miscarriage, is held liable for the bodily pain and suffering directly due thereto, although no physical violence is done to her person. 96. Impairment of health, or loss of bodily power, through fright which is the natural and direct result of another's negligent act in blasting, is held sufficient to sustain an action against him. 545.

Navigation. Those in charge of a steamship whose waves endanger the lives of occupants of a small boat near it are held bound to stop normal operations of the ship until the small boat has passed out of the danger zone. 920.

Negligence of water company. Breach of a contract to connect property with a water main and erect a hydrant for protection from fire, without fixing any time to commence delivery of water, is held not to render the company liable for the value of property destroyed by fire from want of water. 913. A private corporation authorized to use the city streets on condition that it will lay its mains and furnish the city and its inhabitants with water at fixed rates is held liable for its wrongful act in cutting off the supply of water from one of its patrons. 917.

Electric shock. An electric light company which negligently turns a current onto a circuit having a grounded wire is held liable for injury to one coming in contact with the grounded current, although the injury would not have occurred if a third person had not made a second ground at another place. 293. A city maintaining an electric-light plant which, for compensation, installs in a business place a light which is imperfectly insulated, is held liable for injuries to an employee of the consumer by coming in contact with an electric current on putting his hand on the globe to warm it. 963.

Liability for servant's torts. A depot agent's malicious refusal to deliver to a licensed drayman goods of merchants which he has contracted to draw is held to render the railway company liable for such damages to the drayman's business as result from the agent's conduct. 926. The act of a conductor in causing the arrest, by a policeman, of a passenger as a pickpocket, is held to render the street car company liable. 162.

Fellow servants. A train despatcher whose duty is to issue telegraphic orders for movement of trains on a single-track road in the superintendent's name, and see to their transmission, is held not to be a fellow servant of a fireman. 650.

Injury to servants. Employment of a
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child in a factory in violation of statute is held to be negligence, entitling the child to recover for personal injuries. 335. One digging a trench for a gas main across a public street at night is held to be a fellow servant of the foreman in charge of the gang, so as to make the master liable for the latter's negligence. 367. The operator of a laundry is held to the duty of exercising ordinary care to release an employee and alleviate her suffering after learning that her fingers have been caught between the rollers of an ironing mangle. 940. A freight conductor is held to have no implied authority to engage an assistant to handle freight for which he is to receive passage on the train, so as to entitle him, in case of injury, to hold the carrier liable as an employer. 950. A mine owner, learning of danger of the flooding of his mine from accumulated water in a neighboring mine, is held bound to make such provision for the safety of his employees as would occur to a person of ordinary prudence, or to warn his employees of the danger. 1170. For liability of charitable institutions, see *supra*, I.

Injury to passenger. A carrier was held negligent in failing to anticipate, and protect intending passengers from injury from, the surging and struggling to get upon a particular train at a particular station, where such occurrences had frequently happened at the same station and train. 729. That a motorman sees one with something in his hand making violent motions towards the car at a place where it is not required to stop for passengers is held not to charge him with notice that his failure to stop will result in throwing a missile at himself, which may injure a passenger. 231. A railway company is held to owe no duty to one who, in violation of law, attempts to board a moving train at a closed vestibule door, until his position of danger is made known to the employees. 603.

Injury by train. A railroad company which permits the frequent use of a private farm crossing by a tenant of the farm for the benefit of which it was constructed is held subject to the liability of one who has extended an invitation which has been acted on. 597.

Injury in highways. For liability of municipality, see *supra*, I.

Liability of landlord. A landlord is held not liable for injury to the tenant, due to a hidden defect in a gutter, unless he knew, or ought to have known, of the defect. 965.

Surgeons. The right of a surgeon to proceed without consent of the patient or anyone authorized by him is sustained where unexpected conditions develop or are discovered in the course of an operation to

RESUME.

(PROPERTY RIGHTS; WILLS.)

which the patient has consented, or where some immediate action is necessary to preserve the patient's life or health. 609. Failure to obtain the father's consent before administering an anesthetic to a boy of seventeen, who, in company with adult relatives, has asked for relief from a small tumor, is held not to render the surgeon liable to the father for the boy's death under its influence. 612.

Last clear chance. One whose contributory negligence continued up to the moment of his injury, although the exercise of reasonable diligence would have warned him of danger and enabled him to escape, was held not to be entitled to recover, although his peril might have been, but was not, discovered in time to prevent the accident. 132. That one was guilty of some negligence in walking on a street-car track does not prevent a recovery for an injury due to the motorman's running a car at high speed with no watchfulness for persons on the track, if she was not negligent in failing to discover the approach of the car. 143. The intoxication of a passenger was held not to relieve the carrier from liability for injury to him by falling down a flight of steps on which he was left by the employees of the carrier on being removed from the train. 148. Negligence of

a passenger after alighting, in stepping on a parallel track without looking for an approaching car, was held not to prevent a recovery if those in charge of the car could, by the exercise of ordinary care, have discovered the peril and prevented the injury. 152.

Proximate cause of injury. The defective condition of a track in a mine, resulting in a car getting off the track, is held not to be the proximate cause of an injury to the miner, due to his pinching his fingers between the car and an implement used by him in attempting to get the car back on the track. 907. A street-car conductor's negligent calling of a street before it is reached, inducing a lady passenger to alight at night during a severe storm, is held to be the proximate cause of injuries sustained by falling upon an unfamiliar curbstone which she could not see, while on her way home. 1177. A thirteen-year-old employee's invention of a device to protect his fingers from handling links upon which he is employed to operate a drill which heats them because of defects in the apparatus, the use of which results in entangling his hand in the machinery, is held to be such an intervening cause as to destroy the proximity of the defect in the drill as a cause of the injury. 955.

VII. PROPERTY RIGHTS; WILLS.

Lease. The rights of a sublessee under the sublease are held not to be affected by a decree canceling the lease, made by consent of the lessee's administrator and the representatives of the lessor, in proceedings to which the sublessee is not a party. 221. A subtenant is held as fully estopped as the tenant to question the landlord's title. 930.

Mortgages. An assignee of a mortgage as collateral security is held to obtain a good title as against his assignor by bidding in the property at his own foreclosure sale. 1094.

Bona fide purchasers. The purchaser of an equity of redemption is held not to be a bona fide purchaser as against an attempt to set aside a prior fraudulent sale, because of his assumption of the outstanding mortgage. 1019.

Curtsey. An alien husband is held entitled to take an estate by the curtesy in land of which his wife died seised. 659.

Right of way. A tenant's acknowledgment that a right of way over adjoining property is permissive and revocable is held not to bind him after securing title to the landlord's estate to which the right of way is appurtenant. 614.

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Merger of life estate. The acquisition of the life estate by the reversioner is held to merge the fee in him, so as to cut out an intermediate, contingent remainder. 433.

Homestead. A homestead settler, who, after his wife's death, commutes the homestead entry and receives a patent on paying cash for the land at the government price, is held to acquire an absolute title free from any devise in his wife's will. 967.

Record title. Failure to remove from the record an undelivered deed given by one's predecessors in title is held not to estop him from denying the title of a stranger who purchased in reliance on the record. 712.

Mines. A location of a mining claim which complies with the act of Congress, but not with a local statute, as to form and record of notice, is held to become valid on the repeal of the local statute, if the required assessment work has been done. 763. The subsequent discovery of mineral-bearing ore is held to validate the location of a mining claim invalid for want of such discovery, in the absence of intervening rights. 791.

Waters. A mill owner is held entitled, if his interest requires it, to use the

(CIVIL REMEDIES; PRACTICE AND PROCEDURE.)

water of the stream in his business nights as well as days, if he leaves the natural flow unobstructed and undiminished during the working hours of the day. 289. The respective riparian owners, on a sudden change in the bed of a river, are held entitled to possession and ownership of the soil formerly under its waters, as far as the thread of the stream. 316. The right to place a jetty in a stream so as to deflect the current to the injury of a lower riparian owner by depriving him of the natural flow of the stream and washing away his bank by casting water directly against it, is denied. 344. The right to use power from a dam is held to pass by a grant of property with appurtenances, if such right has been acquired and affixed to a particular mill or parcel of land, but not merely because the grantor had the right to make use of such power. 1139. For legislative power to prevent pollution of water supply, see *supra*, I.

Market quotations. A board of trade is held not to surrender or dedicate to the public market quotations collected in its exchange by permitting subscribers to paste them upon blackboards in their places of business for their own advantage, and not for that of the public. 889.

Cemeteries. The right of a cemetery company controlled by white persons to prevent a colored person from using his property for burial purposes, or to compel

him to sell it, by purchasing surrounding land, was denied. 155.

Rule in Shelley's Case. A provision in a deed, granting to one a life estate, with habendum to him during his natural life, and to the heirs of his body and their assigns, that his wife shall have merely the privilege of living on the premises during his life, and that neither he nor his wife shall have power to convey or encumber the property, is held not to prevent his taking a fee under the rule in Shelley's Case. 1109.

Charitable trusts. The existence of a public free-school system is held not to invalidate a trust for the benefit of boys unable to educate themselves. 471.

Wills. A bequest by a woman of all money which may become due from insurance on her husband's life at the time of its actual collection and receipt by his executors is held to be specific, and deemed by the collection of the fund by the testatrix and her commingling it with her funds. 592. A devise to the vestry of a parish, to be used for such church purposes as the rector may direct, is held to vest the absolute title in the vestry for corporate purposes. 1119. That an attesting witness able to write his own name holds the end of a pen while it is guided by another in the writing of his name is held not to invalidate the attestation. 1193. For married women's right as to, see *supra*, IV.

VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.

Premature action. An action to establish a trust against an assignee of the trustee, or to impound the rents and profits, is held not maintainable prior to the time at which the beneficiaries are to be determined. 999.

Action against joint tortfeasor. Payment by a livery-stable keeper of a claim against himself and his bailee for the value of a horse killed by the latter's negligence is held to preclude further proceedings by him against the bailee on the owner's claim, although it was assigned to him at the time of payment. 534.

Impounding rents pending foreclosure. The right to impound rents and profits for reduction of the debt pending foreclosure is allowed, notwithstanding a statutory provision that a mortgage shall not be deemed a conveyance. 1001.

Parties. A bank for whose benefit a note is taken in the president's name, of which it has always had the exclusive ownership and possession, is held entitled to maintain an action thereon as the real party in interest. 1035.

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Account stated. A charge for services by an attorney accepted by the client is held to become an account stated, which cannot be reopened except for fraud or mistake. 924.

Specific performance. An antenuptial marriage settlement by which the groom's father agrees to make no discrimination between his children is held enforceable. 734.

Removal of causes. Removal of a suit to a Federal court is held not to prevent plaintiff from instituting a new action on the same cause in the state court after entry of an order of discontinuance. 501.

Execution. Property of a charity is held not liable to sale under execution issued on a judgment rendered for nonfeasance, misfeasance, or malfeasance of its agents or trustees. 485.

Judgment. Indexing under the name of "Frank" a judgment against one whose name is Francis is held to charge a prospective purchaser with notice of the judgment. 415.

Rogues' gallery. A remedy against the exhibition in the rogues' gallery of the

portrait of one merely accused of crime is allowed, where it is not necessary as a means of identification or to prevent escape. 274.

Mandamus. The duty of a street commissioner to hear and determine the only questions within his power as to the interference with travel, and the effect upon the pavement, of the tearing up of a street for the purpose of removing the rails of a street-railway system, is held compellable by mandamus. 525.

Injunction. An injunction against repeated acts of trespass on plaintiff's dooryard to erect and maintain a fence was allowed to prevent a multiplicity of inadequate actions at law. 49. An injunction against acts of trespass on land in another state was denied, where the principal fact involved, and upon which the right to exercise the restraint depended, was that of title to the land, even though the necessary parties were before the court. 114. An injunction against the collection of the purchase money, where the title to the land was questioned by suit, is held allowable. 445. An injunction against the use of voting machines at elections was denied. 512. An injunction against a railroad switch in a public street is denied as against abutting owners who have expressly consented thereto for twenty years, and as against their successors in title. 991. An injunction against the enactment of an ordinance against erecting or operating baseball parks within specified limits is allowed, where it appears that injury to property rights will result, and that the ordinance is personal, arbitrary, and discriminatory, and the power to enact it is questionable. 1014. Want of mutuality is held to prevent an injunction against violation of a heating company's contract to furnish heat at a specified yearly amount, where the use of heat rests in the consumer's discretion. 726.

Garnishment. A contract to indemnify an employer for loss paid because of injury to an employee is held not to create any obligation on the insurer's part which the employee can reach by garnishment proceedings. 958.

Witnesses. Statements made in the presence of a grantee since deceased, by his attorney at the time the deed was executed, are held inadmissible in an action to set aside the deed for fraud,—especially where the attorney is also dead. 684.

Burden of proof. The liability of a carrier for injury to a passenger from the jolt of the vehicle is denied, unless the person injured shows that it was caused by the carrier's negligence. 1076.

Privileged communication. Evidence as 7 L.R.A. (N.S.)

to the contract between an attorney and client for compensation, and the assignment of an interest in the judgment to secure the same, is held not to be privileged. 426.

Evidence. The right of a nonexpert claiming to have received letters from another without ever having seen him write, to testify that he wrote them, is denied, although she claims that he acknowledged having written some of them, where such fact is disputed. 557. Proof of *corpus delicti*, see *infra*, IX.

Reversal on appeal. The right of an appellate court to set aside a finding by the jury on the ground that it was scientifically impossible is sustained. 357.

Laches. Laches is held to apply in favor of a trustee under an express trust, who uses the trust property in the purchase and conveyance of land to another in violation of the trust. 370.

Limitation of actions. The running of the statute of limitations against one of several joint tenants is held to bar an action against all, although the remainder are under disability. 407. A limitation of the time for presenting state bonds which have been overdue for eighteen months to six months from the time of notice, which is to be published in a newspaper at the capital city of the state, is held not to be unreasonable as to the length of time. 714.

Damages. Damages for loss of baggage by a carrier were held not to include the trouble and expense of trying to locate it, or in purchasing other wearing apparel to replace that lost, unless the carrier was notified of facts rendering the special damages probable. 188. The measure of damages for wrongful cancellation, for alleged nonpayment of premiums, of an assessment policy on the life of one who is no longer an insurable risk, is held to be the amount of the policy less the cost of carrying it to maturity, with interest. 1163. Recovery for pain and suffering from delay in reaching a hospital because of the employer's failure promptly to furnish free transportation in accordance with its agreement is denied an injured servant who possessed the means of paying for transportation. 997. A parent's right to damages for mental shock and distress from the unlawful arrest and prosecution of minor children on a charge of malicious mischief is denied. 518. Recovery for injured feelings of the husband is allowed for soiling and ruining the casket of his wife, and the mutilation and disfigurement of her corpse by exposure to rain. 1018. Liability for injury due to fright, see *supra*, VI.

IX. CRIMINAL LAW AND PRACTICE.

Venue. The power of the legislature to permit the grand jury of one county to indict for crimes committed in an adjoining county is sustained on the ground that, although the indictment requires a grand jury, venue is not made an essential element of it. 669.

Proof of corpus delicti. The identity of a corpse found partly consumed in a fire was held sufficiently established by circumstantial evidence, for the purpose of proving the *corpus delicti* in a prosecution for murder. 181.

Cumulative sentence. A sentence of fine for an assault, or imprisonment in default of payment, and a subsequent sentence of imprisonment for a different assault, to begin at the expiration of the former sentence, are held not to be cumulative, with in a statute limiting the term of imprisonment and declaring that cumulative sentences shall be regarded as one. 124.

Pardon. A condition of a pardon, for reimprisonment for the original sentence of imprisonment after the expiration of the time fixed by the court within which his sentence should be executed, is held valid. 719.

Compounding felony. An indictment for compounding a felony by agreeing not to prosecute persons arrested for larceny is held insufficient, unless it charges that a larceny had been committed. 709.

Gaming. Betting on horse racing is held not to be within a statute against betting on any game of hazard or skill. 899.

Sale of liquor. Evidence of a sale of "lager beer" is held insufficient to support a conviction for selling intoxicating liquors. 194.

False pretenses. The coupling of a future 7 L.R.A.(N.S.)

promise with a false pretense is held not to relieve the false pretense of its criminal character. 278.

Larceny. The value of gas wrongfully consumed by means of false connections, without having it pass through the meter, during the entire period in which the false connections are used, is held proper for consideration in determining the degree of the crime. 520. The trespass necessary to constitute larceny is held to be absent where the owner, on learning of a design to steal the property from a specified place, places it there with instructions to his servant to deliver it to the one who shall call for it. 756. The mere turning over of baggage to one claiming it, by a transportation company, under the mistaken belief that he is entitled to its possession, is held not to be such a consent to his possession as to prevent his guilt of larceny. 1149.

Robbery. The elements of force and putting in fear are held to be present where one approaches and pretends to arrest an intoxicated person, and afterwards takes away his valuables without resistance on his part. 566.

Assault. Wounding one person by shooting at another with intent to kill is held not to sustain a prosecution for shooting the former with intent to kill. 630.

Homicide. A resolution to kill, following deliberation and premeditation, and a killing in pursuance of such resolution, are held to constitute murder in the first degree, regardless of the rapidity with which the commission of the crime followed its first suggestion. 1056.

Suicide. An attempt to commit suicide is held not to be a crime in the absence of statutory provisions. 286.

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ACCOUNTS.

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2. In case of a trust for the heirs of a certain person who shall be living at the death of another, no action can be maintained prior to the latter's death, to establish the trust against an assignee of the trustee, or to impound the rents and profits. *Allen v. White*, 7: 999, 85 Pac. 695, — Colo. (Annotated)

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1. Title by adverse possession cannot be acquired against a married woman pending coverture. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

2. When one is shown to have taken possession of land as agent of another, his subsequent holding will be regarded as permissive in the absence of proof to the contrary. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

3. The statute of limitations is, during the minority of the trustees, prevented from running upon possession being taken under a deed of a married woman for whose use property was conveyed to a trustee with power to sell by joining her in the deed, if at the time of the conveyance the trustee is dead and the title has descended to his infant heirs. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

4. The statute of limitations does not, for want of adverse actual possession, apply in favor of one claiming coal in a state of nature, in place, and not developed. *Newman v. Newman*, 7: 370, 55 S. E. 377, — W. Va. —.

5. An intermediate remainder will not be cut out by the acquisition by the ultimate remainder-man of the life estate under adverse possession claimed against the life tenant alone, with the admission that the intermediate remainder is unclaimed and unaffected. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

6. Possession taken under a deed by a married woman of property which was conveyed to a trustee for her life and to preserve remainders, with power to convey by joining the life tenant, sets the statute of limitations in operation against not only the trustee, but the life tenant and the remainder-men. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

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APPEAL AND ERROR.**Record on appeal.**

1. The record may be made to show an exception to the overruling of a motion for new trial by *nunc pro tunc* entry. *Mitchell v. Young*, 7: 221, 97 S. W. 454, — Ark. —.

2. The certificate of a trial judge that the bill of exceptions contains all the evidence pertaining or material to the questions raised by a motion for a directed verdict must be accepted as correct, if there is nothing properly in the record to impeach it. *Lesch v. Great Northern R. Co.* 7: 93, 106 N. W. 955, 97 Minn. 503.

3. That evidence upon a certain question was presented at the trial is sufficiently shown by a bill of exceptions which states that no question was made but that there was evidence for the jury upon all the issues submitted to them, where the instructions show that the issue upon which the evidence is claimed to be wanting was submitted to them. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

4. A bill of exceptions which shows inferentially and by natural implication, from the language used, that it contains all the evidence, is sufficient. *Mitchell v. Young*, 7: 221, 97 S. W. 454, — Ark. —.

Mode of raising questions in court below.

5. Exception during the trial or on motion for new trial is necessary to preserve error in the instructions to the jury for the consideration of the appellate court. *Potts v. State*, 7: 194, 97 S. W. 477, — Tex. Crim. App. —.

6. The court will not interfere with verdicts against a master and in favor of an employee upon whose negligence the liability depends, where neither party asks to set aside the verdicts for mistrial, but each seeks to preserve all in his favor and re-

ject the rest. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 556. Dismissal.

7. If the term of imprisonment expires pending an appeal by the jailer from a decision in a habeas corpus proceeding releasing a prisoner from custody, the appeal will be dismissed. *Harris v. Lang*, 7: 124, 27 App. D. C. 84.

What matters reviewable generally.

8. A question once decided by the court of appeals will not be re-examined when the case again comes before that court upon the same facts and under the same conditions. *Mutual Reserve Fund L. Asso. v. Ferrenbach*, 7: 1163, 144 Fed. 342, 75 C. C. A. 304.

Objections as to which party is estopped.

9. One who procures the giving of an instruction in conflict with a correct statement of the law which has been previously given cannot complain of the error of the court in that regard. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —.

Discretionary matters.

Discretion of trial court as to admission of evidence, see also Evidence, 19.

10. The appellate court cannot review the action of the trial court in refusing to permit an accused to withdraw his plea of not guilty and file a special plea to the indictment. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

11. A judgment will not be reversed on the ground that evidence was allowed in rebuttal that should have been offered in chief, unless a manifest abuse of discretion appears. *Mendel v. Miller*, 7: 1184, 56 S. E. 88, 126 Ga. 834.

Questions not raised below.

12. Want of certainty in a complaint may be remedied by the evidence and verdict, as against an attack for the first time on appeal. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —.

Errors waived or cured below.

13. Participating in the taking of testimony by a referee out of the jurisdiction of the court without a special order authorizing it waives the error. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —.

14. Failure to request the exclusion of evidence which has become immaterial because not connected with the point in issue will waive the error of its admission, although objection was made to it at the time it was offered, which was overruled upon the promise to connect it with the issue. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

Review of facts.

15. A finding by the jury of a double automatic stroke by a steam hammer will be set aside on appeal where the hammer, weighing 1,250 pounds, was operated by a piston arm working in a cylinder and driven by a pressure of 70 to 90 pounds of steam to the square inch, which was controllable

only by a hand lever, and no defect is shown in the mechanism; since there could be no rebound or double stroke to a hammer of that character without the operation of the controlling lever. *Chybowski v. Bucyrus Co.* 7: 357, 106 N. W. 833, 127 Wis. 332. (Annotated)

Grounds for reversal.

16. The admission of evidence in an action against an electric light company for the death of a person because of grounded current, that there were means by which the grounded portion might have been cut out, is not prejudicial, where the company had, before turning the current into the circuit containing the ground, concluded that the ground was not located there, so that it would not have made use of such appliances had they been part of its equipment. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

17. A conviction in a case tried without a jury will not be reversed on appeal for admission of improper evidence, unless the court can see that the accused was prejudiced by the error. *Topolewski v. State*, 7: 756, 109 N. W. 1037, — Wis. —.

18. Error in admitting incompetent evidence in an action tried without a jury does not require reversal if there is abundant competent evidence to justify the finding of the court. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

19. The exclusion from evidence of the opinion of a witness as to a fact in controversy in a case is immaterial if the jury finds in accordance with the contention of the party offering it. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —.

20. There is no reversible error in refusing to admit in evidence an application for carriage of freight where it is not materially different from the carriage agreement which is admitted. *Wabash R. Co. v. Thomas*, 7: 1041, 78 N. E. 777, 222 Ill. 337.

21. Instructions submitting issues not authorized by the evidence are, if prejudicial, ground for reversal. *Mendel v. Miller*, 7: 1184, 56 S. E. 88, 126 Ga. 834.

22. If, after having notice of the terms of a guaranty written over his indorsement, the payee of a note ratifies it, any error in an instruction that it was immaterial if the guaranty was written before or after the signature was placed on the note, if the signature was placed there with the intention of guaranteeing it and the words were written in accordance with that purpose, is harmless. *George E. Lloyd & Co. v. Matthews*, 7: 376, 79 N. E. 172, 223 Ill. 477.

23. In an action by a passenger to recover damages for having been wrongfully threatened with expulsion from a street car, an instruction that the jury may weigh the wordly circumstances of the parties is reversible error, where there is no evidence as to such circumstances, and the only question to be determined is the amount of the 7 L.R.A.(N.S.)

verdict. *Georgia R. & E. Co. v. Baker*, 7: 103, 54 S. E. 639, 125 Ga. 562.

24. A ruling that defendant in an action for damages for performing an unauthorized surgical operation upon a married woman has the burden of showing leave and license, notwithstanding the declaration avers want of consent by herself "or anyone authorized to act for her," to which defendant pleaded leave and license, which was denied by plaintiff, is harmless, if error, where it is shown that plaintiff herself did not consent, and evidence of the conduct of her husband, the only one claimed to be authorized to consent for her, tends to negative consent on his part. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

25. Taking notes of the testimony, by a juror, does not require the setting aside of the verdict; but the matter is within the discretion of the trial court. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

Costs.

26. Each party may be required to pay his own costs on reversal of a decree for want of jurisdiction in the trial court, where defendant did not question the jurisdiction, but proceeded to try the case on its merits. *Columbia Nat. Sand Dredging Co. v. Morton*, 7: 114, — App. D. C. —.

APPURTENANCES.

Right to, as included in deed of property, see Deeds, 2, 3.

ARREST.

See also False Imprisonment.

Of passenger, see Carriers, 2, 3.

Of child, parent's right to damages for mental anguish, see Damages, 10.

When reward offered for, is earned, see Reward.

1. A private citizen cannot justify an arrest without warrant for the alleged commission of a felony, unless it appears that a felony was in fact committed. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

2. Persons assisting a police officer in making an arrest without a warrant out of his jurisdiction cannot justify under his authority, since he has none. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

3. A police officer cannot, as such, justify an arrest without warrant out of the limits of the town for which he was appointed. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

ASSAULT.

On passenger, punitive damages for, see Damages, 1.

The wounding of one while shooting at another with intent to kill will not sustain a prosecution for shooting the former with intent to kill, under a statute providing that every person who shall shoot at another with intent to kill such other shall be punished. *State v. Mulhall*, 7: 639, 97 S. W. 583, 199 Mo. 202. (Annotated)

ASSIGNMENT.

A decree for permanent alimony is not assignable. *Fournier v. Clutton*, 7: 179, 109 N. W. 425, — Mich. —. (Annotated)

ASSIGNMENT OF ERRORS.

See Appeal and Error.

ASSOCIATIONS.

See Benefit Societies.

ASSUMPSIT.

A city, when about to distrain for taxes, may make an agreement with the taxpayer that the payment is under protest, which may be carried out in any subsequent litigation to recover back the money paid. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641.

ATTEMPT.

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Notice to special attorney as notice to general attorney, see Notice, 2.

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Right of bailor paying claim against himself and bailee to enforce primary liability of bailee, see Payment.

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Binding effect on, of statements by cashier to bonding company, see Bonds.

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Right to maintain action in its own name to recover back money paid for taxes on stock, see Parties, 3.

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Notice to agent intrusted with examination of passbook as notice to depositor, see Notice, 3.

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Liability of executors for money lost by failure of, see Executors and Administrators, 1, 2.

Liability for loss of public funds by bank failure, see Officers.

Question for jury as to sufficiency of care of depositor in examining passbooks and vouchers, see Trial, 14.

1. Whether or not a bank receiving and crediting to a depositor a check on another bank is entitled to enforce it as owner depends upon its having been the intention of the parties that the deposit shall be treated as cash, which fact is to be determined by the jury. *Fayette Nat. Bank v. Summers*, 7: 694, 54 S. E. 862, 105 Va. 689. (Annotated)

Overdrafts.

Estoppel of principal, by failure to examine passbook, to deny liability for agent's overdraft, see Estoppel, 8.

2. That the proceeds of overdrafts drawn by an agent without authority upon his principal's bank account went to pay expenses of the principal's business does not entitle the bank to charge them against the account, if the proceeds were used merely to replace money which had been misappropriated by the agent. *Merchants' Nat. Bank v. Nichols & S. Co.* 7: 752, 79 N. E. 38, 223 Ill. 41.

BASEBALL.

Voluntary exposure to unnecessary danger in playing, see Insurance, 17.

BENEFIT SOCIETIES.

Insurance by, see Insurance, 6, 11, 12, 18-22.

Taxation of property of, see Taxes, 6-8.

1. The secretary of a local branch of a fraternal society, charged with the duty of collecting the assessments on benefit certificates issued by the grand lodge, is the agent of such lodge with respect to the business of such collections. *Trotter v. Grand Lodge, I. L. of H.* 7: 569, 109 N. W. 1099, — Iowa, —.

2. The classification of members of a mutual-benefit society according to age, in a by-law readjusting methods of assessment, is not illegal. *Reynolds v. Supreme Council, R. A.* 7: 1154, 78 N. E. 129, 192 Mass. 150.

3. A mutual-benefit society has power to amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter authority to provide for the payment of a certain death benefit, to be secured by assessment, and to provide for the amendment of its by-laws. *Reynolds v. Supreme Council, R. A.* 7: 1154, 78 N. E. 129, 192 Mass. 150. (Annotated)

4. Raising the rate of assessment on a member of a mutual-benefit society by

change of by-laws does not impair his contract, where the by-laws to which he agreed required him to conform to the laws then in force, or which might thereafter be adopted. *Reynolds v. Supreme Council, R. A. 7: 1154, 78 N. E. 129, 192 Mass. 150.*

BETTING.

1. Betting on horse racing is not within a statute making criminal "betting any money on any game of hazard or skill." *State v. Vaughan, 7: 899, 98 S. W. 685, — Ark. —* (Annotated)

2. Rooms where bets are made on horse racing are common nuisances at common law, although betting on horse races is not prohibited by statute. *State v. Vaughan, 7: 899, 98 S. W. 685, — Ark. —*

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By married woman, see Husband and Wife, 3, 4.

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Consideration.

Burden of showing consideration, see Evidence, 14.

1. A note without consideration, payable out of the estate of the maker after his death, is void. *Sullivan v. Sullivan, 7: 156, 92 S. W. 966, — Ky. —* (Annotated)

Indorsement.

2. The indorsement upon a note by the payee, of a statement that he acknowledges himself a part maker of the note with one of the parties whose names are signed to the note, is not sufficient to render him a joint maker. *Kistner v. Peters, 7: 400, 79 N. E. 311, 223 Ill. 607.* (Annotated)

3. The acknowledgment of liability as maker over the indorsement of a note by the payee may be stricken out as surplusage, and the indorsement treated by a transferee as a blank assignment, over which may be written any words consistent with the contract of indorsement. *Kistner v. Peters, 7: 400, 79 N. E. 311, 223 Ill. 607.*

BILLS OF LADING.

Burden of proving that shipper assented to special conditions in, see Evidence, 5.

BLASTING.

That one attempting to use dynamite in blasting without smothering the blasts cannot foresee the exact consequences of his act does not absolve him from liability for an injury to an occupant of neighboring property, where the neighborhood is populous, and he ought, in the exercise of ordinary care, to know that he is subjecting the occupants of the dwellings in the

vicinity to danger. *Kimberly v. Howland, 7: 545, 55 S. E. 778, — N. C. —*

BOARD OF TRADE.

See Exchanges.

BONA FIDE PURCHASER.

See Vendor and Purchaser.

BONDS.

Impairing contract right to use state bonds in payment for state land, see Constitutional Law, 11.

Injunction against enforcement of, see Injunction, 13, 14.

Statute limiting time for presentation of state bonds, see Limitation of Actions, 1.

Taxation of state bonds, see Taxes, 4, 5.

1. A receiver of a bank cannot be heard, in an action against a surety company on the bond of the defaulting president of the bank, to repudiate or question the authority of the assistant cashier to bind the bank by his statements and representations concerning the conduct, duties, employment, and accounts of the president, where the bond was issued by the surety company and accepted by the bank upon the faith of such statements and representations. *Willoughby v. Fidelity & D. Co. 7: 548, 85 Pac. 713, 16 Okla. 546.* (Annotated)

2. In an action against a surety company to recover on the bond of a defaulting bank president, statements and representations in writing, made by the assistant cashier of the bank, relative to the conduct, duties, employment, and accounts of the president, which by the terms of the bond are made a part of the bond itself, form part of the contract, and upon the construction of the statements and bond as a whole the rights and liabilities of the parties thereto must depend. *Willoughby v. Fidelity & D. Co. 7: 548, 85 Pac. 713, 16 Okla. 546.*

BOYCOTT.

See Conspiracy, 1.

BREACH OF PROMISE.

A son of consumptive parents will not render himself liable in damages for refusal to perform his promise to marry a woman afflicted with pulmonary consumption, although he knew at the time of making the promise that she was so afflicted,—at least where such marriage would violate the spirit of the statute against the spread of such disease. *Grover v. Zook, 7: 582, 87 Pac. 638, — Wash. —* (Annotated)

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Duty of motorman in approaching car discharging passengers at street crossing, see Street Railways, 2, 4.

Question for jury as to duty to provide extra men to prevent crowding at certain hours, see Trial, 22.

1. That the motorman of a street car sees a person with something in his hand near the track at a place where the car is not required to stop for passengers, making violent motions toward the car, does not charge him with notice that his failure to stop the car will result in the throwing of a missile at himself which may strike and injure a passenger, and charge him with the duty of protecting the passenger, so as to render the company liable for injury to the passenger by his neglect so to do. *Woas v. St. Louis Transit Co.* 7: 231, 96 S. W. 1017, 198 Mo. 664. (Annotated)

2. Neither the failure of a street railway company to give its conductors full and specific instructions, nor the placing of restrictions upon the extent of their authority, nor enjoining them to perform their duties cautiously, prudently, and well, will relieve it from liability for the wrongful arrest of a passenger, made at the instance of a conductor who mistakenly pointed out a respectable person as a pickpocket. *Schmidt v. New Orleans* R. Co. 7: 162, 40 So. 714, 116 La. 311. (Annotated)

3. A street railway company is liable in damages for a wrongful arrest due to the act of its conductor, who mistakenly pointed out a respectable passenger as a pickpocket to a police officer, under La. Civ. Code, art. 2324, declaring that one who causes another person to do an unlawful act, or assists or encourages the commission of it, is responsible *in solido* with that person for the damages occasioned by the act. *Schmidt v. New Orleans* R. Co. 7: 162, 40 So. 714, 116 La. 311. (Annotated)

4. No actionable negligence on the part of a railroad company is shown by the fact that those in charge of a vestibule train, upon receiving notice that an intending passenger was outside of a closed door of the

moving train, attempted to rescue him by going the length of the car and opening the door, rather than by operating the emergency brakes. *Graham v. Chicago & N. W.* R. Co. 7: 603, 107 N. W. 595, — Iowa, —.

5. A railway company owes no duty to one who, in violation of law, attempts to board a moving train at a closed vestibule door, until his position of danger is made known to employees in charge of the train. *Graham v. Chicago & N. W.* R. Co. 7: 603, 107 N. W. 595, — Iowa, —. (Annotated)

6. To hold a carrier liable for injury to a passenger by reason of a jolt of the vehicle, plaintiff must show that it was caused by the carrier's negligence. *Foley v. Boston & M. R. Co.* 7: 1076, 79 N. E. 765, — Mass. —. (Annotated)

7. Where it appears that there is usually a large crowd at a particular station to take a particular train, and that there has been on many occasions surging and struggling to get upon the cars, the jury may find the carrier negligent in failing to anticipate such occurrences and take precautions to protect intending passengers from injury therefrom. *Kuhlen v. Boston & N. Street R. Co.* 7: 729, 79 N. E. 815, — Mass. —. (Annotated)

8. Train men who attempt to assist an intoxicated passenger from the train are bound to use ordinary care to leave him where he will be reasonably safe in view of his condition. *Black v. New York, N. H. & H. R. Co.* 7: 148, 79 N. E. 797, — Mass. —.

Negligence of passenger.

9. A passenger is not exercising due care in standing near an open door without supporting himself by his hands while the car is passing over a cross-over switch of which he knows, and which is necessary because of repairs in progress on the track. *Foley v. Boston & M. R. Co.* 7: 1076, 79 N. E. 765, — Mass. —.

10. A passenger induced by the negligent act of the conductor to leave a street car at a point remote from her destination is under no legal duty to apply for shelter at houses in the vicinity of the place where she alights, rather than to attempt to reach her destination on foot, over a highway which is in a reasonably safe condition for travel by pedestrians. *Georgia R. & E. Co. v. McAllister*, 7: 1177, 54 S. E. 957, 126 Ga. 447.

11. An intending passenger is not negligent as matter of law, in entering a crowd attempting to board a train, by the fact that she narrowly escaped injury at the same place by doing so on former occasions. *Kuhlen v. Boston & N. Street R. Co.* 7: 729, 79 N. E. 815, — Mass. —.

Ejection of passenger.

12. A street-car passenger who is given an invalid transfer check upon paying his fare and asking for a transfer, to which he is entitled, cannot, upon refusal by the conductor of the connecting car to honor it, refuse to pay his fare, thereby rendering nec-

essary forcible ejection, and hold the carrier liable for the assault; but his remedy is confined to damages for the breach of contract, including reasonable compensation for the indignity put upon him through the fault of the company. *Little Rock R. & E. Co. v. Goerner*, 7: 97, 95 S. W. 1007, — Ark. —. (Annotated)

Tickets; conditions; fares.

Requiring railroad companies to sell mileage books at certain rate, see Constitutional Law, 5.

13. A condition on a transfer issued by a street railway company that "the holder, by accepting, agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void. *Georgia R. & E. Co. v. Baker*, 7: 103, 54 S. E. 639, 125 Ga. 562.

14. A street car conductor is bound at his peril to determine whether a passenger presenting a transfer is entitled to ride upon it, notwithstanding it does not, upon its face, show such right, where the passenger gives a reasonable explanation of the mistake made by the conductor who issued it. *Georgia R. & E. Co. v. Baker*, 7: 103, 54 S. E. 639, 125 Ga. 562.

15. The voluntary offer of a street railway company to issue a transfer giving the right to ride on other cars of its lines, when accepted, completes a contract the consideration for which is the amount paid to the conductor issuing it; and the right to ride on the car to which the passenger is transferred is in no sense a gratuity. *Georgia R. & E. Co. v. Baker*, 7: 103, 54 S. E. 639, 125 Ga. 562.

16. A threat by a street car conductor to expel a passenger on account of a mistake in the transfer slip presented by him is a legal wrong giving the passenger a right of action against the company, although there is nothing insulting in the words or manner of the conductor, further than a mere threat to expel might be deemed an insult. *Georgia R. & E. Co. v. Baker*, 7: 103, 54 S. E. 639, 125 Ga. 562.

Freight.

Burden of proving that shipper assented to special conditions in bill of lading, see Evidence, 5.

Question for jury whether stipulation in bill of lading was assented to by consignor, see Trial, 12.

Question for jury whether stipulation limiting damages for injury to freight is reasonable, see Trial, 13.

17. By accepting freight marked for a particular place, a carrier is *prima facie* bound to carry it to and deliver it at that place, although beyond the terminus of its own line. *Wabash R. Co. v. Thomas*, 7: 1041, 78 N. E. 777, 222 Ill. 337.

CASE.

A wife has an interest in and a right to the possession and quiet enjoyment of the homestead of herself and husband, al-
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though the legal title thereto is in him; and an unlawful invasion of the premises by trespassers who, in her presence, ransack the house and interfere with her personal effects, is a legal wrong against her. *Lesch v. Great Northern R. Co.* 7: 93, 106 N. W. 955, 97 Minn. 503.

CEMETERIES.

A cemetery company controlled by white persons cannot, by purchasing land surrounding a lot owned by a colored person, prevent his using his property for burial purposes, or compel him to sell it. *Richmond Cemetery Co. v. Walker*, 7: 155, 97 S. W. 34, — Ky. —. (Annotated)

CERTIFICATE.

Of trial judge that bill of exceptions contains all the evidence, see Appeal and Error, 2.

CERTIORARI.

1. Facts not appearing in the return to a writ of certiorari, nor in any other manner which would enable the court to take notice of them, are not to be considered in determining the propriety of the writ. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa. —.

2. The filing of answers in an injunction suit in which a restraining order has been issued to prevent the carrying out of a contract does not defeat the right of defendants to apply for a writ of certiorari to annul the injunction. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa. —.

3. The right to appeal from an order restraining performance of a contract for voting machines does not defeat the right to apply for a writ of certiorari to annul it on the ground that it was in excess of jurisdiction and therefore void, where the election at which the machines were to be used would pass before the appeal could be heard. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa. —.

CHARITIES.

Laches to bar proceeding to contest validity of charitable trust, see Limitation of Actions, 2.

1. A charitable trust attaches to property secured for its purposes by a corporation organized to maintain a library for the benefit of the members and of the multitude of people who visit the city, where anyone contributing a certain amount towards the purposes of the enterprise may become a member, and the funds are secured by membership fees and charitable contributions. *Fordyce v. Woman's Christian Nat. Library Asso.* 7: 485, 96 S. W. 155, — Ark. —.

Definiteness.

2. The existence of a public free-school system does not necessarily render invalid a trust for the benefit of boys unable to educate themselves, on the theory that the

trust has no field for operation, since, notwithstanding such system, there may be boys who, by reason of poverty or other circumstances, cannot avail themselves of it. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649. (Annotated)

3. That no provision is made by the donor for the selection of the beneficiaries of a trust for the education of boys not able to educate themselves does not invalidate the trust, since equity will appoint a trustee for that purpose. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649.

4. A charitable trust for the education of poor boys is not rendered invalid by the fact that the class is not restricted in any way by the capacity, color, or condition of the beneficiaries. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649.

Cy pres doctrine.

5. That the donor of a fund to be held in trust for the education of boys unable to educate themselves provides that, after the building is secured, the income of the fund shall be used to pay teachers, does not prevent the use of a part of it for the heating, lighting, and care of the building. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649.

Liability for damages.

Estoppel to maintain action to recover possession of property sold under execution on judgment for negligence of agent, see Estoppel, 6.

6. That a hospital is conducted as a public charity without expectation of profit does not render it immune from liability for negligent injuries to its servants. *Hewett v. Woman's Hospital Aid. Assn.* 7: 496, 64 Atl. 190, 73 N. H. 556.

7. That a hospital is founded by property given in trust for that purpose does not exempt it from liability for negligent injury to its employees. *Hewett v. Woman's Hospital Aid Assn.* 7: 496, 64 Atl. 190, 73 N. H. 556.

8. The rule of *respondeat superior* does not apply in case of trustees who are administering a fund created for the sole purpose of educating and maintaining indigent boys without recompense, who have exercised reasonable care to select competent servants; and therefore they are not liable for injury to one servant through negligent orders given him by another. *Farigan v. Pevear*, 7: 481, 78 N. E. 855, — Mass. —. (Annotated)

9. The property of a charity cannot be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees. *Fordyce v. Woman's Christian Nat. Library Assn.* 7: 485, 96 S. W. 155, — Ark. —.

CHATTEL MORTGAGE.

1. A parol mortgage to secure a loan for the purchase of a stock of goods, which is to attach not only to the goods already in stock, but to such as might be added thereafter. *L.R.A.(N.S.)*

after, is valid as between the parties. *Mower v. McCarthy*, 7: 418, 64 Atl. 578, — Vt. —.

2. A parol mortgage to one loaning money to purchase a stock of goods upon the stock, and additions to it, is valid; and possession taken under it by the mortgagee will relate to the date of the agreement, so as to preclude creditors of the purchaser from sharing in the proceeds of their sale. *Mower v. McCarthy*, 7: 418, 64 Atl. 578, — Vt. —. (Annotated)

CHECKS.

See Banks.

CLAIMS.

Mining claims, see Mines.

CLOUD ON TITLE.

Amendment of pleading in action to quiet title, see Pleading, 1.

The owner of the minerals underlying land is within the protection of a statute permitting one in peaceable possession of "lands" to maintain a bill to quiet title to them against one denying or disputing his title. *Alabama Coal & C. Co. v. Gulf Coal & C. Co.* 7: 712, 40 So. 397, — Ala. —.

COLLATERAL ATTACK.

Upon assessment of board of equalization, see Taxes, 9.

COLLISION.

Negligence in navigating steamship, see Negligence, 2.

COMMERCE.

No unconstitutional interference with interstate commerce is effected by statutes requiring a carrier receiving baggage for transportation into another state over connecting lines, in case of loss, to adjust the loss with the shipper, or inform him of the point where loss occurred, or produce a receipt from the carrier to whom it delivered the property, unless it proves that, by the exercise of due diligence, it has been unable to trace the loss, and holding the initial carrier liable to the shipper, permitting it to recover over against the carrier liable for the loss. *Skipper v. Seaboard Air Line R. Co.* 7: 388, 55 S. E. 454, — S. C. —. (Annotated)

COMMISSIONS.

Of administrator, see Executors and Administrators, 5.

COMMON LAW.

By statute so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States or the Constitution and statutes of this state is in force in the state of Nebraska. *Kinkead v. Turgeon*, 7: 316, 109 N. W. 744, — Neb. —.

COMMUNITY PROPERTY.

See Husband and Wife, 5.

COMPOUNDING FELONY.

Sufficiency of indictment for, see Indictment, 1.

CONFIDENTIAL COMMUNICATIONS.

See Evidence, 26.

CONFLICT OF LAWS.

As to contracts; insurance.

1. The statute of a state where the action is brought to recover damages for injuries to an employee, making void unreasonable contracts for notice of the injury to the employer as a condition to maintaining an action in such cases, is not applicable to affect a contract valid in the sister state where made, and in that where the injury occurred, in the absence of anything to disclose a legislative intent to make it applicable to such contracts. *Chicago, R. I. & P. R. Co. v. Thompson*, 7: 191, 97 S. W. 459, — Tex. —. (Annotated)

2. Handing an application and fee to the agent of an insurance company in one state, to be forwarded to the insurer in another state, does not render the former state the place of contract, although the policy is returned to the applicant in that state by mail, where the by-laws of the insurer provide that the association shall not be liable in any manner until the directors have accepted the application and a certificate has been issued, since the contract is complete when the policy is placed in the mail, in the absence of anything requiring personal delivery. *Tuttle v. Iowa State Traveling Men's Asso.* 7: 223, 104 N. W. 1131, — Iowa, —.

Property rights.

3. The question, What title passes by a patent to a homestead settler on public land? must be solved by the law of the United States. *Cunningham v. Krutz*, 7: 967, 83 Pac. 109, 41 Wash. 190.

CONGRESS.

Exclusiveness of power to prohibit use of flag, see State.

CONSENT.

Estoppel by, see Estoppel.
To larceny, see Larceny, 1.

CONSPIRACY.

Evidence of acts of co-conspirators, see Evidence, 40.

Sufficiency of indictment for, see Indictment, 2.

1. Injury caused to a retail merchant because of inability to purchase goods on account of a combination among other retail and wholesale merchants for the purpose of maintaining maximum prices for the goods dealt in by them, to be made effectual by refusal to deal with persons who will not agree to maintain prices, and by threats to boycott wholesalers who deal with them, give a right of action. *Klingel's Pharmacy v. Sharpe & Dohme*, 7: 976, 64 Atl. 1029. — Md. —. (Annotated)
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2. Persons agreeing to a plan to maintain the prices of proprietary medicines by refusing to sell to aggressive cutters are not, unless they expressly agree thereto, responsible for the acts of a retailers' association which is a party to the agreement, in putting in force coercive measures against aggressive cutters by requesting wholesalers of general druggists' supplies to desist from selling to aggressive cutters, and reporting their replies to the organized retailers; the effective working of which would drive the aggressive cutters out of business. *Jayne v. Loder*, 7: 984, 149 Fed. 21, — C. C. A. —.

3. That each proprietor and wholesaler of patent medicines is permitted to determine for himself to what retailers he will refuse to sell does not prevent an undertaking on the part of associations of proprietors, wholesalers, and retailers to prevent rate cutting from being within the Sherman anti-trust act, if they bind themselves by an agreement not to sell to aggressive cutters of prices, and the agreement is enforced by the retailers notifying wholesalers who are aggressive cutters, and putting upon the list of aggressive cutters all wholesalers who do not desist from selling to persons on the list so furnished; the result of which is greatly to increase the cost of proprietary medicines to consumers throughout the country. *Jayne v. Loder*, 7: 984, 149 Fed. 21, — C. C. A. —.

(Annotated)

CONSTABLE.

That a constable has not given the bond required by statute to qualify him for serving civil process does not disqualify him for serving a venire for the summoning of a jury in a criminal case. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

CONSTITUTIONAL LAW.

Permitting grand jury of one county to indict for crimes committed in adjoining county, see Criminal Law, 1.

Exclusiveness of power of Congress to protect national flag, see State.

Statute providing for payment of money raised for taxation to blind person, see Taxes, 2.

Attempted exemption from taxation of state bonds, see Taxes, 5.

Vested rights.

1. The rights of a reversioner who has cut out an intermediate contingent remainder by the purchase of the life estate cannot be affected by a subsequent statute enacted to preserve the rights of remaindermen. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

Delegation of power.

2. The power delegated to the voting machine commission created by chapter 267, p. 400, Minn. Laws 1905, to determine the efficiency of the voting machine thereby authorized to be used at elections in this state, is neither legislative nor judicial, but administrative, in character. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. —.

Equal protection; abridging privileges.

3. That a state statute forbidding the use of the United States flag for advertising purposes excepts from its operation any act permitted by the statutes of the United States or by the Army and Navy regulations, or any use of the flag for purposes of display or ornament, disconnected from any advertisement, does not render the act objectionable as special or class legislation. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —. (Annotated)

4. A statute forbidding the use of the flag for advertising purposes does not abridge the privileges or immunities of citizens of the United States, in contravention of § 1 of the 14th Amendment to the Federal Constitution. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —. (Annotated)

5. A statutory provision requiring railroad companies to sell mileage books at less than the rates regularly charged for transportation is class legislation, and not for the benefit of the whole people, and is therefore void as depriving the corporation of its property without due process of law, and of the equal protection of the laws. *Com. ex rel. Anderson v. Atlantic Coast Line R. Co.* 7: 1086, 55 S. E. 572, — Va. —. (Annotated)

Due process; life, liberty and property.

6. A statute forbidding an employer to exact an agreement from an employee not to join a labor union infringes his constitutional rights of liberty. *People v. Marcus*, 7: 282, 77 N. E. 1073, 185 N. Y. 257. (Annotated)

7. The personal liberty of the citizen, guaranteed by the Federal and state Constitutions, is not infringed by the enactment of a statute by the state, in the exercise of its police power, forbidding the use of the flag of the United States for advertising purposes. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —. (Annotated)

8. The prohibition of a state statute against the use of the United States flag for advertising purposes does not deprive any person of his property without due process of law, in violation of the 14th Amendment to the Federal Constitution. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —. (Annotated)

9. The legislature may, under its police power, forbid the discharge of unpurified sewage into a river from which a public drinking-water supply is taken, without infringing the constitutional rights of the riparian owner, although no injury to the public health or comfort is actually shown. *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615. (Annotated)

Police power.

10. A state statute forbidding the desecration of the flag of the United States by using it for advertising purposes tends to foster sentiments of patriotism, and is not vulnerable to the objection that it is not calculated to promote the welfare of so-

ciety. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —. (Annotated)

Impairing contract obligations.

11. No impairment of a contract right to use state bonds in payment for state lands is effected by a statute providing for the payment of the bonds in cash, and limiting the time for presentation to six months after publication of notice, after the expiration of which the bonds are not to be recognized as valid for any purpose. *Tip-ton v. Smythe*, 7: 714, 94 S. W. 678, 78 Ark. 392.

CONTRACTS.

Impairing obligation of, see Benefit Societies, 4; Constitutional Law, 11.

Conflict of laws as to, see Conflict of Laws.

Injunction against violation of, see Injunction, 1.

Unlawful interference with, by rule forbidding teachers to wear religious garb, see Schools, 2.

Specific performance of, see Specific Performance.

Implied agreements.

1. An artist who, after filling an order to paint a portrait from photographs of the deceased wife of his customer, proceeds without orders to paint another, cannot compel the customer to pay for it if it is placed in his possession for inspection and retained by him, since the act of painting it constitutes a violation of the contract and breach of trust. *Klug v. Sheriffs*, 7: 362, 109 N. W. 656, — Wis. —. (Annotated)

Statute of frauds.

2. An oral contract between two persons to purchase a single tract of land together or in partnership, which purchase is finally made by one of them, who pays the whole of the purchase price and takes the title in his own name, the other simply agreeing to pay him half thereof on demand, is within the inhibition of the statute of frauds (Neb. Comp. Stat. 1905, chap. 32, § 3), and is void. *Norton v. Brink*, 7: 945, 110 N. W. 669, — Neb. —.

Validity.

3. One who, to secure the money with which to procure the return of stolen property, is obliged to indorse the check of the owner, may, if he is compelled to make good the amount upon the owner's stopping payment of the check, recover the sum so paid from the owner, since the payment of money to secure the return of stolen property violates no rule of law and such a transaction is therefore legal and binding. *Schirm v. Wieman*, 7: 175, 63 Atl. 1056, 103 Md. 541. (Annotated)

4. A contract to pay for the construction of a building does not become enforceable against a corporation because it is executed by its president under its corporate seal, if a large bonus in addition to the amount of the bid is included in the contract price, which is to be divided between

such president and the contractor and its representatives, even as to extra work after the price named in the contract has been paid, where, under the statutes of the state, such conduct on the part of the president is a misdemeanor. *Standard Lumber Co. v. Butler Ice Co.* 7: 467, 146 Fed. 359, 76 C. C. A. 39. (Annotated)

5. Where a contract on which an action is founded is *contra bonos mores*, or forbidden by express law, defendant may plead its invalidity, even though he is a participant in the wrong. *Standard Lumber Co. v. Butler Ice Co.* 7: 467, 146 Fed. 359, 76 C. C. A. 39.

6. A contract by an employee relieving the employer from liability for injuries due to the latter's negligence is against public policy and void. *Johnston v. Fargo*, 7: 537, 77 N. E. 388, 184 N. Y. 379. (Annotated)

Recovery on part performance.

7. One failing fully to perform his contract to support his mother in consideration of a note of a certain amount, given him by her, is entitled to recover only the proportional value of the services actually performed. *Sullivan v. Sullivan*, 7: 156, 92 S. W. 966, — Ky. —.

Rescission; restoring benefits.

8. A formal tender of consideration received for an assignment of a judgment is not necessary before instituting an action for its rescission, where defendant expressly refuses to accept a tender. *Fournier v. Clutton*, 7: 179, 109 N. W. 425, — Mich. —.

Actions.

Right of party for whose benefit made, to maintain action, see Parties, 2.

9. Neglect to interpose objections to the probate of a will will not prevent the enforcement of a contract made in anticipation of marriage, the provisions of which are antagonistic to the will. *Phalen v. United States Trust Co.* 7: 734, 78 N. E. 943, 186 N. Y. 178.

CONTRIBUTORY NEGLIGENCE.

Of servant, see Master and Servant, 9-11.

CORPORATIONS.

Officers and their acts.

Liability of, on contract by president, see Contracts, 4.

Implied power of agent of, to borrow money, see Principal and Agent, 2.

1. Execution by the president of a corporation, on its behalf and for its benefit, of a guaranty which the corporation has power to make, is sufficient to establish the liability of the corporation in the absence of anything to show that he did not act by authority of the corporation, notwithstanding the corporation, by verified plea, puts in issue the execution of the instrument. *George E. Lloyd & Co. v. Matthews*, 7: 376, 79 N. E. 172, 223 Ill. 477. (Annotated)

Foreign corporations.

2. That a foreign corporation which has 7 L.R.A. (N.S.)

attempted to place children under its care in homes within the state has exceeded its charter authority, and that it has not complied with the provisions of the local law so as to be entitled to do business within the state, will not prevent its applying for a writ of habeas corpus to recover the custody of the children in case they are wrongfully seized by strangers. *New York Foundling Hospital v. Gatti*, 7: 306, 79 Pac. 231, — Ariz. —. (Annotated)

CORPSE.

Damages for mental anguish for causing mutilation of, see Damages, 11.

A husband may maintain an action *ex delicto* against a common carrier to recover damages resulting from the act of the carrier in soiling and ruining the casket containing the body of his dead wife, and mutilating and disfiguring the corpse by negligently and wilfully exposing it to the rain. *Lindh v. Great Northern R. Co.* 7: 1018, 109 N. W. 823, — Minn. —.

CORPUS DELICTI.

Evidence to establish, see Evidence, 45, 51, 52.

COSTS.

On appeal, see Appeal and Error, 26.

Complainant's solicitors' fees will not be paid out of the trust estate in a proceeding by an heir to annul his ancestor's bequest for charity, especially where a judicial construction has already been given to the will which is sufficient for the purposes of the trustees. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649.

COTENANCY.

Running of statute against one of several joint tenants as bar against all, see Limitation of Actions, 4.

1. A joint tenancy in lands held by husband and wife has the same characteristics as to survivorship, under the statutes of the state of Wisconsin, as existed between joint tenants at common law. *Bassler v. Rewolinski*, 7: 701, 109 N. W. 1032, — Wis. —.

2. A married woman who is a joint tenant of property with her husband cannot, by devising her interest therein, affect the husband's right of survivorship; nor does Wis. Rev. Stat. § 2342, abolishing the disabilities of married women as to the acquisition and enjoyment of property, confer upon her capacity to pass her interest in such property by devise. *Bassler v. Rewolinski*, 7: 701, 109 N. W. 1032, — Wis. —. (Annotated)

COURTS.

Mandamus to, see Mandamus, 1.

1. The courts may inquire whether an act, the constitutionality of which is assailed, is a valid exercise of the police power and calculated to promote the health, comfort, safety, and welfare of society.

Halter v. State, 7: 1079, 105 N. W. 298, — Neb. —.

2. A civil district court has jurisdiction of a complaint to compel police authorities to destroy pictures of the plaintiff intended for the rogue's gallery, and taken after the plaintiff had been accused of a crime for which he has never been tried, since the action relates to a personal right. *Schulman v. Whitaker*, 7: 274, 42 So. 227, 117 La. 703.

COVENANT.

Merger of rights under, see *Merger*, 1.

1. The incorporation of a water-lot company with power to purchase, hold, and convey property, with a provision that the death of one or more of the directors or parties in interest shall not prevent or delay a sale of the lots, or any of them, or "an interest therein," does not prevent the insertion, in deeds of some of the lots, of restrictive covenants as to the amount of water or power to be used by the grantees respectively. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

2. A stipulation in a deed, that the grantee of even-numbered water lots shall build a dam, with a canal or race of a specified character extending through the property, including the odd-numbered lots, and that the lots conveyed, with their improvements, shall be forever liable for the payment of any damage sustained by the owners of the odd-numbered lots by reason of the failure to complete the race or canal and keep it in good repair,—is a covenant running with the land. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

3. As a general rule, a covenant in a deed of land, restricting the mode of its use, and inserted for the benefit of adjoining land of the grantor, will be extinguished by the subsequent vesting in one person of the title to both tracts of land. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

COVERTURE.

Adverse possession against married woman pending, see *Adverse Possession*, 1.

CRIMINAL LAW.

See also *Assault*; *Conspiracy*; *False Pretenses*; *Homicide*; *Larceny*; *Lynching*.

Reversal of conviction for admission of improper evidence, see *Appeal and Error*, 18.

Injunction against criminal proceedings, see *Injunction*, 15.

Failure of court to instruct upon lesser degree of crime, see *Trial*, 33.

1. The constitutional guaranty of immunity from criminal prosecution except by indictment does not prevent the legislature from permitting the grand jury of one coun-

ty to indict for crimes committed in an adjoining county, since, although indictment requires a grand jury, venue is not an essential element of it. *State v. Lewis*, 7: 669, 55 S. E. 600, 142 N. C. 628. (Annotated)

Sentence and imprisonment.

2. A prisoner under sentence for a longer term than the court had jurisdiction to impose cannot be relieved from custody until the expiration of the time which was within the court's jurisdiction. *Harris v. Lang*, 7: 124, 27 App. D. C. 84.

3. The imposition of cumulative sentences in a criminal action, the aggregate of which exceeds the jurisdiction of the court to impose, does not render the entire sentence void, but it will be valid for the term which the court has jurisdiction to impose. *Harris v. Lang*, 7: 124, 27 App. D. C. 84. (Annotated)

4. A sentence of fine, in default of payment of which there shall be imprisonment for a certain time, imposed upon conviction for assault, and one subsequently imposed upon the same defendant of imprisonment for another assault upon a different person, to which he pleaded guilty at the time of his former conviction, which term is to begin at the expiration of the former one, are not cumulative within the meaning of a statute limiting the jurisdiction of the court as to the term for which it may impose imprisonment, and declaring that cumulative sentences shall be regarded as one. *Harris v. Lang*, 7: 124, 27 App. D. C. 84. (Annotated)

5. Under a statute which provides that "in all cases the court shall award the sentence and fix the punishment or penalty prescribed by law," the power of the court extends to fixing the kind and amount or duration of the punishment, rather than the time when it shall be executed, which is not an essential part of the sentence; and expiration of the time fixed by the order of the court for the execution of a sentence without imprisonment, is in no sense an execution of the sentence. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

Pardon.

Right of jury to determine whether or not condition of pardon has been broken, see *Jury*, 20.

6. Under a constitutional provision that the pardoning power "may, upon such conditions and with such limitations and restrictions as they may deem proper, . . . grant pardon after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons," the pardoning power may, in granting a pardon after conviction, impose any condition, limitation, or restriction that is not illegal, immoral, or impossible of performance, and the acceptance of the pardon binds the person accepting it to all such conditions, limitations, and restrictions contained therein that are legal, moral, and possible of performance. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

7. A conditional pardon may, by its express terms, provide that, upon violation of the conditions, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence, and such stipulations upon acceptance of the pardon become binding upon the convict, and authorize his rearrest and recommitment in the manner and by or through the officials authorized as stipulated in the pardon. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

8. A provision in a conditional pardon, that, upon breach of the condition on which the pardon is granted, it shall be the duty of the sheriff of any county immediately to arrest the person pardoned and return him to the penitentiary, to serve out the remainder of his term, refers to the length of imprisonment fixed by the sentence, and not to the particular period of time mentioned in the sentence during which it was to be executed; since the latter is not a material or effective part of the sentence. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

9. A conditional pardon by virtue of which a prisoner accepting its terms has been released from imprisonment does not, upon his failure to perform the conditions, or his violation of them, take effect where the contingency specified is a condition precedent, and it becomes void where it is a condition subsequent. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

10. If the condition of a pardon upon which a convict secures his release from imprisonment is violated, the pardon becomes void, and the convict may be arrested as though no pardon had been granted, and compelled to undergo so much of the original sentence as he had not suffered at the time of his release. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

11. A convict who has been released upon a conditional pardon cannot be rearrested and recommitment, upon breach of the condition, upon the mere order of the governor alone, unless such a course is authorized by a statute or by the express terms of the pardon; but he is entitled to a hearing before a court of general criminal jurisdiction, in order that he may show, if he can, that he has performed the conditions of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

12. A provision in a pardon requiring re-imprisonment, upon breach of a condition of the pardon, for the remainder of the original sentence of imprisonment, after the expiration of the particular period of time fixed by the court within which the sentence imposed shall be executed, is not immoral or impossible of performance during the life of the convict; nor is it illegal, since the particular period of time within which the sentence is to be suffered by the convict as specified in the sentence is not a part of the legal sentence, except so far 7 L.R.A. (N.S.)

as it fixes the quantum of time that he must suffer such penalty; nor does it increase the punishment imposed by the court in the sentence; and it is not forbidden by law. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

CROP.

Landlord's lien on, see Landlord and Tenant, 6, 7.

CROWDING.

Liability for injury to passenger by, see Carriers, 7, 10.

CUMULATIVE SENTENCE.

See Criminal Law, 3, 4.

CURTESY.

1. An alien husband may take an estate by the curtesy in land of which his wife died seised, under a statute providing that aliens shall be capable of taking by descent lands within the state, in the same manner as citizens may do. *Cooke v. Doron*, 7: 659, 64 Atl. 595, 215 Pa. 393.

(Annotated)

2. If an estate by the curtesy is an estate by purchase, it is covered by a provision of a statute permitting aliens to purchase and hold real estate. *Cooke v. Doron*, 7: 659, 64 Atl. 595, 215 Pa. 393.

CUSTODY.

Of infants, see Infants, 1.

CUSTOM.

A custom for property owners to retain control of the outside portions of property leased by them is bad. *Shute v. Bills*, 7: 965, 78 N. E. 96, 191 Mass. 433.

CY PRES.

See Charities, 5.

DAMAGES.

Remittitur of, see Trial, 37.

Exemplary damages.

1. A street car company is liable not only for actual and compensatory damages, but for punitive damages also, if its conductor wilfully refuses to honor a valid transfer under circumstances of insult and aggravation, followed by an assault upon the passenger. *Little Rock R. & E. Co. v. Goerner*, 7: 97, 95 S. W. 1007, — Ark. —.

Breach of insurance contract.

Acceptance of article as waiver of, see Sale, 2.

2. The measure of damages for wrongful cancellation, for alleged nonpayment of premiums, of an assessment insurance policy upon the life of one who at the time of cancellation is no longer an insurable risk, is the amount of the policy, less cost of carrying it to maturity had it remained in force, all amounts entering into the calculation to be calculated upon the basis of the legal rate of interest as of the date of cancellation. *Mutual Reserve Fund L. Asso.*

v. Ferrenbach, 7: 1163, 144 Fed. 342, 75 C. C. A. 304. (Annotated)

3. The amount of premiums paid, with interest, is not the measure of damages for the wrongful cancellation for alleged non-payment of premiums of a life-insurance policy issued on the assessment plan. Mutual Reserve Fund L. Asso. v. Ferrenbach, 7: 1163, 144 Fed. 342, 75 C. C. A. 304. (Annotated)

Failure in duty to passenger.

See also *supra*, 1.

4. If a passenger could not, by the exercise of ordinary care, have discovered that she was invited by the conductor to disembark at a point short of her destination, she is entitled to recover damages arising from illness brought about by exposure to the weather after leaving the car. Georgia R. & E. Co. v. McAllister, 7: 1177, 54 S. E. 957, 126 Ga. 447.

5. In an action brought to recover damages for a threat made by a conductor to expel from the street car a passenger who presented a transfer defective because of a mistake made by the conductor issuing it, the measure of damages is not limited to the amount paid to prevent an expulsion, but general damages may be recovered as for an inexcusable trespass, even though no aggravating circumstances were connected with the threat of expulsion. George R. & E. Co. v. Baker, 7: 103, 54 S. E. 639, 125 Ga. 562.

Loss of baggage.

6. Damages for loss of baggage by a carrier cannot include the trouble and expense of trying to locate it, or in purchasing other wearing apparel to replace that lost, in the absence of notice to the carrier at the time of delivering the baggage to him of facts which would render special damages probable. Turner v. Southern R. Co. 7: 188, 54 S. E. 825, — S. C. —. (Annotated)

Personal injuries; death.

7. Proof of pain and suffering following the removal of a woman's uterus is not necessary to render them an element of damages against the one performing the operation, since they are inferred by law. Pratt v. Davis, 7: 609, 79 N. E. 562, 224 Ill. 300.

8. The damages recoverable by a married woman for personal injuries may include expenses for medical attendance which have been actually paid or contracted by her, although the primary duty to make the payment was upon her husband. Indianapolis Traction & T. Co. v. Kidd, 7: 143, 79 N. E. 347, — Ind. —.

9. A man may recover compensation from one causing negligent injuries to his wife, for the loss of society, service, aid, and comfort resulting therefrom, including, if the injury is permanent, compensation for diminished capacity to labor in the future. Kimberly v. Howland, 7: 545, 55 S. E. 778, — N. C. —.

Mental anguish.

10. A parent cannot recover damages for 7 L.R.A. (N.S.)

mental shock and distress on account of the unlawful arrest and prosecution of minor children on a charge of malicious mischief, nor for illness resulting from such shock. Sperier v. Ott, 7: 518, 41 So. 323, 116 La. 1087. (Annotated)

11. Damages for mental anguish may be recovered in an action by a husband against a common carrier for soiling and ruining the casket containing the body of his dead wife, and mutilating and disfiguring the corpse, by negligently and wilfully exposing the casket to the rain. Lindh v. Great Northern R. Co. 7: 1018, 109 N. W. 823, — Minn. —.

Aggravation.

12. A consumer whose supply of water has been wrongfully cut off by a water company cannot rely on the fact that a member of his family was ill at the time as an aggravating circumstance, unless it is shown that the agents of the company knew of such illness; nor can he recover anything on the ground that the action of the company imperiled the health and lives of his entire household. Freeman v. Macon Gas Light & W. Co. 7: 917, 56 S. E. 61, 126 Ga. 843.

DAMS.

Right to use power from, as included in grant of property, see Deeds, 2.

DEAD BODY.

See Corpse.

DECEIT.

See Fraud and Deceit.

DECLARATIONS.

Admissibility in evidence, see Evidence, 27-31.

DE DONIS.

See Real Property, 3.

DEEDS.

Failure to remove from record as estoppel to deny title of one purchasing on faith of record, see Estoppel, 3.

Admissibility of declarations in suit to set aside, see Evidence, 27, 28.

1. One who grants a thing is deemed, also, to grant that within his ownership, without which the grant itself would be of no effect; but this rule applies only to such things as are incident to the grant and directly necessary to the enjoyment of the thing granted. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 7: 139, 54 S. E. 1028, 126 Ga. 210.

2. If the right to use power from a dam has been acquired and affixed to a particular mill or parcel of real estate, it will pass by a grant of the property, with appurtenances; but, if the power was not an appurtenance of the property at the time of the grant, it will not pass as such, although the grantor had a right to make use of the power at that time. Muscogee Mfg. Co. v.

Eagle & Phenix Mills, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

3. A grant of property will carry with it actual existing appurtenances, but will not create any appurtenances. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

DELEGATION OF POWER.

See Constitutional Law, 2.

DEMURRER.

See Pleading, 7.

DEPOT GROUNDS.

Duty to fence, see Railroads, 2.

What constitutes, see Railroads, 1; Trial, 15.

DESCENT AND DISTRIBUTION.

That the children of a trustee are infants does not prevent the trust estate from descending upon them in case of the death of the trustee charged with the trust. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

DEVISE.

See Wills.

DIRECTION OF VERDICT.

See Trial, 28.

DISCOVERTURE.

Ratification by married woman after, of note executed during coverture, see Husband and Wife, 4.

DISMISSAL.

Of appeal, see Appeal and Error, 7.

DIVORCE.

Assignment of decree for alimony, see Assignment, 2.

1. A man cannot change the matrimonial domicile by abandoning his wife and going into another state to reside. *State ex rel. Aldrach v. Morse*, 7: 1127, 87 Pac. 705, — Utah, —.

2. The courts of the state of the matrimonial domicile have jurisdiction of a suit for divorce, although the defendant is out of the jurisdiction, and service of process is made upon him by publication only. *State ex rel. Aldrach v. Morse*, 7: 1127, 87 Pac. 705, — Utah, —. (Annotated)

3. The right to a divorce, conferred by Ga. Civ. Code 1895, § 2426, par. 8, upon the conviction of either party for an offense involving moral turpitude, and under which the offending party is sentenced to imprisonment in a penitentiary for a term of two years or more, is not affected by an executive pardon granted after such a sentence has been imposed. *Holloway v. Holloway*, 7: 272, 55 S. E. 191, — Ga. —. (Annotated)

4. Voluntary manslaughter is an offense involving moral turpitude, within the meaning of Ga. Civ. Code, 1895 § 2426, par. 8, specifying as a ground for divorce the conviction of either party for an offense in-

volving moral turpitude. *Holloway v. Holloway*, 7: 272, 55 S. E. 191, — Ga. —.

DOCUMENTARY EVIDENCE.

See Evidence, 15-20.

DOGS.

See Nuisances.

DOMICIL.

Change of, for purpose of divorce, see Divorce, 1.

DRUNKENNESS.

See also Intoxication.

As proximate cause of injury to passenger, see Proximate Cause, 2.

DUE PROCESS OF LAW.

See Constitutional Law, 6-9.

EASEMENTS.

Burden of proof that use of way was permissive, see Evidence, 11, 12.

An agreement by a tenant to pay rent for the use of a right of way over adjoining property which is appurtenant to the estate is not binding on his lessor if made without his knowledge. *Schwer v. Martin*, 7: 614, 97 S. W. 12, 29 Ky. L. Rep. 1221.

EJECTION.

Of passenger, see Carriers, 12.

EJECTMENT.

Permitting a recovery in ejectment against one of the defendants who was not shown to be connected with the main title in the controversy is not erroneous where such title was good against all except plaintiff, by reason of adverse possession. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

ELECTION.

Between counts, see Trial, 3.

ELECTIONS.

Voting machines.

Injunction against use of, see Injunction, 9.

Sufficiency of title of statute as to use of, see Statutes, 2.

Delegation of power to voting machine commission, see Constitutional Law, 2.

1. The use of voting machines is not prohibited by a constitutional provision that all elections shall be by ballot. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa, —.

2. The approval for use at elections of a voting machine on which the whole ticket can be voted as a unit is not annulled by the passage of a statute striking the circle from the Australian ballot. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa, —.

3. The provision of Minn. Const. art. 7, § 6, that all elections, except for town

officers, shall be by ballot, was merely intended to secure to the elector the privilege of exercising his right of franchise secretly and effectively, and is not contravened by Minn. Laws 1905, chap. 267, p. 400, providing for the use of voting machines at elections. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. — (Annotated)

Ballots; identifying marks.

4. An elector who has placed a mark upon his ballot whereby it may be identified cannot be heard to say that he did not intend the mark for that purpose. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. —

5. Words or sentences such as "nit" or "may the best man win," written upon ballots, were apparently not placed there for the purpose of identifying the ballots, which may properly be counted. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. —

6. A ballot cast at an election, which is so marked by the voter with his name or initials that his identity is thereby disclosed to any other person, is void. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. —

ELECTRICAL USES.

See Electricity.

ELECTRICITY.

Negligence as to, see also Negligence, 4.

Liability of master for negligence of servant as to, see Master and Servant, 15.

Liability of municipality for negligence as to, see Municipal Corporations, 4.

Proximate cause of death by, see Proximate Cause.

1. An electric light company which negligently turns a current on to a circuit having a grounded wire cannot escape liability for resulting injury to a person coming in contact with the grounded current by the fact that the injury would not have occurred except for the act of a stranger in making a second ground at another place. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

(Annotated)

2. An electric light company cannot escape liability for the death of a person who innocently came in contact with its grounded current upon his own premises, upon the theory that it owed him no duty. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

3. An electric light company is negligent in turning the current upon a circuit upon which it has known that the wire was grounded, without positively knowing that the trouble has been remedied, where the means to ascertain that fact are within its reach and at hand. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.
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ELECTRIC LIGHTS.

See Electricity.

EMINENT DOMAIN.

Who may exercise.

1. Authority to condemn property for the public uses recited in the charter of a corporation will not be denied because a portion of the enterprises in which it is authorized to engage are merely private, where the two are not so combined as to be inseparable. *State ex rel. Harland v. Centralia-Chehalis Electric R. & P. Co.* 7: 198, 85 Pac. 344, 42 Wash. 632.

2. That a street railway company had not in fact secured its right of way and necessary franchises will not prevent an exercise by it of the power of eminent domain to secure power to operate the road, if it is proceeding diligently with the enterprise, and has proceeded far enough to demonstrate that its immediate purpose is to apply the power sought to a public use. *State ex rel. Harland v. Centralia-Chehalis Electric R. & P. Co.* 7: 198, 85 Pac. 344, 42 Wash. 632. (Annotated)

What may be taken.

3. An electric railway company is not, in securing property necessary for power purposes, limited to that adjacent to its right of way, under a statute empowering it to appropriate land for right of way and "other corporate purposes" without limitation as to locality. *State ex rel. Harland v. Centralia-Chehalis Electric R. & P. Co.* 7: 198, 85 Pac. 344, 42 Wash. 632.

For what purpose.

4. A street cannot be created under the power of eminent domain, to be devoted to the purpose of railway switch tracks for the benefit of business concerns in the vicinity. *Kansas City v. Hyd*, 7: 639, 96 S. W. 201, 196 Mo. 498.

Additional servitude.

5. The poles and wires of a long-distance telephone strung along a public road do not constitute an additional burden which will entitle the fee owner to compensation, unless he shows that there will be an actual and substantial injury to his property. *Hobbs v. Long Distance Teleph. & Teleg. Co.* 7: 87, 41 So. 1003, — Ala. — (Annotated)

6. A pipe line, laid in a public rural highway under proper authority, and used for supplying the public with natural gas for heating and illuminating purposes, though imposing an additional public service upon the road, is not a use in excess of the right of the public in such road, and does not impose an additional burden upon the estate in fee in the land. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. — (Annotated)

EMPLOYERS' LIABILITY.

Insurance against, see Garnishment; Insurance, 23.

EQUAL PROTECTION.

See Constitutional Law, 3-5.

EQUITY.

Jurisdiction to grant injunction, see Injunction.

Power of equity pending foreclosure of mortgage to impound rents and profits, see Mortgage, 1.

Specific performance of contract, see Specific Performance.

Equity has jurisdiction of a bill to require the removal from a public highway of street-railway tracks placed there without the consent of the proper authorities. *Bangor v. Bay City Traction & E. Co.* 7: 1187, 110 N. W. 490, — Mich. —.

ESTOPPEL.

To complain of instruction, see Appeal and Error, 9.

Of municipality.

1. Municipal authorities cannot become estopped to require the removal from a street of the rails of a street railway by standing by and seeing the rails laid without objection. *Bangor v. Bay City Traction & E. Co.* 7: 1187, 110 N. W. 490, — Mich. —. (Annotated)

2. A municipal corporation which fails to assert its title to a street dedicated to public use, and permits an abutting property owner to improve his property at large expense, with reference to what he supposes in good faith to be the true street boundary line, and maintain the improvements for a period of thirteen years, will be estopped from asserting a title which will practically destroy the value of the abutting property for residence purposes, and work irreparable injury to the owner. *Oliver v. Synhorst*, 7: 243, 86 Pac. 376, — Or. —. (Annotated)

By record.

3. Failure of successors in title to one whose undelivered deed to real estate has been recorded, to remove it from the record, will not estop them from denying the title of a stranger who purchases the property in reliance on the record. *Alabama Coal & C. Co. v. Gulf Coal & C. Co.* 7: 712, 40 So. 397, — Ala. —. (Annotated)

By conduct or admissions.

4. The acknowledgment by a tenant that a right of way over adjoining property is permissive and subject to revocation will not bind him after he secures title to the landlord's estate, to which the right of way is appurtenant. *Schwer v. Martin*, 7: 614, 97 S. W. 12, 29 Ky. L. Rep. 1221. (Annotated)

By assent.

5. After the maintenance of a railroad switch in a public street for twenty years under the express consent of the abutting owners, neither those who gave the consent, nor their successors in title, are entitled to injunctive relief against the alleged nuisance. *Wolfard v. Fisher*, 7: 991, 84 Pac. 860, — Or. —. (Annotated)

By silence or acquiescence.

6. That a charitable corporation has

permitted a judgment to go against it for the negligence of its agent and its property to be sold under an execution does not prevent it from maintaining an action to recover possession of the property. *Fordyce v. Woman's Christian Nat. Library Asso.* 7: 485, 96 S. W. 155, — Ark. —.

By negligence.

7. The beneficiary in a deed of trust of real estate to secure notes is not negligent in surrendering a note without cancellation when it is paid, as the result of which a fraud is committed by securing the sale of the property under it to the detriment of the security of the other notes, so as to subordinate his equities to those of one claiming an interest derived from such sale, but who has not secured the title or paid the purchase money. *Wasserman v. Metzger*, 7: 1019, 54 S. E. 893, 105 Va. 744.

8. A bank which has paid an overdraft of a local agent upon the bank account of his principal, who resides in another state, without ascertaining the authority of the agent, cannot assert failure of the principal to examine the pass book and returned vouchers after the balancing of the account, as an estoppel upon the principal to deny liability for the overdraft. *Merchants' Nat. Bank v. Nichols & S. Co.* 7: 752, 79 N. E. 38, 223 Ill. 41.

Inconsistency in acts or claims.

9. An averment of consent to an operation, in the declaration in an action which is disposed of without any determination of the rights of the parties, does not estop plaintiff, in a subsequent suit, to show want of consent. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

Receiving benefits.

10. The receipt by the beneficiary in a deed of trust to secure notes of a portion of the proceeds of the fraudulent sale of the property will not estop him from contesting the validity of the sale if he acted without full knowledge of the facts, where no prejudice has resulted to anyone from his act. *Wasserman v. Metzger*, 7: 1019, 54 S. E. 893, 105 Va. 744.

By relation of parties.

11. The title of the lessor cannot be questioned by the lessee before the expiration of the lease, while he is in possession under it, unless based upon some distinct and independent claim to the land. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —.

12. One to whom a tenant leases the premises is as fully estopped to question the landlord's title as is the tenant himself. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —. (Annotated)

13. Life tenants cannot, by their own acts or admissions, defeat or prejudice the rights of the remainder-man. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179.

EVIDENCE.**Judicial notice.**

Waiver of error as to admission of, or method of taking testimony, see Appeal and Error, 14, 15.

Error in reception or exclusion of, see Appeal and Error, 17-21; Trial, 4-6.

Admission to corroborate witness, see Witnesses, 2-4.

1. The court will take judicial notice of the laws of nature. *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151, — Or. —.

Presumptions and burden of proof.

2. In assailing a prima facie right or title by a bill in equity, the plaintiff must aver and prove facts sufficient to overcome it; otherwise he cannot ordinarily put the defendant to the proof of a perfect, infeasible title or right. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. —.

3. If two estates in the same property united in the same person in the same capacity, and it is contended that no merger took place, the person making such contention, if entitled so to do, must allege and prove facts negating the existence of such merger. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

4. Proof that a machine worked perfectly both before and after an alleged erratic movement which is alleged to have caused a personal injury casts the burden on plaintiff of showing that such movement was caused by a defect in the appliance. *Chybowski v. Bucyrus Co.* 7: 357, 106 N. W. 833, 127 Wis. 332.

5. The carrier has the burden of showing that a shipper assented to special conditions in the bill of lading, limiting the liability of the carrier for injury occurring beyond its own line and requiring claims to be presented within a specified time. *Wabash R. Co. v. Thomas*, 7: 1041, 78 N. E. 777, 222 Ill. 337.

6. The burden of showing authority on the part of a conductor of a freight train to employ an assistant is upon one asserting such authority, and the railroad company has not the burden of disproving it. *Vassor v. Atlantic Coast Line R. Co.* 7: 950, 54 S. E. 849, 142 N. C. 68.

7. The burden of showing lack of knowledge or information on the part of a mine employee killed by the flooding of the mine, of conditions in an adjoining mine which were likely to result in such flooding, does not rest upon one seeking to recover for his death, but the mine owner has the burden of showing such knowledge; and therefore the court cannot direct a verdict for defendant merely because the evidence tending to show absence of knowledge is not conclusive. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

8. A conveyance by one to his general

agent having control and management of all his affairs, and who is his confidential adviser and friend, is presumed in law to be fraudulent; and the grantee has the burden of overcoming the presumption. *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 277.

9. The burden rests upon a passenger induced to leave a street car at a point remote from her destination, to show that her subsequent illness, alleged to have been caused by exposure to the weather, was due to such exposure, rather than to other causes for which the carrier would not be responsible. *Georgia R. & E. Co. v. McAllister*, 7: 1177, 54 S. E. 957, 126 Ga. 447.

10. The mere fact that a passenger negligently permitted to leave a street car at a point remote from her destination sustained an injury does not raise a presumption of negligence against the carrier; but the burden rests upon the passenger to prove the allegations of fact upon which she relies for a recovery. *Georgia R. & E. Co. v. McAllister*, 7: 1177, 54 S. E. 957, 126 Ga. 447.

11. One undertaking to close a pass way over his land, which has been enjoyed by a neighbor for nearly fifty years, has the burden of showing that the use was merely permissive, and to explain away the presumption that it was under color of right. *Schwer v. Martin*, 7: 614, 97 S. W. 12, 29 Ky. L. Rep. 1221.

12. The mere facts that one using a pass way over another's land never asked permission, and that the owner of the land never gave it, are not of themselves sufficient to overcome the presumption, arising from long-continued use, that it was claimed as matter of right. *Schwer v. Martin*, 7: 614, 97 S. W. 12, 29 Ky. L. Rep. 1221.

13. In the absence of proof that a note executed by a man and wife was for necessities ordered by the wife, the presumption is that it was for the husband's debt. *Gilbert v. Brown*, 7: 1053, 97 S. W. 40, 29 Ky. L. Rep. 1248.

14. Upon the introduction, by the maker of a promissory note, of evidence tending to show absence of consideration, the burden of showing consideration by a preponderance of the evidence is upon the one seeking to enforce it. *Best v. Rocky Mountain Nat. Bank*, 7: 1035, 85 Pac. 1124, — Colo. —.

Documentary evidence.

15. A letter seventy years old, found in proper custody, is an ancient document which proves itself. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

16. Upon the question of the genuineness of a letter seventy years old, the public records kept by the alleged writer as the incumbent of the office to which they belonged are admissible in evidence. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

17. The record of a deed is not inadmissible in evidence because the letters U.

Q., following the name of the one taking the probate, did not indicate any officer authorized to take a probate, where it appears that the person designated was clerk of the court, of which fact the court could take judicial notice, and *ex officio* one of the quorum who by statute had authority to take probates, so that the letters doubtless signified *unum quorum*. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

18. Under a rule that a standard for comparison of handwriting must be established by direct proof or equivalent evidence, a signature may be established for such purpose by showing that it was attached to a slip handed in by the one whose name it is, and whose signature it is alleged to be, and whose duty it is to fill out and sign such slips, in the absence of evidence to the contrary. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

19. The trial court has discretion to admit in evidence a photograph of wearing apparel taken from a murdered body, although the apparel is in court at the time of the trial. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

20. A stenographer's transcript of testimony given by witnesses at a former trial who have since died is not admissible in the absence of any evidence that the evidence was correctly transcribed, other than the certificate of the stenographer. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

Opinions and conclusions.

21. A witness cannot be asked for his opinion upon facts and conditions which must be determined by the jury, and which can be fully placed before them. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —.

22. The question whether or not a particular pin is one shown in a photograph is not one for expert testimony. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

23. One who claims to have received letters from another, but who has never seen him write and is not an expert in handwriting, is not competent to testify that they were written by him, although she claims that he acknowledged that he wrote two of them, where that fact is disputed, so that there is no undisputed writing in evidence to form the basis of comparison. *State v. McBride*, 7: 557, 85 Pac. 440, 30 Utah, 422. (Annotated)

Evidence wrongfully obtained.

24. If officers armed with a search warrant, upon presenting it at the home of one accused of crime, are invited by his mother to enter and search the premises, so that they do not act under the warrant, evidence obtained during the search is not inadmissible against accused, although the act may have been a trespass as against him. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.
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Admissions.

25. Statements against interest, by a party to an attempted arbitration to one of the selected arbitrators, are admissible in evidence against him, in an action growing out of the subject-matter of the controversy. *Sullivan v. Sullivan*, 7: 156, 92 S. W. 966, — Ky. —.

Confidential communications.

26. Evidence as to the contract between attorney and client for compensation, and the assignment of an interest in the judgment to secure the same, is not within the rule excluding evidence of privileged communications. *Strickland v. Capital City Mills*, 7: 426, 54 S. E. 220, 74 S. C. 16.

(Annotated)

Declarations of deceased person.

27. Evidence of declarations by one in possession of real estate, that he has conveyed the property to another by deed based upon a meritorious consideration, is admissible, in a suit after his death, to set aside a purported deed on the ground of fraud in that the signature was procured under the representation that it was a will. *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 277.

28. In an action by a remainder-man to set aside a deed signed by himself and the life tenant, on the ground that it was procured under the representation that it was a will, declarations by the life tenant, since deceased, are admissible, to the effect that the estate had been conveyed, as tending to show that the alleged representations were not made. *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 277.

Declarations of former owner.

29. Statements of a mortgagor tending to show intent on his part to defraud his creditors, with which the mortgagee is in no wise connected, are not admissible in an action to recover property from the mortgagee after he has taken possession of it under his mortgage. *Mower v. McCarthy*, 7: 418, 64 Atl. 578, — Vt. —.

30. Evidence of a statement by a mortgagor that the mortgagee had loaned him money and had a right to take possession of the property at any time is admissible in an action on behalf of creditors to recover possession of the property from the mortgagee after he has taken possession of it under his mortgage. *Mower v. McCarthy*, 7: 418, 64 Atl. 578, — Vt. —.

31. The mere relation of mortgagor and mortgagee does not create such a privity of estate as to render the declarations of one with regard to the property admissible in evidence against the other. *Mower v. McCarthy*, 7: 418, 64 Atl. 578, — Vt. —.

Relevancy and materiality.

32. In a proceeding to open a street, which, as proposed, would result in a mere cul-de-sac, and therefore be of no benefit to the public, evidence is admissible of a proposal to extend another street at right angles to its termination and thereby secure the necessary thoroughfare and public

benefit. *Kansas City v. Hyde*, 7: 639, 96 S. W. 201, 196 Mo. 498.

33. That a jury in an eminent domain proceeding is impaneled merely to try the question of damages does not preclude the admission of evidence, for the consideration of the court, that the proceeding is instituted for private, and not for public, benefit. *Kansas City v. Hyde*, 7: 639, 96 S. W. 201, 196 Mo. 498.

34. One whose property is sought by right of eminent domain to widen a street may introduce evidence to prove that the purpose of the widening is to accommodate a railway connection with private property. *Kansas City v. Hyde*, 7: 639, 96 S. W. 201, 196 Mo. 498.

35. Upon the question of fraud in procuring the signature of a deed under a misrepresentation as to its character, the jury may be permitted to consider the fact that it was kept off the record for a period of ten months. *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 277.

36. Evidence of lack of ladders and bulkheads where they should have been in a mine in which an employee was drowned by an inrush of water cannot be excluded in an action for his death merely because he knew of their absence, unless he had knowledge of the danger arising from the presence of the water in an adjoining mine in connection with the absence of such appliances. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

37. Evidence of absence of ladders and bulkheads at places where they should have been in a mine is admissible, in an action against the mine owner for the death of an employee drowned by the flooding of a mine through an adjoining one, as tending to show that, if the defendant knew of the danger from the water, he failed to use reasonable precautions for the safety of his employees. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

38. In an action against an electric light company for injuries caused by a grounded current evidence is not admissible that appliances existed which would enable it to cut out the grounded portion and turn the current into the remainder of the circuit, since it is not bound to adopt any particular appliance, but is required to have the appliances which it does adopt reasonably safe. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

39. For the purpose of connecting one accused of murder with money taken from the possession of the victim, evidence is admissible that, before the crime, accused was short of money, pawning his belongings, and that, after the crime, he had money, as well as his statements as to his lack of money, his losses, and his financial transactions before and after the crime; and the fact that it has not been shown as yet that money had been taken from the possession of the victim is immaterial. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.
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40. In an action against members of a combination in restraint of trade having for its object the driving out of business of aggressive cutters of prices, evidence is not admissible of other measures adopted by only part of the members of the former combination, which are separate and distinct from it, unless they are shown to have been agreed to by all the defendants. *Jayne v. Loder*, 7: 984, 149 Fed. 21, — C. C. A. —.

41. In an action by a licensed drayman against a railroad company to recover damages for alleged injury to his business, arising from the malicious acts of the company's agent, evidence as to the conduct of the latter when acting as agent for an express company, in reference to packages which the plaintiff had authority to receive, is irrelevant and inadmissible. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 128 Ga. 404.

42. That one on trial for obtaining money by false pretenses had made similar false representations and pretenses to others is admissible to show his knowledge of the falsity of the representations made to the prosecuting witness, and his guilty intent in making them. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —.

43. Upon a trial for murder, evidence is admissible of the finding of a ring which belonged to deceased several weeks after the commission of the crime, in a piece of tin foil which was found in a sack of potatoes belonging to accused shortly after the crime was committed, but which was not examined until the time of the finding of the ring. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592.

44. The attempt of one awaiting trial to escape from jail is a circumstance which may be considered on the question of his guilt. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592.

45. That several days elapse between the finding of a corpse and, near the spot, an article known to have belonged to a certain person who is charged to have been murdered, does not render the fact of the finding inadmissible in proof of the *corpus delicti*, but it weakens its force for that purpose. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592.

46. Evidence of an experiment made by an expert to determine whether or not a stab in the body of a murdered person severed a particular vein is properly excluded. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

47. Evidence that, several months after the injury to one riding on a freight train, the railroad company issued to him a pass describing him as an injured employee is not admissible as tending to show ratification of the conductor's act in permitting him to ride in consideration of services to be rendered in handling freight. *Vassar v. Atlantic Coast Line R. Co.* 7: 950, 54 S. E. 849, 142 N. C. 68.

Explanation and rebuttal.

48. After a witness for defendant in a criminal case has testified on cross-examination designed to show his interest, that he did not have a certain conversation with the prosecuting witness, evidence of such conversation may be admitted to contradict him, although accused was not present when it occurred. *State v. Mulhall*, 7: 630, 97 S. W. 583, 199 Mo. 202.

Under general denial.

49. In a suit to enjoin the use of a public road for the purpose of conveying natural gas by means of pipes laid underground in accordance with permission granted by the county court, on the ground that the pipes are not maintained and the gas conveyed for public consumption, the defendant may introduce evidence that the pipes are maintained and the gas conveyed for public use, without any affirmative allegation to that effect, under his denial of the allegation of the bill. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. —.

Weight and sufficiency.

50. A property owner may be found to have been negligent in making repairs to the gutter of a leased building to stop a leak, if the leak continued after the repairs the same as before. *Shute v. Bills*, 7: 965, 78 N. E. 96, 191 Mass. 433.

51. The identity of a corpse found partly consumed in a fire may, for the purpose of proving the *corpus delicti* in a prosecution for murder, be established by circumstantial evidence, such as the size of the remains, and the finding, at and near the spot where the body was found, articles known to have belonged to a person who is alleged to have been killed; the weight and sufficiency of the evidence for that purpose being for the jury to determine. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592. (Annotated)

52. The evidence necessary to establish the *corpus delicti* in cases of homicide must show that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed, and that the death was unlawfully caused by the party accused thereof, and by no other person. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592.

53. That one whose skeleton was found in a burning pile of logs was wrongfully killed may be found from the facts that he was a healthy man, and that, from conditions in the vicinity of the fire the body had been dragged to it leaving bloody stains along the way. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592.

54. Possession shortly after his homicidal death of articles known to have belonged to decedent, under circumstances which would justify accused's conviction of larceny, will warrant a conviction of murder, especially when coupled with contradictory statements by accused as to the whereabouts of the missing person. *State v. Barnes*, 7: 181, 85 Pac. 998, 47 Or. 592. 7 L.R.A. (N.S.)

Variance.

55. Proof of a contract by ratification of an agent's act is not a departure from the theory of a complaint seeking recovery on a direct contract. *Shuman v. Steinel*, 7: 1048, 109 N. W. 74, — Wis. —.

EXCHANGES.

A board of trade, which has a right of property in market quotations collected in its exchange, does not surrender or dedicate them to the public by permitting subscribers, to whom they are communicated upon condition that they shall not be made public, to post them upon blackboards in their places of business, where the posting is done for the advantage of the subscribers, and not of the public, and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value. *McDermott Commission Co. v. Chicago Bd. of Trade*, 7: 889, 77 C. C. A. 479, 146 Fed. 961. (Annotated)

EXECUTION.

See Levy and Seizure.

EXECUTORS AND ADMINISTRATORS.**Liabilities.**

Power to mortgage trust estate, see Trusts, 8.

1. An administrator who deposits funds in a bank in good standing in the community, and promptly distributes the interest to the next of kin, is not liable for losses caused by the failure of the bank, no negligence on his part being shown, and the exigencies of administration requiring the fund to be kept on hand. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —. (Annotated)

2. The retaining in a bank, by an administrator, for three months, of money received by him, instead of distributing it, does not make him liable for its loss through failure of the bank, where he had a right to retain money for the use of the testator's widow, which might be called for at any time. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —.

Accounting.

Liability for interest, see Interest.

3. An administrator is entitled to credit for an item for the construction and repair, at reasonable expense, of a vault for the remains of the dead, according to the expressed wish of intestate. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —.

Payment of claims.

4. Next of kin cannot complain of the payment of an item by the administrator without its allowance by the court, where it is less in amount than the balance due the administrator for overpayment in the distribution of the estate. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —.

Commissions.

5. No fault can be found with the allowance of statutory fees to an administrator, where he collected the funds of the

estate, cared for the real estate, looked after the widow, and promptly divided to each heir his share of the estate. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —.

EXEMPLARY DAMAGES.

See *Damages*, 1.

EXEMPTION.

Exemption from taxation, see *Taxes*, 4-7.

EXPERIMENTS.

Evidence of, see *Evidence*, 46.

EXPERTS.

Expert evidence, see *Evidence*, 22, 23.

FALSE IMPRISONMENT.

See also *Malicious Prosecution*, 10.

Of passengers, see *Carriers*, 2, 3.

Question for jury whether imprisonment was voluntary or by force, see *Trial*, 27.

1. Words are sufficient to constitute an imprisonment, if they impose a restraint upon a person, and he is actually restrained. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317. (Annotated)

2. False imprisonment may be effected if one is ordered to do or not to do a certain thing, to move or not to move against his own free will, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

3. A formal declaration of arrest is not requisite to constitute an imprisonment, if the person imprisoned understands that he is in the power of the one making the arrest, and submits in consequence thereof. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

4. The essential thing to constitute an imprisonment is constraint of the person, which may be by threats as well as by actual force. *Hebrew v. Pulis* (N. J. Err. & App.) 7: 580, 64 Atl. 121, — N. J. —

Liability of officer making arrest.

5. An officer who, in good faith and after diligent inquiry, arrests a person bearing the same name as that contained in the warrant, but who is not the person intended thereby, is not liable in an action for false imprisonment founded on the mere fact of arrest; but if he detains such person in custody after information reaches him that the mistake has been made, he will be liable in an action for false imprisonment for such detention. *Blocker v. Clark*, 7: 268, 54 S. E. 1022, — Ga. —. (Annotated)

6. The good faith which will protect an officer in arresting one bearing the name stated in the warrant, but who is not the person intended, may be negatived by such want of ordinary care as is inconsistent with good faith; and it is not necessary to the maintenance of an action for false imprisonment that he should have made the 7 L.R.A.(N.S.)

arrest out of spite or a reckless disregard for the rights and liberties of the citizen. *Blocker v. Clark*, 7: 268, 54 S. E. 1022, — Ga. —.

7. The failure of an officer to exercise reasonable diligence in taking a person arrested before a committing magistrate renders him liable to the person arrested, unless the delay is occasioned by the conduct of the latter. *Blocker v. Clark*, 7: 268, 54 S. E. 1022, — Ga. —.

FALSE PRETENSES.

Validity of indictment for, see *Indictment*, 3, 4.

Venue in prosecution for, see *Venue*.

1. A representation that a person is in a business or situation in which he is not made for the purpose of defrauding another and by which money or property is fraudulently obtained, is a false pretense. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —.

2. The coupling of a future promise with a false pretense does not relieve the false pretense of its criminal character. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —. (Annotated)

FELLOW SERVANTS.

See *Master and Servant*, 12-14.

FENCES.

Injunction against maintenance of, see *Injunction*, 5.

Duty of railroad to fence, see *Railroads*, 2.

FIRES.

Liability for failure to furnish water to extinguish, see *Waters*, 12.

FLAG.

Statute forbidding use of, for advertising, see *Constitutional Law*, 3, 4, 7, 8, 10.

Relative rights of state and Congress as to protection of, see *State*.

That a representation of the United States flag forms part of the trademark of a brewing company, and is, as such, a property right, does not justify its use on labels attached to bottles containing beer and used to advertise the company's product, in violation of a statute enacted in the exercise of the police power of the state, and forbidding the use of the flag for advertising purposes. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —.

FOREIGN CORPORATIONS.

See *Corporations*, 2.

FORFEITURE.

Of insurance policy, see *Insurance*, 6-12.

FRATERNITIES.

Forbidding high-school pupils to belong to, see *Schools*, 1.

FRAUD AND DECEIT.

Presumption of, in case of conveyance, to confidential advise, see Evidence, 8.

Admissibility of declarations to prove or disprove, see Evidence, 27, 28, 35.

Larceny by obtaining property by, see Larceny, 5-7.

Repudiation of purchase of horse because of, see Sale, 1.

Suspicion that a statement of facts made to affect the sale of a chattel may be false is sufficient, if it proves to be so, to sustain an action for deceit. *Shackett v. Bickford*, 7: 646, 65 Atl. 252, 74 N. H. 47. (Annotated)

FREIGHT.

See Carriers, 17.

FRIGHT.

Of horse, see Railroads, 4.

Proximate cause of injury resulting from, see Proximate Cause, 8.

1. Impairment of health, or loss of bodily power, through fright which is the natural and direct result of the negligent act of another, is sufficient to sustain an action against the wrongdoer. *Kimberly v. Howland*, 7: 545, 55 S. E. 778, — N. C. —.

2. One who causes nervous excitement in a pregnant woman by his wrongful trespass upon her home to such an extent as to cause her miscarriage is liable to her for the bodily pain and suffering endured in direct line of causation from the wrongful act, although no physical violence is done to her person. *Engle v. Simmons*, 7: 96, 41 So. 1023, — Ala. —.

GAMING.

See Betting.

GARNISHMENT.

Under a contract by which an insurer undertakes to indemnify an employer for loss paid because of injury to an employee, there is no obligation on the part of the insurer which can become the subject of garnishment in proceedings by an employee to enforce a judgment which he has secured against the insured. *Allen v. Aetna L. Ins. Co.* 7: 958, 145 Fed. 881, 78 C. C. A. 265. (Annotated)

GAS.

Pipe lines in highways, see Eminent Domain, 6; Highways, 3, 4.

Larceny of, see Larceny, 2-4.

GIFT ENTERPRISES.

Giving of trading stamps by merchants as, see Municipal Corporations, 2, 3.

GRADING.

Of highway, see Highways, 6.
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GRANT.

See also Deeds.

Grants by implication are not favored. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

GUARANTY.

Of fidelity of employee, see Bonds.

HABEAS CORPUS.

Expiration of term of imprisonment pending appeal from decision in, see Appeal and Error, 7.

Right of foreign corporation to apply for writ of, see Corporations, 2.

HANDWRITING.

Proof of, see Evidence, 16, 18, 23.

Question for jury as to authenticity of standards for comparison, see Trial, 17.

HIGHWAYS.

Additional servitude on, see Eminent Domain, 5; 6.

Injunction against cutting trees in, see Injunction, 6.

Establishment.

Creating, under power of eminent domain, for private purpose, see Eminent Domain, 4.

1. The court will adjudge void municipal ordinances passed for the purpose of opening and widening streets for the extension of railway switches for the accommodation of private business enterprises. *Kansas City v. Hyde*, 7: 639, 96 S. W. 201, 196 Mo. 498.

Uses.

Jurisdiction of equity to require removal from, of street railway tracks, see Equity.

Estoppel of municipality to require removal of street railway tracks from, see Estoppel, 1.

2. In respect to the rights of the public in highways, held under valid dedications and acceptances, and the power of the legislature over the same, there is no distinction in West Virginia between the streets of incorporated cities and towns and country roads. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. —.

3. Permission to lay a pipe line under the surface of a public road for the purpose of conveying natural gas for public use may be granted by the county court to a natural person. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. —.

4. The right to convey natural gas for public use along a highway by means of pipes laid underground can be exercised only with the consent of the authorities having control of the streets and roads, and under such restrictions as they, in the exercise of their discretion, may see fit to impose. *Hardman v. Cabot*, 7: 506, 55 S. E. 756, — W. Va. —.

5. That a railroad was constructed in

a public street partly for the accommodation of a certain mill owner does not make it private, so as to constitute a public nuisance, if it is open to all persons generally for shipping purposes. *Wolfard v. Fisher*, 7: 991, 84 Pac. 850, — Or. —.

Grading.

6. A municipal corporation is not liable for injury to abutting property by alteration of the natural surface of a street in bringing it to the first established grade where the change is not unreasonable or carelessly done, even under a constitutional provision that private property shall not be damaged for public use without compensation. *Leiper v. Denver*, 9: 108, 85 Pac. 849, — Colo. —. (Annotated)

Liability for injuries on.

Liability of municipality for injury to pedestrian by falling through aperture, see *Municipal Corporations*, 5.

Fright of horse at railroad crossing, see *Railroads*, 4.

7. A city is not liable for injuries due to a fall upon a sidewalk covered with ice and snow, where the ice, which accumulated from natural causes, was less than an inch in thickness, and the person injured knew when he went upon it that it was smooth and slippery, and he fell because of its smooth and slippery condition, and no other defect is claimed. *Evans v. Concordia*, 7: 933, 85 Pac. 813, — Kan. —. (Annotated)

HOMESTEAD.

Wife's right of action for trespass on, see *Case*, 1.

Law governing question of title given by patent, see *Conflict of Laws*, 3.

Effect of dissolution of marriage after initiation, but before consummation, of right under, see *Husband and Wife*, 5.

HOMICIDE.

Evidence in case of, see *Evidence*, 39.
Admissibility and sufficiency of evidence to establish *corpus delicti*, see *Evidence*, 45, 51, 52.

Sufficiency of evidence to establish that man was murdered, see *Evidence*, 53.

Sufficiency of evidence to establish that of accused, see *Evidence*, 54.

To bring a homicide within the statute defining murder in the first degree as one committed with deliberately premeditated malice aforethought, all that is necessary is that a resolution to kill must have followed deliberation and premeditation, and that the killing must have been in pursuance of the resolution, regardless of the rapidity with which the commission of the crime followed its first suggestion. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457. (Annotated)

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HORSE RACE.

Betting on, see *Betting*.

HORSES.

Fright of, at railroad crossing, see *Railroads*, 4.

HOSPITAL.

Liability for negligent injury to servant, see *Charities*, 6, 7; *Master and Servant*, 6.

HUSBAND AND WIFE.

As to breach of promise, see *Breach of Promise*.

As joint tenants, see *Cotenancy*.

Estate by curtesy, see *Curtesy*.

As to divorce, see *Divorce*.

Damages recoverable for personal injuries to wife, see *Damages*, 8, 9.

Husband's right to damages for mental anguish because of mutilation of wife's corpse, see *Damages*, 11.

Presumption that note executed by man and wife was for husband's debt, see *Evidence*, 13.

Unauthorized operation on wife, see *Physicians and Surgeons*.

Husband's liabilities.

1. To render a man liable on his promise to pay for goods not necessities ordered by his wife, she must have purported to act as his agent in making the purchase, so that his promise is a ratification of her act. *Shuman v. Steinel*, 7: 1048, 109 N. W. 74, — Wis. —. (Annotated)

2. A set of Stoddard's Lectures is not a necessary, which a woman may purchase on the credit of her husband. *Shuman v. Steinel*, 7: 1048, 109 N. W. 74, — Wis. —.

Wife's powers and liabilities.

Adverse possession against married woman, see *Adverse Possession*, 1.

Deed by married woman to property conveyed in trust for her as color of title, see *Adverse Possession*, 6.

3. The execution, by a woman, of a note to take up one of her deceased husband, is without consideration if she received nothing from his estate. *Gilbert v. Brown*, 7: 1053, 97 S. W. 40, 29 Ky. L. Rep. 1248.

4. A woman cannot, after discovery, ratify a note which was executed by her during coverture, and was void because not for a debt for the payment of which she could contract. *Gilbert v. Brown*, 7: 1053, 97 S. W. 40, 29 Ky. L. Rep. 1248. (Annotated)

Community property.

5. A homestead settler who, after the death of his wife pending the homestead period, commutes the homestead entry, and, upon paying cash for the land at the government price, receives a patent therefor, acquires the absolute title free from any homestead interest under the laws of the state, which might pass by the will of the

deceased wife. *Cunningham v. Krutz*, 7: 967, 83 Pac. 109, 41 Wash. 190.

(Annotated)

Trusts.

6. A deed by a married woman, executed in the manner prescribed by law for the conveyance of her estates, is of no effect against a trustee to whom the property was conveyed for her use by a deed providing that it might be conveyed by the trustee joining her in the deed. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

7. A provision in a deed conveying property to a trustee for the use of a married woman during life with remainder over, that, in case the life tenant should desire any of the property to be conveyed in fee or otherwise, the trustee should have power to convey joining her in the deed, applies to her life estate as well as to the fee so as to prevent any conveyance by her without joining the trustee. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

8. Where an estate is conveyed to a trustee for the use of a married woman for life and to preserve contingent remainders, the statute, upon the death of her husband, does not execute the use in her so as to permit her to convey the estate. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

9. The death of the trustee to whom is conveyed property for a married woman with power to join her in its conveyance without the execution of the power destroys it so that it cannot be subsequently executed. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

10. A provision in a deed conveying property to a trustee for the use of a married woman, permitting him to convey upon request of the beneficiary, she joining in the deed, prevents her conveyance without the aid of the trustee. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

Action by wife.

Wife's right of action for invasion of homestead, see *Case*, 1.

11. A woman is not prevented from maintaining an action in her own name for injuries to her person by one committing a trespass upon the real estate upon which she resides by the fact that the ownership of the property is in her husband. *Engle v. Simmons*, 7: 96, 41 So. 1023, — Ala. —.

ICE.

On sidewalk; liability for injury by, see *Highways*, 7.

IMPUTED NEGLIGENCE.

See *Master and Servant*, 15; *Negligence*, 4.

INDEMNITY INSURANCE.

See *Insurance*, 23.
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INDICTMENT, INFORMATION, AND COMPLAINT.

Constitutional guaranty of right to, see *Criminal Law*, 1.

1. An indictment for compounding a felony by agreeing not to prosecute persons arrested for larceny is insufficient, which does not charge that a larceny had been committed. *State v. Hodge*, 7: 709, 55 S. E. 626, 142 N. C. 665. (Annotated)

2. An indictment for conspiracy to break a jail for the purpose of lynching a prisoner is not defective for alleging conspiracy with others without naming them, or stating that they are to the jurors unknown, unless the statute requires such facts to be stated. *State v. Lewis*, 7: 669, 55 S. E. 600, 142 N. C. 626.

3. An information charging that the defendant obtained a draft by false pretenses, on which she collected the money, is not bad for duplicity as charging that the pretenses were made for the purpose of obtaining both draft and money. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —.

4. An information which charges that the defendant obtained a draft for money as commission for a loan on a farm, on the false and fraudulent pretense that he was an agent engaged in loaning money on farms, and that he had much property, and was financially responsible, and had a large amount of money under his control, is not bad because it fails to state whether the application of the borrower for the loan was oral or written, since it is wholly immaterial whether it was oral or written. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —.

INDORSEMENT.

Of note, see *Bills and Notes*, 2, 3.

INFANTS.

Effect of minority of children of trustee, on descent, at his death, of trust estate, see *Descent and Distribution*.

Unlawful employment of, see *Master and Servant*, 8; *Proximate Cause*, 5.

Negligence of, see *Negligence*, 3; *Trial*, 21.

Custody.

1. The court will not grant the application of a foundling hospital which, through a mistake of its agents and representatives, has placed children which have come to its care in homes of filth and degradation in a distant state, to recover their custody from persons of some means and education, who, actuated by humanitarian motives, have rescued them from their unfortunate surroundings, administered to their needs, and became attached to them, so that they are willing to care for and educate them as their own, so that it appears that the change will not work for the best interests of the children. *New York Foundling Hospital v. Gatti*, 7: 306, 79 Pac. 231, — Ariz. —.

Mortgage of real estate.

2. Whether or not executors exceeded their power with reference to the income of a trust estate placed in their hands is immaterial in a proceeding to mortgage the interests of infant remainder-men to take up a valid mortgage placed by them on the estate and to pay overdue taxes. *Re Lueft*, 7: 263, 109 N. W. 652, — Wis. —.

3. The interests of an infant remainder-man will be promoted by the execution of a mortgage to take up a valid prior one and pay overdue taxes, within the meaning of a statute permitting the mortgaging of estates in which infants are interested to promote their interests in the property. *Re Lueft*, 7: 263, 109 N. W. 652, — Wis. —.

4. The duty of the life tenant to pay taxes on the estate does not prevent the court from authorizing the mortgage of the estate to pay overdue taxes, and thereby preserve it for infant remainder-men. *Re Lueft*, 7: 263, 109 N. W. 652, — Wis. —.

INJUNCTION.

Annulling by writ of certiorari, see Certiorari, 2, 3.

Estoppel to claim injunctive relief against maintenance of railroad switch in street, see Estoppel, 5.

Contract rights.

1. Want of mutuality will prevent a court of equity from enjoining violation of a contract by a heating company, after installing a system in a building, to furnish heat at a certain sum per annum, where the use of heat from its plant rests in the discretion of the consumer. *Fowler Utilities Co. v. Gray*, 7: 726, 79 N. E. 897, — Ind. —.

Nuisance.

Against nuisance, see Nuisances, 1.

2. The jurisdiction of equity to abate a nuisance is not destroyed by the passage of a municipal ordinance purporting to award an easy and expeditious remedy for the inconvenience caused thereby. *Herring v. Wilton*, 7: 349, 55 S. E. 546, — Va. —.

3. Injunction will not lie against the maintenance of a criminal nuisance merely to subserve the public welfare. *State v. Vaughan*, 7: 899, 98 S. W. 685, — Ark. —.

Trespass.

4. Equity has no jurisdiction to restrain acts of trespass on lands in another state where the principal fact involved and upon which the right to exercise the restraint depends is that of title to the land, even though the necessary parties are properly before it. *Columbia Nat. Sand Dredging Co. v. Morton*, 7: 114, — App. D. C. —.

(Annotated)

5. Equity will take jurisdiction of a suit to restrain repeated acts of trespass upon plaintiff's dooryard for the purpose of erecting and maintaining a fence there, under its power to prevent a multiplicity of inadequate actions at law for the trespass. *Miller v. Hoeschler*, 7: 49, 99 N. W. 228, 121 Wis. 558.

(Annotated)

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Cutting trees.

6. An injunction will not be granted at the instance of an abutting owner to restrain a telephone company from cutting trees and shrubs along a public highway in the erection of its poles and wires, since the remedy at law is adequate. *Hobbs v. Long Distance Teleph. & Teleg. Co.* 7: 87, 41 So. 1003, — Ala. —.

Waters; pollution.

7. Injunction will lie to compel the removal of a jetty placed in a stream in such a manner as to deflect the current to the injury of a lower riparian owner by depriving him of the natural flow of the stream and washing away his bank by casting the water directly against it. *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151, — Or. —.

8. An inconsiderable pollution of a river at a point 17 miles above the intake of a city water supply will not be enjoined as a nuisance in the absence of any analysis of the water at the point of intake merely upon opinion evidence that the pollution affects the water at that point. *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

Political rights.

9. There is no right on the part of voters and taxpayers to injunctive relief against the use of voting machines at elections, and therefore the court has no jurisdiction of suits seeking such relief. *United States Standard Voting Mach. Co. v. Hobson*, 7: 512, 109 N. W. 458, — Iowa, —.

Legal proceedings.

10. Equity will enjoin the collection of the purchase price of land, when the vendee is in possession under a conveyance with covenants of general warranty, and the title is clearly shown to be defective, or is questioned by suit prosecuted or threatened. *Harvey v. Ryan*, 7: 445, 53 S. E. 7, 59 W. Va. 134.

(Annotated)

11. Collection of the purchase price of land the title to which has failed may be enjoined, irrespective of the insolvency of the vendor. *Harvey v. Ryan*, 7: 445, 53 S. E. 7, 59 W. Va. 134.

12. That an action of ejectment was pending against a grantor of land at the time he conveyed it with covenants of general warranty of title will not preclude the grantee from enjoining the collection of the purchase money after the grantor has been defeated in the ejectment suit. *Harvey v. Ryan*, 7: 445, 53 S. E. 7, 59 W. Va. 134.

13. The enforcement of a bond given for the purchase price of land will be enjoined, where the vendee, who entered into possession under a conveyance with covenants of general warranty, has been evicted in an action of ejectment brought by a stranger. *Harvey v. Ryan*, 7: 445, 53 S. E. 7, 59 W. Va. 134.

14. Equity is not deprived of jurisdiction to restrain the enforcement of a bond given for the purchase price of land the title

to which has failed, by a statute permitting defenses of failure of consideration, fraud in the procurement of a contract, or breach of warranty of title, to be interposed in an action at law on a sealed instrument, when the statute further provides that the party may, at his election, avail himself of his remedy in equity. *Harvey v. Ryan*, 7: 445, 53 S. E. 7, 59 W. Va. 134.

See also *infra*, 16.

15. A court of equity may enjoin criminal proceedings under a void law or ordinance, where property rights will be destroyed or greatly impaired. *New Orleans Baseball & A. Co. v. New Orleans*, 7: 1014, 42 So. 784, 118 La. —.

Enforcement of ordinance.

See also *supra*, 15.

16. The enforcement of a municipal ordinance excluding the erection or operation of baseball parks within certain limits may be restrained by injunction, where the ordinance is personal, arbitrary, and discriminatory in its character, the power of the city council to enact it as a police regulation is questionable, and it would injuriously affect property rights. *New Orleans Baseball & A. Co. v. New Orleans*, 7: 1014, 42 So. 784, 118 La. —.

INSTRUCTIONS.

See Appeal and Error, 9, 22-25; Trial, 29-35.

INSURANCE.

Secretary of local branch of fraternal society as agent of grand lodge for collection of assessments, see Benefit Societies, 5.

Conflict of laws as to insurance contract, see Conflict of Laws, 1, 2.

Measure of damages for wrongful cancellation of policy, see Damages, 2, 3.

By-laws.

1. A by-law of an insurance company that the mailing of notices of assessments may be conclusively shown by the certificate of an officer of the corporation who is not required to be personally cognizant of the fact is unreasonable and void. *Duffy v. Fidelity Mut. L. Ins. Co.* 7: 238, 55 S. E. 79, 142 N. C. 103. (Annotated)

Acceptance of policy.

2. The enumeration in the application for insurance in a mutual benefit association of certain exceptions from liability does not, by exclusion, prevent the operation of an exception of suicide contained in the insurer's by-laws, so as to render acceptance necessary to make binding a policy containing such exception, where the application makes the by-laws a basis of membership in the association. *Tuttle v. Iowa State Traveling Men's Asso.* 7: 223, 104 N. W. 1131, — Iowa. —.

3. No proposal for absolute indemnity is contained in an application for insurance which does not allude to the method of raising the fund, so as to render necessary an

acceptance of the policy, where it provides for the levying of an assessment to meet the obligation. *Tuttle v. Iowa State Traveling Men's Asso.* 7: 223, 104 N. W. 1131, — Iowa, —.

Sole ownership.

4. One holding real estate under a conveyance in fee is sole and unconditional owner, within the meaning of a fire-insurance policy, notwithstanding he owes a portion of the purchase price, for which the statute gives a vendor's lien. *Insurance Co. of N. A. v. Pitts*, 7: 627, 41 So. 5, — Miss. —. (Annotated)

Vacancy; reoccupation before loss.

5. Reoccupation, before the fire occurs, of an insured building after a vacancy, sufficient to avoid the policy under a condition against vacancy, revives the policy, so as to permit a recovery in case the fire occurs during the occupancy. *Insurance Co. of N. A. v. Pitts*, 7: 627, 41 So. 5, — Miss. —.

Forfeiture.

6. Failure for more than two years to make an attempt to secure relief from what is alleged to be an irregular forfeiture of a mutual benefit certificate, or to tender dues and assessments thereon, will be regarded as an acquiescence in the forfeiture. *Sheridan v. Modern Woodmen of America*, 7: 973, 87 Pac. 127, — Wash. —.

7. Under a clause in a note given for an insurance premium, that "for any loss occurring by death after this note is due and remains unpaid then said company shall not be liable," the policy is not forfeited by failure to make prompt payment, but the liability of the insurer is merely suspended during the default, permitting the insured by payment to restore the liability. *Kavanaugh v. Security Trust & L. Ins. Co.* 7: 253, 96 S. W. 499, — Tenn. —.

8. The mere mailing of a notice properly addressed and stamped is not, in the absence of a statute or contract provision, a compliance with a custom to give notice of the maturing of a note given for an insurance premium, where the letter never reaches its destination, although the custom has been to give notice by mail. *Kavanaugh v. Security Trust & L. Ins. Co.* 7: 253, 96 S. W. 499, — Tenn. —. (Annotated)

9. Where for eight years an insurance company has permitted an assignee of a policy to pay the annual premium by notes falling due quarterly, and has always notified him when a note was falling due, the policy cannot be forfeited for nonpayment of a note, unless the customary notice reached him. *Kavanaugh v. Security Trust & L. Ins. Co.* 7: 253, 96 S. W. 499, — Tenn. —.

10. The duty of an insured promptly to pay his premiums is complied with in case, through miscarriage of the mail, a customary notice of the maturity of a premium does not reach him, if, upon subsequently receiving notice, he promptly pays the premium due. *Kavanaugh v. Security Trust*

& L. Ins. Co. 7: 253, 96 S. W. 499, — Tenn. — (Annotated)

11. A single act of the clerk of a local camp of a mutual benefit society in attempting to contract notwithstanding a provision of the laws of the order that no act on his part shall have the effect of creating a liability on the part of the society, or of waiving any right belonging to it; which act consists of promising the representatives of an insane member to notify them of assessments,—will not bind the society so as to prevent its claiming a forfeiture of the certificate for nonpayment of dues, notice of which is regularly mailed to the representatives according to the promise. *Sheridan v. Modern Woodmen of America*, 7: 973, 87 Pac. 127, — Wash. —.

12. Insanity of a member of a mutual benefit society is no excuse for noncompliance with his contract as to payment of dues. *Sheridan v. Modern Woodmen of America*, 7: 973, 87 Pac. 127, — Wash. —.

Waiver and estoppel.

13. The principal of waiver and estoppel applies in case of fraternal or lodge insurance. *Trotter v. Grand Lodge, I. L. of H.* 7: 569, 109 N. W. 1099, — Iowa, —.

14. Where the secretary of the local lodge of a mutual benefit society is frequently away from home on the last day prescribed for payment of assessments on certificates, and for a long time has been in the habit of accepting payments any time prior to the date of transmitting the assessments to the supreme body, a rule of the order that failure to pay assessments on or before the last specified day shall of its own force suspend the certificate will be regarded as waived. *Trotter v. Grand Lodge, I. L. of H.* 7: 569, 109 N. W. 1099, — Iowa, —.

15. Waiver of the defense of suicide by an insurer is not effected by mailing blanks for proofs of loss with knowledge of the facts, under the express statement that they are for the convenience of the attorneys of the beneficiary, and with the distinct understanding that no rights are waived. *Tuttle v. Iowa State Traveling Men's Asso.* 7: 223, 104 N. W. 1131, — Iowa, —.

Cause of death.

16. Death from suicide which springs from an insane impulse of a disordered or insane mind is through external, violent, and accidental means, within the meaning of an accident insurance policy. *Tuttle v. Iowa State Traveling Men's Asso.* 7: 223, 104 N. W. 1131, — Iowa, —. (Annotated)

Voluntary exposure.

17. One running to a base while playing indoor baseball does not voluntarily expose himself to unnecessary danger, within the meaning of an accident insurance policy, by merely overrunning his base and relying on the wall of the building to stop him when he places his hands and feet against it. *Hunt v. United States Acci. Asso.* 7: 938, 109 N. W. 1042, — Mich. —.

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Who entitled to proceeds.

18. The terms of the charter of a mutual benefit society, and not those of the statute under which it was incorporated, and which might have been adopted, will control in determining who may become beneficiaries. *Murphy v. Nowak*, 7: 393, 79 N. E. 112, 223 Ill. 301.

19. Proof that a benefit society had adopted a statute limiting the class of its beneficiaries is not necessary in a contest over a fund, if facts showing the applicability of the statute are admitted by the pleadings. *Murphy v. Nowak*, 7: 393, 79 N. E. 112, 223 Ill. 301.

20. The right of one made beneficiary in a mutual benefit certificate as a dependent of assured to receive the proceeds of the certificate ceases upon her marrying and securing means of support other than the assured prior to his death, where by the laws of the order the fund can be paid only to dependents of deceased members. *Murphy v. Nowak*, 7: 393, 79 N. E. 112, 223 Ill. 301.

(Annotated)

21. A sufficient designation of beneficiary is effected where assured, in his application, directs the certificate to be issued in favor of his wife, subject to such future disposal as applicant may direct, and upon the back indorses an unsigned direction to make the certificate payable to the wife in trust for a person named, and accepts and recognizes as valid a certificate following such direction. *Murphy v. Nowak*, 7: 393, 79 N. E. 112, 223 Ill. 301.

22. The beneficiary in a mutual benefit certificate cannot complain of the application to the contract of a rule adopted after the certificate was issued, if the applicant expressly agreed at the time the certificate was issued that rules subsequently adopted should be applicable. *Murphy v. Nowak*, 7: 393, 79 N. E. 112, 223 Ill. 301.

Indemnity insurance.

Garnishment by employee of employer's liability insurance, see Garnishment.

23. A clause in a policy undertaking to indemnify assured against loss by reason of liability on account of injuries to employees, by which the insurer undertakes to defend proceedings against the assured, or settle the same, unless it elects to pay the provided indemnity to the assured, does not make the contract one guaranteeing payment of an obligation of the insured, rather than one of indemnity, where another clause of the policy provides that no action shall be brought against the insurer unless by the insured himself to reimburse him for loss actually sustained and paid, the former clause being merely an additional privilege for the protection of the insurer. *Allen v. Aetna L. Ins. Co.* 7: 958, 145 Fed. 881, 76 C. C. A. 265.

INTEREST.

The estate of an administrator is not chargeable with interest on a mortgage

which was part of the assets, which came into his possession and was paid, but not discharged, since the presumption is that it was promptly collected and included in the appraisal of assets. *Knapp v. Jessup*, 7: 617, 109 N. W. 666, — Mich. —.

INTOXICATING LIQUOR.

1. To sustain a conviction for violation of the local-option law the liquid sold must be shown to have been of sufficient alcoholic body to produce intoxication if drunk in reasonable quantities. *Potts v. State*, 7: 194, 97 S. W. 477, — Tex. Crim. App. —.

2. One cannot be convicted of selling intoxicating liquors on the testimony of a witness that he bought from accused a beverage called "lager beer." *Potts v. State*, 7: 194, 97 S. W. 477, — Tex. Crim. App. —. (Annotated)

INTOXICATION.

Duty toward intoxicated passenger, see Carriers, 8.

JETTIES.

Right of riparian owner to erect, see Waters, 6.

JOINT CREDITORS AND DEBTORS.

See Payment.

JOINT TENANCY.

See Cotenancy.

JUDGMENT.

Binding effect, on teacher not a party to appeal to superintendent of public instruction, of his decision, see Schools, 4.

The record of a judgment against one whose Christian name is Francis, if indexed under the name of Frank, charges a prospective purchaser from the judgment debtor's heirs with notice of the existence of the judgment. *Burns v. Ross*, 7: 415, 64 Atl. 526, 215 Pa. 293. (Annotated)

JUDICIAL NOTICE.

See Evidence, 1.

JURY.

Review of finding of fact by, see Appeal and Error, 16.

Discretion of trial court as to taking notes of testimony by, see Appeal and Error, 26.

Qualification of officers serving venire for summoning of, see Constable.

Sufficiency of evidence to carry case to, see Trial, 9-11.

A convict who has been released upon a conditional pardon, and is charged with having broken the condition, is not entitled, upon a hearing to determine whether or not the condition has been violated, to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted; but the court may, in its discretion, take the ver-

dict of a jury as to the facts involved. *State v. Horne*, 7: 719, 42 So. 388, — Fla. —.

LABOR ORGANIZATION.

Forbidding employer to exact agreement of employee not to join, see Constitutional Law, 6.

LACHES.

See Limitation of Actions, 2, 3.

LANDLORD AND TENANT.

Effect, on lessor of agreement of tenant to pay for easement, see Easements.

Binding effect on tenant after securing landlord's title, of previous acknowledgment that use of right of way was permissive, see Estoppel, 4.

Estoppel of tenant or subtenant to question lessor's title, see Estoppel, 11, 12.

Sufficiency of evidence to establish landlord's negligence, see Evidence, 50.

Leases.

1. Possession by the lessor is not essential to the validity of a lease, under statutes permitting the assignment of choses in action and the sale of an interest in land which is in adverse possession of another. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —.

Sublease.

2. A tenant need not be in possession in order to sublet. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —.

3. A decree canceling a lease, made by consent of the lessee's administrator and representatives of the lessor, in proceedings to which the sublessee is not a party, will not affect his rights under the sublease. *Mitchell v. Young*, 7: 221, 97 S. W. 454, — Ark. —. (Annotated)

Liability of landlord.

4. The mere fact that a property owner retains control of the roof and gutter of a building leased by him does not render him liable for injury to the tenant through their defective condition, if they remain in as good condition as when let. *Shute v. Bills*, 7: 965, 78 N. E. 96, 191 Mass. 433.

5. The owner of property is not liable for injury to his tenant due to a hidden defect in a gutter on the property, unless he knew or ought to have known of the defect. *Shute v. Bills*, 7: 965, 78 N. E. 96, 191 Mass. 433.

Landlord's lien.

6. A statute preserving a landlord's lien for one year after the year's rent falls due operates to bind crops of a sublessee for one year from the time the rent falls due upon the principal lease, and is not controlled by the terms of the contract between the tenant and sublessee. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —.

7. One purchasing crops from the sub-lessee of a farm takes them subject to the statutory lien for rent. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa, —.

LARCENY.

1. The trespass necessary to constitute larceny is absent where a property owner, upon being informed of a design to steal his property, places it upon a platform where the intending thief is planning to get it, with instructions to his servant in charge of the platform to deliver it to the one who will call for it, so that when the intended thief arrives he is treated as having a right to the property,—especially where another agent of the owner, sent to arrange for the taking of the property, has agreed to the place proposed by the thief under circumstances which involve a promise of assistance in carrying out the plan. *Topolewski v. State*, 7: 756, 109 N. W. 1037, — Wis. —. (Annotated)

2. To determine the degree of the crime of one who, by means of false connections, conveys gas around his meter and consumes it upon his property without having it measured, the taking during each day is not to be regarded as a separate offense, but the value of the gas wrongfully consumed during the period during which the false connection is in use at one time will be considered. *Woods v. People*, 7: 520, 78 N. E. 607, 222 Ill. 293. (Annotated)

3. A gas consumer who, by false connections, carries gas consumed on his premises around the meter so that it is not registered, may be prosecuted for larceny, notwithstanding a statute providing for the punishment of persons tampering or making false connections with gas pipes so that gas might be consumed without being registered by a meter. *Woods v. People*, 7: 520, 78 N. E. 607, 222 Ill. 293.

4. The selling, and not the cost, price, is to be considered in determining the value of gas stolen, for the purpose of fixing the degree of the crime. *Woods v. People*, 7: 520, 78 N. E. 607, 222 Ill. 293.

Of money obtained by fraud.

5. One who wrongfully obtains from a transportation company possession of baggage to which he is not entitled, by placing the wrong check on it with intent to appropriate it to his own use, is guilty of larceny. *Aldrich v. People*, 7: 1149, 79 N. E. 964, 224 Ill. 622.

6. The mere turning over by a transportation company, upon the mistaken supposition that he is entitled to its possession, of baggage to one claiming it, is not such a consent to the latter's possession as will prevent his being liable for larceny in case he has not such right. *Aldrich v. People*, 7: 1149, 79 N. E. 964, 224 Ill. 622. (Annotated)

7. The rule that, if the owner of goods parts with both the possession and title to another, not expecting their return or dis-

position in accordance with his directions, the one receiving them is not guilty of larceny, although he procures them by fraud, does not apply where the property is obtained from a transportation company having custody of it merely as bailee, by one wrongfully claiming title to it. *Aldrich v. People*, 7: 1149, 79 N. E. 964, 224 Ill. 622.

LEASE.

See Landlord and Tenant, 1-3.

LETTERS.

Proof of, when offered in evidence, see Evidence, 15, 16.

LEVY AND SEIZURE.

Sale of property of charity under execution on judgment for misfeasance or malfeasance of agents or trustees, see Charities, 9.

A base or conditional fee is subject to seizure and sale under execution against the one in whom it is vested. *Fordyce v. Woman's Christian Nat. Library Asso.* 7: 485, 96 S. W. 155, — Ark. —.

LIENS.

Landlords' liens, see Landlord and Tenant, 6, 7.

LIFE ESTATE.

See Wills, 3, 4, 6.

LIFE TENANTS.

Adverse possession against, see Adverse Possession, 6.

Estoppel of remainder-man by admission or acts of, see Estoppel, 13.

Merger of life estate in fee, see Merger, 2.

LIMITATION OF ACTIONS.

See also Adverse Possession, 3, 4, 6.

Limitation of time for presentation of state bonds, see Constitutional Law, 11.

1. A statute limiting the time for presentation of state bonds which have been overdue for a period of eighteen months, to six months from the time of notice, and which provides for publication of notice in a newspaper published at the capital city of the state, and for filing of copies with the secretaries of various boards of trade, is not unreasonable, and therefore does not impair the constitutional rights of a bondholder, although, by reason of absence from the country, he actually receives no notice of the statute until after the expiration of the limitation period. *Tipton v. Smythe*, 7: 714, 94 S. W. 678, 78 Ark. 392. (Annotated)

Laches.

2. Laches will not debar an heir from proceeding to test the validity of a trust created by the ancestor's will for the accumulation of a fund to establish a charity school. *Tincher v. Arnold*, 7: 471, 147 Fed. 665, 77 C. C. A. 649.

3. The defense of laches, though not applying, as a general rule, to an express trust, does apply to a constructive trust. *Newman v. Newman*, 7: 370, 55 S. E. 377, — W. Va. —. (Annotated)

When statute runs.

4. The running of the statute of limitations against one of several joint tenants will operate as a bar against all, although the remainder are under disability. *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21. (Annotated)

LIVERY STABLE.

Right of livery-stable keeper paying claim against himself and bailee for horse killed by latter to enforce bailee's primary liability, see *Payment*.

LOCAL OPTION LAWS.

See *Intoxicating Liquors*, 1.

LOTTERIES.

Giving of trading stamps by merchants as, see *Municipal Corporations*, 2, 3.

LYNCHING.

Sufficiency of indictment for conspiracy to lynch, see *Indictment*, 2.
Statute for punishment of, see *Statutes*, 1.

MALICIOUS PROSECUTION.

Minor children who, in the belief that they were at liberty to do so, took a few pieces of old, decayed boards from an abandoned building which was being demolished, and who were subsequently arrested and prosecuted for malicious mischief, but acquitted, may maintain an action to recover exemplary damages for unlawful arrest and for malicious prosecution. *Sperier v. Ott*, 7: 518, 41 So. 323, 116 La. 1087.

MANDAMUS.

To court.

1. Mandamus lies to compel a trial court to proceed with a cause of which it has jurisdiction. *State ex rel. Aldrich v. Morse*, 7: 1127, 87 Pac. 705, — Utah, —.

To street superintendent.

2. One who has purchased the rails of a street railway imbedded in the street, knowing that, under the municipal ordinance, he cannot remove them without authority from the street superintendent, cannot compel the issuance of such permit by mandamus, since the officer has a discretionary power to issue it or not according to its effect upon the interests of the public in the street. *French v. Jones*, 7: 525, 78 N. E. 118, 191 Mass. 522.

3. A street commissioner who has refused to permit the tearing up of a street for the purpose of removing the rails of a street-railway system therefrom, actuated merely by the hope that someone will operate the road, without considering the only questions within his power, as to the inter-

ference of the tearing up of the street with public travel and its effect upon the pavement, may be compelled by mandamus to hear and determine such questions. *French v. Jones*, 7: 525, 78 N. E. 118, 191 Mass. 522. (Annotated)

MANDATORY INJUNCTION.

See *Injunction*, 7.

MANSLAUGHTER.

As ground for divorce, see *Divorce*, 4.

MARKET QUOTATIONS.

See *Exchanges*.

MARRIAGE.

Specific performance of contract as to marriage settlement, see *Specific Performance*, 1, 2.

MASTER AND SERVANT.

Statute forbidding master to stipulate that servant shall not belong to labor union, see *Constitutional Law*, 6.

When relation exists.

Burden of proof as to authority of conductor to employ assistant, see *Evidence*, 6.

1. That an apprentice nurse is working for the opportunity of learning the trade, and receives only small wages in addition, does not deprive her of the rights of an employee. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 558.

2. The conductor of a freight train has no implied authority to engage the services of a person to assist in handling freight for which he is to receive passage on the train, so as to entitle such person, in case of his injury, to hold the carrier liable as an employer. *Vassor v. Atlantic Coast Line R. Co.* 7: 950, 54 S. E. 849, 142 N. C. 68.

Duty to servant generally.

Liability of hospital for negligent injury to servant, see *Charities*, 6, 7.

Contract by employee relieving master from liability for negligent injuries see *Contracts*, 6.

Evidence to show negligence in action for death of servant, see *Evidence*, 36, 37.

Proximate cause of injury to servant, see *Proximate Cause*, 5-7.

Question for jury as to negligence of master, see *Trial*, 23-26.

3. That at the time of seeking service an employee represents herself to be older than she is does not relieve the employer of its ordinary duty to her as its employee. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 558.

4. A proprietor of a laundry, after notice that an employee has caught her fingers between the rollers of an ironing mangle which she is operating, is bound to exercise ordinary care to release her and alleviate her suffering; and the fact that the employee contributes to the injury by

her own negligence in assuming the risks of operating the machine does not affect the rule. *Raasch v. Elite Laundry Co.* 7: 940, 108 N. W. 477, 98 Minn. 357.

(Annotated)

5. Upon failure of a railroad company promptly to furnish an injured employee free transportation to its hospital, to which he is entitled under his contract, he cannot, in case he has in his possession the means of paying for the transportation, hold the company liable for pain and suffering due to delay in reaching the hospital. *St. Louis S. W. R. Co. v. Reagan*, 7: 997, 96 S. W. 168, — Ark. — (Annotated)

Duty to warn.

6. A hospital, upon assigning an inexperienced nurse to attend a patient sick from a contagious disease, is bound to inform her of the dangerous character of the service. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 556.

Duty as to place.

7. A mine owner, upon learning of the existence of water in a neighboring mine in such quantities as to be dangerous to his employees, is bound to make such investigation as would suggest itself to one using ordinary care and prudence, and, upon learning that there is danger of his mine becoming flooded, to make such provision for the safety of his employees as would occur to a person of ordinary prudence, or inform his employees of the impending danger. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —

Unlawful employment of children.

8. The employment of a child in a factory in violation of the provisions of the statute is evidence of negligence in an action by the child to recover for personal injuries inflicted by a machine in the factory. *Rolin v. R. J. Reynolds Tobacco Co.* 7: 335, 63 S. E. 891, 141 N. C. 300. (Annotated)

Contributory negligence of servant.

Question for jury as to, see Trial, 20.

9. A railroad employee injured while crossing the track for the purpose of carrying ice to a car, on a clear day, and at a point where he could have seen an approaching locomotive and tender for a quarter of a mile, cannot recover damages, although the employees in charge of the engine ought to have discovered, but did not discover, his peril in time to prevent the accident, where his negligence continued up to the moment he was hurt, and the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape. *Dyerson v. Union P. R. Co.* 7: 132, 87 Pac. 680, — Kan. — (Annotated)

10. A railroad employee injured while attempting to cross a track for the purpose of icing a car, the circumstances not requiring the crossing to be made at a particular time or place, is not within the rule that an employee who is engaged in the discharge of a duty the performance of which requires him to be near or on the track need not keep a strict watch for approaching

trains in order to be deemed to be exercising reasonable care for his own protection. *Dyerson v. Union P. R. Co.* 7: 132, 87 Pac. 680, — Kan. —

11. That a railroad employee, in the performance of his duties, has frequent occasion to cross the track, does not relieve him from the duty of looking in both directions for an approaching train before undertaking to cross; nor is he relieved from such duty by the fact that the rule and practice of the company to run trains along the track only in one direction, except under unusual circumstances, has been changed without notice to him. *Dyerson v. Union P. R. Co.* 7: 132, 87 Pac. 680, — Kan. —

Fellow servants.

12. One engaged in digging a trench for a gas main across a public street at night, and the foreman in charge of the gang, are fellow servants, so that the master is not liable for injuries to the former through the failure of the latter to inform him that more cars may be expected on the tracks laid in the street, or in failing to keep watch and warn him of the approach of a car which strikes him. *Gereg v. Milwaukee Gas Light Co.* 7: 367, 107 N. W. 289, 128 Wis. 35.

13. The act of a pit boss in assisting a miner to run cars out of his room to be taken to the pit mouth is that of a fellow servant, and not of a vice principal. *Cavanaugh v. Centerville Block Coal Co.* 7: 907, 109 N. W. 303, — Iowa, —

14. A train despatcher of a railroad company, whose duty is to issue telegraphic orders for the movement of trains upon a single-track road, in the name of the superintendent, and to see that they are transmitted, is not a fellow servant of a fireman upon one of the locomotives of the company. *Riker v. Central R. Co.* (N. J. Err. & App.) 7: 650, 64 Atl. 1068, — N. J. — (Annotated)

Liability to third person.

Liability of trustees of charity for acts of servant, see Charities, 8.

Sale of property of charity on judgment for misfeasance of agents or trustees, see Charities, 9.

15. The negligence of the lineman of an electric light company in reporting that a circuit upon which a wire had been grounded, and which he had been sent to clear, was cleared, without having remedied the trouble, is imputable to the company. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

16. A mine owner is not liable for the negligent act of the pit boss in assisting a miner who was to be paid for the amount of coal delivered, in replacing a loaded car on the track, where the mine owner owed the injured person no duty with respect to such service. *Cavanaugh v. Centerville Block Coal Co.* 7: 907, 109 N. W. 303, — Iowa, —

17. The malicious acts of an agent of a railway company, who persuaded persons

receiving freight to refuse to employ a licensed drayman who had theretofore transported their freight for them, will not impose liability upon the railway company, unless such acts were expressly authorized by it, or were within the scope of the agent's employment, or, if beyond the scope of his employment, were approved and ratified by the company after a full knowledge of his conduct. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

18. A railway company is liable for damages sustained by a licensed drayman who had contracts with merchants to haul their freight from the depot to their places of business, where the agent of the railway company, knowing of the existence of such contracts, wilfully and maliciously refused to deliver to the drayman goods of such merchants, notwithstanding orders, oral and written, that he should do so. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404. (Annotated)

19. A railway company is liable to one who goes to its depot to deal with its agent as to matters connected with the business of the company, and who is insulted and humiliated by the language and conduct of the agent; but if the insult results from the agent's conduct at a place other than that to which the public is invited by the establishment of the agency, the company is not liable, unless the agent's misconduct is authorized or ratified by it. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

MAXIMS.

1. *Aqua currit et debet currere, ut currere solebat.* *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

2. *Audi alteram partem.* *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 27.

3. *Cessante ratione, cessat ipsa lex.* *Cooke v. Doron*, 7: 659, 64 Atl. 595, 215 Pa. 393.

4. *Expressio unius est exclusio alterius.* *Cameron v. Hicks*, 7: 407, 53 S. E. 728, 141 N. C. 21.

5. *Ex turpi causa, non oritur actio.* *Standard Lumber Co. v. Butler Ice Co* 7: 467, 146 Fed. 359, 76 C. C. A. 39.

6. *Mobilia sequuntur personam.* *Eoff v. Kennefick*, 7: 704, 96 S. W. 986, — Ark. —.

7. *Necessitas publica major est quam privata.* *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

8. *Nemo plus juris ad alium transferre potest quam ipse habet.* *Wasserman v. Metzger*. 10: 1019, 54 S. E. 893, 105 Va. 744.

9. No man should be condemned unheard. (*Audi alteram partem.*) *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 27.

10. Prior in time, prior in right. *Wasserman v. Metzger*, 7: 1019, 54 S. E. 893, 105 Va. 744.

11. *Qui facit per alium facit per se.* 7 L.R.A. (N.S.)

Smith v. Moore, 7: 684, 55 S. E. 275, 142 N. C. 277.

12. *Qui hæret in litera, hæret in cortice.* *Tincher v. Arnold*, 7: 471, 147 Fed. 873, — C. C. A. —.

13. *Respondeat superior.* *Farrigan v. Pevear*, 7: 481, 78 N. E. 855, — Mass. —.

Fordyce v. Woman's Christian Nat Library Assoc. 7: 485, 96 S. W. 155, — Ark. —.

14. *Res ipsa loquitur.* *Vassor v. Atlantic Coast Line R. Co.* 7: 950, 54 S. E. 849, 142 N. C. 68.

15. *Sic utere tuo ut alienum non lædas.* *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151 — Or. —.

Durham v. Eno Cotton Mills, 7: 321, 54 S. E. 453, 141 N. C. 615.

16. *Statuta suo clauduntur territorio, nec ultra territorium disponunt.* *New York Foundling Hospital v. Gatti*, 7: 306, 79 Pac. 231, — Ariz. —.

17 The safety of the people is the supreme law. *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

MENTAL ANGUISH.

Recovery of damages for, see Damages, 10, 11.

MERGER.

Acquisition by ultimate remainder-man of life estate, see Adverse Possession, 5.

Burden of proof as to, see Evidence, 3.

1. A merger of rights running in favor of odd-numbered water lots under a covenant in a deed imposing upon the even-numbered lots the burden of maintaining a dam and race is not prevented, where one person acquires title to all the lots in the tract, by the subsequent incorporation by the legislature of a water-lot company upon which power is conferred to purchase, hold, and convey the property, which the survivors are authorized to sell in case of the death of one or more of the parties in interest. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 7: 1139, 54 S. E. 1028, 126 Ga. 210.

2. The acquisition of the life estate by the reversioner will merge the fee in him and cut out an intermediate contingent remainder, unless an intention that it shall not do so appears. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

(Annotated)

3. Merger will not take place, even at law, upon the uniting of a particular estate and the fee in the same person, if opposed to the intention of the parties affirmatively appearing or to be implied from the fact that merger would be opposed to the interest of the party in whom the different estates or interests become united. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

MILEAGE BOOKS.

Requiring sale of, at certain price, see Constitutional Law, 5.

MINES.

Adverse possession of coal in state of nature, see Adverse Possession, 4.
 Bill to quiet title to, see Cloud on Title, 10.

Duty of master as to condition of, see Master and Servant, 7.

Liability of mine owner for negligence of pit boss, see Master and Servant, 16.

Claims; location.

1. A location of a mining claim which complies with the act of Congress, but fails to comply with the local statute as to form and record of notice, will, upon the repeal of the local statute, become valid if the required assessment work has been and is continued. *Dwinnell v. Dyer*, 7: 763, 78 Pac. 247, 145 Cal. 12. (Annotated)

2. The order in which the acts for the location of a mining claim have been done is immaterial where every act necessary to a complete location has been done before an adverse claim has accrued. *Dwinnell v. Dyer*, 7: 763, 78 Pac. 247, 145 Cal. 12. (Annotated)

3. A statute making null and void a mining location which does not comply with its requirements as to marking of boundaries, applies only in favor of conflicting claimants, and does not prevent a correct marking before adverse claims attach. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —. (Annotated)

4. The subsequent discovery of mineral-bearing ore validates the location of a mining claim invalid for want of such discovery, in the absence of intervening rights. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —. (Annotated)

Abandonment.

5. Mining locators who have not perfected their title, who attempt to point out to another unlocated land, and, after he has selected it, place the stakes of the location for him, will, after they have permitted him to improve it at great expense until he has discovered paying ore, be held to have abandoned their claim so far as it conflicts with the later location. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —.

Conflicting claims.

Binding effect on partner of act of copartner permitting location of conflicting claim, see Partnership, 5.

6. The issuance of a patent to a mining claim is conclusive to establish all facts necessary to its validity as against one claiming adverse rights. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —.

MISCARRIAGE.

Resulting from fright, see Fright, 2.

MISNOMER.

Of beneficiary in will, see Wills, 2.
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MONOPOLY.

In patent medicine, see Patent Medicines.

MORTGAGE.

Of infant's property, see Infants, 2-4.
 Estoppel of beneficiary in deed of trust by negligence, see Estoppel, 7.

Estoppel of beneficiary in deed of trust by receiving benefits, see Estoppel, 10.

Admissibility against or in favor of mortgagee of statements by mortgagor, see Evidence, 29, 31.

Pledge of, as collateral security, see Trusts, 7.

Power to mortgage trust estate, see Trusts, 8.

1. Notwithstanding the statute provides that a mortgage of real estate shall not be deemed a conveyance whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure, a court of equity may, pending foreclosure, impound the rents and profits to be applied in reduction of the debt,—especially, where the rents and profits were pledged in the mortgage to the payment of the debt, in consideration of the release by the mortgagee of other security. *Moncrieff v. Hare*, 7: 1001, 87 Pac. 1082, — Colo. —. (Annotated)

2. One to whose trustee the equity of redemption of real estate has been conveyed while the title is in trustees for a mortgagee, and who has not paid more than one sixth of the purchase money, cannot be regarded as a bona fide purchaser entitled to protection against an attempt to set aside a fraudulent sale under a deed of trust in the chain of title; and the fact that he assumed the outstanding mortgage is immaterial, since his undertaking will fall if the consideration fails. *Wasserman v. Metzger*, 7: 1019, 54 S. E. 893, 105 Va. 744. (Annotated)

3. The beneficiary in a deed of trust of real estate to secure notes may procure the setting aside of a sale made in violation of the terms of the trust, as against a purchaser at the sale who was a party to the fraud. *Wasserman v. Metzger*, 7: 1019, 54 S. E. 893, 105 Va. 744.

4. The bidding in of the property, by one who has taken an assignment of a mortgage as collateral security, at his own foreclosure sale, gives him a good title to the property, and transfers the trust in favor of his debtor to the proceeds, although such assignor, because not within the jurisdiction, was not made a party to the proceedings; where, in a contract after the sale, assignor and assignee contracted for a settlement, one element of which was that the foreclosure proceedings should not be disturbed. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179. (Annotated)

MUNICIPAL CORPORATIONS.

- Estoppel to require removal of street railway tracks, see Estoppel, 1.
 Estoppel to assert title to portion of street, see Estoppel, 2.

Ordinances.

- Validity of ordinance to open street for accommodation of private business, see Highways, 1.
 Injunction against proceedings under void ordinance, see Injunction, 16.

1. A property owner may, upon an attempt by a municipal corporation to apply a street-opening ordinance to the injury of his property rights, show, if possible, that its passage was obtained by fraud or other unlawful means, or for an unlawful purpose. *Kansas City v. Hyde*, 7: 639, 96 S. W. 201, 196 Mo. 498. (Annotated)

2. An ordinance forbidding merchants to give out trading stamps in their business is not authorized by constitutional and statutory provisions making lotteries and gift enterprises unlawful. *Denver v. Frueauff*, 7: 1131, 88 Pac. 389, — Colo. — (Annotated)

3. A municipal council cannot, by arbitrarily defining the giving out of trading stamps as a gift enterprise, bring it within the statutory prohibition of such enterprises. *Denver v. Frueauff*, 7: 1131, 88 Pac. 389, — Colo. —

Liability for damages.

- Liability for injury due to fall on slippery sidewalk, see Highways, 7.

4. A municipal corporation maintaining an electric-light plant, which for compensation installs in a business place a light which is imperfectly insulated, is liable to an employee of the consumer for injuries caused by his coming in contact with an electric current when, to warm his hand, he puts it to the globe. *Thomas v. Somerset*, 7: 963, 97 S. W. 420, — Ky. —

5. A municipal corporation which permits the maintenance of a prominent thoroughfare in constant use by pedestrians of an aperture covered with iron doors of such character that one may be opened without any guard to protect the hole is liable for an injury caused to a pedestrian who fell through an opening left by the raising of one door, although it had no actual knowledge of the negligent use being made of the opening at the time of the accident, and the cover had been raised only a few minutes, so that it was not chargeable with notice. *Hayes v. Seattle*, 7: 424, 86 Pac. 852, — Wash. — (Annotated)

MUTUAL BENEFIT ASSOCIATION.

- Insurance by, see Insurance.

NAVIGATION.

- Negligence in, see Negligence, 2.

NECESSARIES.

- What constitutes, see Husband and Wife, 2.

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NEGLIGENCE.

- In blasting, see Blasting.
 Of landlord, see Landlord and Tenant, 4, 5.

Of carrier, see Carriers.

Contributory negligence of passenger, see Carriers, 9-11.

With respect to electricity, see Electricity.

Estoppel by, see Estoppel, 7, 8.

Burden of proving that illness of passenger induced to leave car at wrong place resulted from exposure, see Evidence, 9.

Presumption of, where passenger is permitted to leave street car at wrong place, see Evidence, 10.

Sufficiency of evidence to establish, see Evidence, 50.

Causing fright; liability for consequences, see Fright, 1, 2.

Unlawful employment of child as, see Master and Servant, 8.

Liability of municipal corporation for, see Municipal Corporations, 4, 5.

Sufficiency of complaint in action for, see Pleading, 2-5.

As to proximate cause, see Proximate Cause.

In operation of street railways, see Street Railways.

Question for jury as to, see Trial, 14, 16, 18-26.

1. To entitle one to a trial of the question of another's negligence which resulted in injury, it is not necessary that the effect of the act or omission complained of would in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner. *Baltimore & O. S. W. R. Co. v. Slaughter*, 7: 597, 79 N. E. 186, — Ind. —

On waters.

2. Those in charge of a steamship creating waves which endanger the lives of the occupants of a small boat near it are bound to stop the normal operation of their boat until the small boat has passed out of the zone of danger. *Daniels v. Carney*, 7: 920, 42 So. 452, — Ala. — (Annotated)

Of infant.

3. A child under twelve years of age is presumed to be incapable of so understanding and appreciating danger from attempting to remove an article from a machine at rest as to make him guilty of contributory negligence and bar his recovery in case the machine is started to his injury. *Rolin v. R. J. Reynolds Tobacco Co.* 7: 335, 53 S. E. 891, 141 N. C. 300.

Imputed.

Imputing negligence of servant to master, see Master and Servant, 15.

4. The act of a boy in wrongfully grounding an electric-light current is not imputable to his father, so as to prevent a recovery against the electric company in

case the father is killed by innocently coming in contact with the current, which the company negligently turns onto the circuit without employing means in its control to ascertain whether or not the ground which it has known to exist has been remedied. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

NEGROES.

Rights in cemetery, see Cemeteries.

NONRESIDENTS.

Taxation of property of, see Taxes, 3.

NOTICE.

Of maturity of premium, see Insurance, 8, 9.

Mistake in Christian name in record of judgment as affecting, see Judgment.

1. Notice to an attorney who has received an assignment of a portion of a judgment to secure his compensation of bankruptcy proceedings against the judgment debtor is not notice to the judgment creditor, so as to bind him by the bankruptcy proceedings. *Strickland v. Capital City Mills*, 7: 426, 54 S. E. 220, 74 S. C. 16.

2. Notice of the pendency of bankruptcy proceedings to an attorney who is employed to prosecute a claim against the bankrupt in the state courts is not notice to a duly authorized attorney, within the meaning of the bankruptcy law, so as to bind the creditor by the bankruptcy proceedings in which his claim was not scheduled, where the attorney has no authority to represent the creditor in the bankruptcy proceedings. *Strickland v. Capital City Mills*, 7: 426, 54 S. E. 220, 74 S. C. 16.

3. A bank depositor who intrusts the examination of the pass books and returned vouchers to an agent, who has been guilty of raising its checks, is charged with such knowledge as he has in making the examination. *First Nat. Bank v. Richmond Electric Co.* 7: 744, 56 S. E. 152, — Va. — (Annotated)

4. Knowledge by one in charge of the sales agency of another, who resides in another state, that he is overdrawing the bank account of the agency, is not notice to the principal. *Merchants' Nat. Bank v. Nichols & S. Co.* 7: 752, 79 N. E. 38, 223 Ill. 41.

NUISANCES.

Rooms where bets are made as, see Betting, 2.

Railroad constructed partly for private use as, see Highways, 5.

Jurisdiction of equity to abate, see Injunction, 2, 3.

The maintenance of howling and barking dogs and whining puppies on neighboring premises, to the great and continuous annoyance and discomfort of a property holder and his family, so that their rest is broken, sleep interrupted, and their reasonable use and enjoyment of their home 7 L.R.A.(N.S.)

disturbed, is a nuisance subject to be enjoined. *Herring v. Wilton*, 7: 349, 55 S. E. 546, — Va. — (Annotated)

NUNC PRO TUNC.

Showing exception by, see Appeal and Error, 1.

NURSE.

Liability of hospital for injury to, see Master and Servant, 1, 6.

OFFICERS.

See also Police Officers.

Arrest by police officer without warrant outside of jurisdiction. see Arrest, 2, 3.

Liability for false imprisonment, see False Imprisonment, 5-7.

Liability for search of person without warrant, see Search and Seizure.

1. Want of business capacity or familiarity and experience with business affairs and banks will not absolve a public official from liability for loss of public funds deposited in an insolvent bank because thereof. *State use of Fentress County v. Reed*, 7: 1084, 95 S. W. 809, 116 Tenn. 110.

2. Mere inquiry of the general public, or of the business men of the community where a bank does business, as to its solvency and the integrity of its officers, will not absolve a public official from liability for loss of public funds deposited in the institution through its insolvency. *State use of Fentress County v. Reed*, 7: 1084, 95 S. W. 809, 116 Tenn. 110. (Annotated)

3. A public official who is also a director of the bank is bound, before depositing public funds therein, to utilize the opportunities given him by his position as director to ascertain the condition of the bank. *State use of Fentress County v. Reed*, 7: 1084, 95 S. W. 809, 116 Tenn. 110. (Annotated)

OPINIONS.

Opinion evidence, see Evidence, 21-23.

ORDINANCES.

Restraining enforcement of, see Injunction, 15, 16.

See also Municipal Corporations, 1-3.

OVERDRAFTS.

See Banks, 2; Estoppel, 8.

PARDON.

See Criminal Law, 6-12.

Effect of, on divorce, see Divorce, 3.

PAROL MORTGAGE.

See Chattel Mortgage, 2.

PARTIES.

Action by wife for injury to person by one trespassing on husband's property, see Husband and Wife, 11.

1. A bank for whose benefit a note is taken in the name of its president, and which has always had exclusive ownership

and possession of it, may maintain an action thereon in its own name as the real party in interest, notwithstanding the statute provides that an action may be maintained by a trustee of an express trust, which will include a person in whose name a contract is made for the benefit of another. *Best v. Rocky Mountain Nat. Bank*, 7: 1035, 85 Pac. 1124, — Colo. —.

2. A son who is a party to the contract may enforce the provision in marriage articles entered into by his father in contemplation of the son's marriage, which is subsequently consummated, to make no discrimination against him by will in favor of the other children. *Phalen v. United States Trust Co.* 7: 734, 78 N. E. 943, 186 N. Y. 178.

3. A bank having a right, under the statute, to pay the taxes assessed on its stock, may maintain an action in its own name to recover back money illegally exacted as taxes. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641.

PARTNERSHIP.

1. A parol agreement between two persons to purchase a single tract together or "in partnership" does not create a partnership, where the purchase is finally made by one of them, who pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him half thereon on demand. *Norton v. Brink*, 7: 945, 110 N. W. 669, — Neb. —.

2. The managing partner of a mining claim possesses sufficient authority from his co-owners to bind them by his negligence in permitting the location of a conflicting claim and its improvement until paying ore is discovered, so that the partners cannot subsequently assert their rights to the land within the conflicting location. *Sharkey v. Candiani*, 7: 791, 85 Pac. 219, — Or. —.

PATENT.

Conclusiveness of patent to mining claim, see Mines, 6.

PATENT MEDICINES.

Conspiracy to maintain prices, see Conspiracy, 2, 3.

The owner of a proprietary medicine may lawfully fix the price and name the terms and conditions, at and upon which alone he will supply his product to the trade, refusing to deal with those who refuse to comply with such conditions. *Jayne v. Loder*, 7: 984, 149 Fed. 21, — C. C. A. —.

PAYMENT.

Assumpsit to recover taxes paid under protest, see Assumpsit.

Of claims by administrators, see Executors and Administrators.

Payment by a livery-stable keeper to whom a horse had been loaned for use, of a claim by the owner against himself and his bailee for the value of the horse which, was killed by the negligence of the latter, will preclude further proceedings *7 L.R.A.(N.S.)*

against the bailee upon the owner's claim, although the stable keeper takes an assignment of it for the purpose of enforcing the primary liability of the bailee. *Tanner v. Bowen*, 7: 534, 85 Pac. 876, — Mont. —. (Annotated)

PHOTOGRAPHS.

See also Portrait.

Action to compel destruction of picture taken for rogues' gallery, see Action or Suit, 1.

Admissibility in evidence, see Evidence, 19.

The destruction of photographs taken under the direction of the police authorities, of a person accused of but not yet convicted of crime, with the intention of placing them in the rogues' gallery, should be directed when the portraits are not necessary to prove his guilt, identify his person, or guard against escape. *Schulman v. Whitaker*, 7: 274, 42 So. 227, 117 La. 703.

(Annotated)

PHYSICIANS AND SURGEONS.

Pain and suffering as element of damages for performance of unauthorized operation, see Damages, 7.

1. The consent by a man to an operation upon his insane wife upon taking her to a hospital is exhausted when the operation is performed and she is taken away, so as not to justify another operation if she subsequently returns to the institution. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

2. Consent by a man to an operation upon his wife for the removal of her uterus and ovaries is not shown by the fact that, after an operation of a minor nature to which he consented, which did not prove successful, he complied with a direction to bring his wife again to the surgeon for treatment. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

3. When a patient consents to an operation, and unexpected conditions develop, or are discovered in the course of the operation; or when a surgeon is called in an emergency, and some immediate action is found necessary for the preservation of the life or health of the patient,—where it is impracticable to obtain the consent of the patient or anyone authorized to speak for him, the surgeon may perform such operation as good surgery demands, without consent. *Pratt v. Davis*, 7: 609, 79 N. E. 562, 224 Ill. 300.

4. Failure to obtain the father's consent before administering an anæsthetic to a youth seventeen years old, who, in company with adult relatives, has applied to a surgeon to be relieved of a small tumor, will not render the surgeon liable to the father for the death of the boy under its influence. *Bakker v. Welsh*, 7: 612, 108 N. W. 94, — Mich. —. (Annotated)

PIPE LINE.

As additional servitude in highway, see Eminent Domain, 6.

PLEADING.**Amendment.**

1. No departure in a suit to quiet title to real estate is effected by an amendment seeking to estop defendant from questioning plaintiff's title on the ground that a deed in plaintiff's chain of title had never been delivered, for the reason that defendant claiming under the grantor in the undelivered deed had taken no steps to cancel the record of it, although the bill proceeded merely on the statutory grounds for such action. *Alabama Coal & C. Co. v. Gulf Coal & C. Co.* 7: 712, 40 So. 397, — Ala. —.

Sufficiency of plaintiff's pleadings.

2. The complaint in an action to hold the owner of a steamship liable for injuries caused to the occupants of a small boat by its negligent management must allege that at the time of the accident those in charge of the boat were acting within the scope and line of their authority. *Daniels v. Carney*, 7: 920, 42 So. 452, — Ala. —.

3. A complaint in an action to hold the owner of a steamship liable for negligence in its operation so as to cause the capsizing of a small boat by the waves generated by it after knowledge of the peril of the small boat must allege not only that the small boat was actually seen by those in charge of the steamboat, it not being sufficient to allege that it was in plain sight of them, but also that the peril was known to them. *Daniels v. Carney*, 7: 920, 42 So. 452, — Ala. —.

4. The complaint in an action for injuries resulting from the frightening of plaintiff's horse is not rendered demurrable by failure to allege that the horse was one of ordinary gentleness, if the injury is charged to have been caused by the negligent acts of defendant, the particulars of which are stated. *Baltimore & O. S. W. R. Co. v. Slaughter*, 7: 597, 79 N. E. 186, — Ind. —.

5. Failure to allege that a hand car and articles thereon were calculated to frighten horses of ordinary gentleness does not render the complaint demurrable, in an action to recover damages for leaving such car and articles near a railroad crossing, which resulted in the frightening of plaintiff's horses, and consequent injury, where it is alleged that defendant carelessly and negligently placed the car upon the crossing, and obstructed the free use of it, as a direct result of which the accident was caused. *Baltimore & O. S. W. R. Co. v. Slaughter*, 7: 597, 79 N. E. 186, — Ind. —.

6. In an action by a consumer of water to recover damages against a water company which had wrongfully cut off his supply, an averment in the petition, that the company has a monopoly of the business, is not irrelevant and impertinent, since it

discloses the pertinent fact that the consumer is wholly dependent on the company for his supply. *Freeman v. Macon Gas Light & W. Co.* 7: 917, 56 S. E. 61, 126 Ga. 843.

7. An averment in a petition in an action brought against a water company by a consumer to recover damages for the company's wrongful act in cutting off his water supply, that the company acted "without legal cause," is an allegation to the effect that the company, without any justification, wrongfully discontinued to serve him, and is not demurrable as a mere conclusion of law. *Freeman v. Macon Gas Light & W. Co.* 7: 917, 56 S. E. 61, 126 Ga. 843.

PLEDGE AND COLLATERAL SECURITY.

Of mortgage as collateral security, see Mortgage, 4; Trust, 7.

POLICE.

Arrest by, without warrant, outside of jurisdiction, see Arrest, 2, 3.

A police officer has only such powers as are given him by statute, since such officer was not known to the common law. *Martin v. Houck*, 7: 576, 54 S. E. 291, 141 N. C. 317.

POLICE POWER.

See Constitutional Law, 10.

POLITICAL RIGHTS.

Injunction to protect, see Injunction, 2

POLLUTION.

Of water, see Waters, 8.

PORTRAIT.

Right of artist filling order for, to duplicate, see Contracts, 1.

PREJUDICIAL ERROR.

See Appeal and Error, 16-25.

PRESUMPTIONS.

See Evidence.

PRINCIPAL AND AGENT.

Presumption that possession of agent is permissive, see Adverse Possession, 2.

Overdrafts by agent on principal's bank account, see Banks, 2.

Estoppel of principal to deny liability for overdraft by agent, see Estoppel, 8.

Notice to agent as notice to principal, see Notice, 3, 4.

1. One authorized to collect the rent due on a farm has authority to make a demand upon persons who have purchased crops gathered upon it, for the value thereof. *Beck v. Minnesota & W. Grain Co.* 7: 930, 107 N. W. 1032, — Iowa —.

2. Placing one in charge of a sales agency of a manufacturing concern with supervision of sales and local agents does

not confer the implied power to borrow money for the concern; and it is immaterial that the principal is a corporation. *Merchants' Nat. Bank v. Nichols & S. Co.* 7: 752, 79 N. E. 38, 223 Ill. 41.

PRIVACY.

Invasion of, by taking photograph for rogue's gallery, see Courts, 2; Photographs.

PRIVATE WAY.

See Easements; Estoppel, 4; Evidence, 11, 12.

PRIVILEGED COMMUNICATIONS.

See Evidence, 26.

PROXIMATE CAUSE.

Of death by electricity.

1. An electric light company which negligently permits its current to be grounded cannot escape liability for the death of one who innocently comes in contact with it at a point where a stranger has made another ground, on the theory that the particular injury could not have been anticipated by any reasonable man. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

Of injury to passenger.

2. The intoxication of a passenger may be found by the jury not to be a direct and proximate cause of his injury, so as to relieve the carrier from liability for injury to him in consequence of his being removed from the train by employees and left upon a flight of steps, down which he falls to his injury because of his inability to care for himself. *Black v. New York, N. H. & H. R. Co.* 7: 148, 79 N. E. 797, — Mass. —.

3. The negligent conduct of a street-car conductor in calling a street crossing before his car had arrived at the street announced, thereby inducing a lady passenger to alight, at night and during a severe rain storm, at a strange place remote from her destination, is to be regarded as the proximate cause of injuries sustained by reason of her slipping and falling upon a curbstone which she was unable to see, because of the darkness, while endeavoring with due care to make her way homeward along a street with which she was unfamiliar. *Georgia R. & E. Co. v. McAllister*, 7: 1177, 54 S. E. 957, 126 Ga. 447. (Annotated)

Of injury by street car.

4. Whatever negligence exists on the part of one in walking along a street car track in the direction in which the cars move, without constantly watching for the approach of cars, is not the proximate cause of his being run down by a car running at high speed, with no attention by the motorman to the track in front of his car, where the pedestrian is guilty of no negligence in failing to hear the car because of noise made by a car on a parallel track. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —. 7 L.R.A.(N.S.)

Of injury to servant.

5. The jury may find that the employment, contrary to statute, of a child in a factory, was the proximate cause of his injury by the starting of the machine by another child after he had put his hand into it to remove an article thrown into it by such other child. *Rolin v. R. J. Reynolds Tobacco Co.* 7: 335, 53 S. E. 891, 141 N. C. 300.

6. The defective condition of the track upon which cars are run in a mine, by reason of which a car, loaded by a miner who is to be paid by the amount delivered at the pit mouth, gets off the track, is not the proximate cause of an injury due to his pinching his fingers between the car and an implement which has been employed in attempting to get the car back on the track, where he was at liberty to suit his own convenience and employ his own methods in replacing the car. *Cavanaugh v. Centerville Block Coal Co.* 7: 907, 109 N. W. 303, — Iowa —. (Annotated)

7. The invention, by a thirteen-year-old boy, of a device to protect his fingers from the discomfort of handling links upon which he is employed to operate a drill, and which become heated and require handling because of defects in the drilling apparatus, which invention is unprecedented in experience, and the use of which results in the entangling of the boy's hand with the machinery to its injury, is such an intervening cause as to destroy the proximity of the defect in the drill, as a cause for the injury, and to relieve the master from liability therefor. *Stefanowski v. Chain Belt Co.* 7: 955, 109 N. W. 532, — Wis. —.

Of damage by fright.

8. Fright and resulting illness suffered by a woman whose home was ransacked by trespassers in her presence and in the absence of the rest of the family may properly be found by the jury to be the proximate result of the trespasser's wrongful acts. *Lesch v. Great Northern R. Co.* 7: 93, 106 N. W. 955, 97 Minn. 503.

PUBLIC LANDS.

Conflict of laws as to title passed by patent to homestead, see Conflict of Laws, 3.

Mines on, see Mines.

PUBLIC MONEY.

Purposes for which money raised for taxation may be used, see Taxes, 1, 2.

PUNITIVE DAMAGES.

See Damages, 1.

QUESTION FOR JURY.

See Trial.

QUIETING TITLE.

See Cloud on Title.

QUITCLAIM.

By trustee, see Trusts, 6.

QUOTATIONS.

See Exchanges.

RAILROADS.

See also Master and Servant.

Creating street under power of eminent domain for use of private railway, see Eminent Domain, 4.

Estoppel to complain of maintenance of railroad switch in street, see Estoppel, 5.

Constructed partly for accommodation of private person as nuisance, see Highways, 5.

Duty to fence.

1. The appropriation, survey, and setting apart of land by a railroad company for depot purposes afford strong, if not conclusive, evidence that its boundaries and extent are such as, and no more than, are necessary and proper; and the limits should not be curtailed or extended by the court or jury unless in a very clear case. *Wilmot v. Oregon R. & Nav. Co.* 7: 202, 87 Pac. 528, — Or. —.

2. The depot grounds of a railway company within the meaning of the fence laws are the place where passengers get on and off the trains, and where freight is loaded and unloaded, and include all grounds reasonably necessary and convenient for that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station. *Wilmot v. Oregon R. & Nav. Co.* 7: 202, 87 Pac. 528, — Or. —. (Annotated)

Injury at private crossing.

3. A railroad company which constructs a private farm crossing and permits its frequent use by a tenant of the farm for the benefit of which it is constructed, is, in case of a negligent injury to the tenant at the crossing, subject to the liability of one who has extended an invitation which has been acted on, and cannot treat the injured person as a trespasser or bare licensee. *Baltimore & O. S. W. R. Co. v. Slaughter*, 7: 597, 79 N. E. 186, — Ind. —. (Annotated)

Frightening horse.

4. A railroad company may be liable, for placing an object calculated to frighten horses upon its right of way near a crossing, to one receiving injuries through the frightening of his horse thereon. *Baltimore & O. S. W. R. Co. v. Slaughter*, 7: 597, 79 N. E. 186, — Ind. —.

RATIFICATION.

By married woman after discovery of note executed during coverture, see Husband and Wife, 4.

REAL PROPERTY.

Impairment of vested rights of reversioner, see Constitutional Law, 1. 7 L.R.A. (N.S.)

As to merger of estate, see Merger, 2, 3.

1. The vesting of a fee in the grantee of real estate is not prevented by the fact that the land was public and Congress authorized its purchase for the purpose of a public library, the patent, however, containing no conditions or limitations upon the character of estate conveyed. *Fordyce v. Woman's Christian Nat. Library Asso.* 7: 485, 96 S. W. 155, — Ark. —.

Conditional fee; *Shelley's Case*; estates tail.

2. If a grant of a life estate to one, habendum to him for life and the heirs of his body and their assigns in fee simple, should not be regarded as vesting a fee in the first taker under the rule in *Shelley's Case*, it conveys a conditional fee which, in states where the statute *de donis* is not in force, may, after the birth of a child to the life tenant, be conveyed by him in fee simple. *Kepler v. Larson*, 7: 1109, 108 N. W. 1033, — Iowa —.

3. The statute *de donis*, being contrary to the spirit of its institutions, has never been in force in Iowa. *Kepler v. Larson*, 7: 1109, 108 N. W. 1033, — Iowa —.

4. A grant to one of a life estate, habendum to him during his natural life and to the heirs of his body and their assigns in fee simple, conveys to him a fee under the rule in *Shelley's Case*, notwithstanding the deed also provides that the wife of the life tenant shall have merely the privilege of living on the premises during his life, and neither the life tenant nor his wife shall have any power to convey, or place encumbrances on, the property. *Kepler v. Larson*, 7: 1109, 108 N. W. 1033, — Iowa —. (Annotated)

Remainders.

5. If a grant to one for his natural life, habendum to him for life and then to the heirs of his body and their assigns in fee, should be construed as vesting in him a life estate with remainder to the heirs of his body, after the birth of a child to him a conveyance by the reversioners would not destroy the remainder and vest a fee in the life tenant. *Kepler v. Larson*, 7: 1109, 108 N. W. 1033, — Iowa, —.

RECEIVERS.

Duty to continue operation of railroad purchased at receiver's sale, see Street Railways, 2.

1. That a statute providing for receiver's sale of the property of a street railroad company contains provisions contemplating the continued operation of the road by the purchaser does not prevent a purchaser from becoming the absolute owner of the property, and therefore entitled to remove the tracks from the street. *French v. Jones*, 7: 525, 78 N. E. 113, 191 Mass. 522.

2. No duty to continue the operation of a street railroad purchased at receiver's sale is imposed by a statute providing that

the purchaser shall take the property subject to the same duties and liabilities of the original company, where it also provides that, upon failure for sixty days to organize a company to operate the road, the right of the company to do so shall cease. *French v. Jones*, 7: 525, 78 N. E. 118, 191 Mass. 522.

RECORD.

On appeal, see Appeal and Error, 1-4.
Estoppel by, see Estoppel, 3.
Admissibility in evidence, see Evidence, 16, 17.

REMAINDERMEN.

See Real Property, 5.
Adverse possession against, see Adverse Possession, 6.
Estoppel by acts or omissions of life tenant, see Estoppel, 13.
Mortgage on estate of infant remainderman, see Infants, 3, 4.

REMAINDERS.

See Wills, 3, 7.

REMITTITUR.

See Trial, 37.

REMOVAL OF CAUSES.

The removal of a suit from a state to a Federal court does not confer upon the latter such exclusive jurisdiction that, upon its entering an order of discontinuance, plaintiff cannot institute a new action upon the same cause in the state court, laying the damages so low as to prevent a second removal. *Young v. Southern Bell Teleph. & Teleg. Co.* 7: 501, 55 S. E. 765, — S. C. (Annotated)

RESTRAINT OF TRADE.

See Conspiracy.

RESULTING TRUST.

See Trusts.

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REVERSION.

See Real Property, 5.

REWARD.

A reward offered for the arrest of a criminal is not earned by the giving of information which leads to his arrest. *McClaghry v. King*, 7: 216, 147 Fed. 483, — C. C. A. — (Annotated)

RIPARIAN RIGHTS.

See Waters.

ROBBERY.

The elements of force and putting in fear, within the statutory definition of robbery, are present where accused approached an intoxicated person and pretended to arrest him, and, after compelling him to go a ways with them, searched and took from

him his valuables, he making no resistance because he believed his assailants to be officers, and that they would "lick him" if he resisted. *State v. Parsons*, 7: 566, 87 Pac. 349, — Wash. —.

ROGUES' GALLERY.

Destruction of photographs taken for, see Action or Suit, 1; Courts, 2; Photographs.

SALE.

1. One who repudiates the purchase of a horse because of false representations on the part of the seller, and turns him into a pasture where he is injured so that he has to be killed, cannot defeat recovery on the purchase-money note so far as the animal had a value at the time the contract was repudiated. *Fayette Nat. Bank v. Summers*, 7: 694, 54 S. E. 862, 105 Va. 689.

2. The mere acceptance of a purchased article after the agreed time of delivery does not constitute a waiver of damages for failure to deliver in time, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the buyer to waive such damages. *Johnson v. North Baltimore Bottle Glass Co.* 7: 1114, 88 Pac. 52, — Kan. —.

(Annotated)

3. After the vendee's refusal to accept and pay for goods, delivery of which was not to be made until payment of the purchase price, it is the duty of the vendor to use ordinary care to preserve the goods between the date on which they should have been accepted and the date on which the vendor proposes to exercise the right of resale; and he cannot hold the vendee responsible for deterioration in the value of the goods during such time, unless it appears that his failure to exercise due care resulted from the conduct of the vendee. *Mendel v. Miller*, 7: 1184, 56 S. E. 88, 126 Ga. 834.

4. If the vendee of goods shipped, to be paid for on delivery, refuses to accept and pay for them, the vendor may, after giving notice to the vendee, sell the property for the latter's benefit; and when the sale is properly made the vendee is conclusively bound by it, and the amount realized under it, and is liable for the difference between the contract price and the price on resale. *Mendel v. Miller*, 7: 1184, 56 S. E. 88, 126 Ga. 834.

SCHOOLS.

1. A board of school directors has, under a statute authorizing it to adopt rules and regulations for the well-being of the school, authority to debar members of high-school fraternities organized against its will, although with consent of parents of the pupils, and meeting out of school hours, from participating in certain privileges attendant on membership in the school, such as connection with athletic teams, musical, literary, and military societies, and to deprive them of customary

graduation honors. *Wayland v. Board of School Directors*, 7: 352, 86 Pac. 642, — Wash. —. (Annotated)

2. No unlawful interference with existing contracts is effected by the promulgation of a regulation by the department of public instruction forbidding teachers to wear a distinctively religious garb while in the performance of their duties, since all contracts are impliedly subject to the power of the superintendent to make reasonable regulations as to the management of the schools. *O'Connor v. Hendrick*, 7: 402, 77 N. E. 612, 184 N. Y. 421.

3. A regulation of the department of public instruction prohibiting teachers in common schools from wearing a distinctively religious garb while engaged in the work of teaching is not unreasonable. *O'Connor v. Hendrick*, 7: 402, 77 N. E. 612, 184 N. Y. 421. (Annotated)

4. That the teacher is not a party to an appeal to the superintendent of public instruction from the hiring by a school trustee of a teacher wearing a distinctively religious garb does not prevent his decision, which is in fact a regulation of the common schools within his jurisdiction, from being binding on her, although as a mere decision it would not be because she is not a party to the proceeding. *O'Connor v. Hendrick*, 7: 402, 77 N. E. 612, 184 N. Y. 421.

5. The power of a superintendent of public instruction to make regulations for the management of the public schools is implied from a provision in a statute permitting him to remove trustees for disobeying any "decision, order, or regulation." *O'Connor v. Hendrick*, 7: 402, 77 N. E. 612, 184 N. Y. 421.

SEARCH.

Admissibility of evidence obtained by wrongful search, see Evidence, 24.

An officer who has no warrant for arrest is not justified in compelling a person whom he may suspect of larceny to strip naked for the purpose of a search. *Hebrew v. Pulis* (N. J. Err. & App.) 7: 580, 64 Atl. 121, — N. J. —.

SENTENCE.

See Criminal Law, 2-5.

SHELLEY'S CASE.

See Real Property, 2, 4.

SHIPPING.

Negligence in navigating steamship, see Negligence, 2.

SPECIFIC PERFORMANCE.

1. An antenuptial marriage settlement by which the groom's father undertakes to make no discrimination among his children in his will is enforceable in equity so as to prevent the enforcement of a provision in the will giving the groom only a life estate, while the portions of testator's other

children are made absolute. *Phalen v. United States Trust Co.* 7: 734, 78 N. E. 943, 186 N. Y. 178. (Annotated)

2. Equity may exercise a judicial discretion in refusing specifically to enforce the provisions of a contract made in contemplation of marriage by which the groom is to secure an absolute estate, if, when suit is brought, his habits are such that enforcement would endanger the estate, or defeat the object of the contract. *Phalen v. United States Trust Co.* 7: 734, 78 N. E. 943, 186 N. Y. 178.

STATE.

The power to prohibit the use of the national flag does not belong exclusively to the Federal Congress, but may be exercised by the several states. *Halter v. State*, 7: 1079, 105 N. W. 298, — Neb. —.

STATUTE DE DONIS.

See Real Property, 3.

STATUTE OF FRAUDS.

See Contracts, 2.

STATUTE OF USES.

See Trusts, 5.

STATUTES.

Power of court to inquire into constitutionality of, see Courts, 1.

1. A statute for the punishment of lynching is not defective for failure to define the crime otherwise than by name, or to state that it shall be a felony, if a punishment is prescribed for it. *State v. Lewis*, 7: 669, 55 S. E. 600, 142 N. C. 626.

Entitling; expression of subject.

2. An act entitled "An Act to Authorize the Use of Voting Machines at Elections," which provides for the creation of a commission to determine whether a particular voting machine may be used effectually to express the will of the voters, is not thereby rendered unconstitutional for failure sufficiently to express the subject-matter of the statute in the title, since the provision for the commission is in no proper sense foreign or dissimilar to the principal subject of legislation. *Elwell v. Comstock*, 7: 621, 109 N. W. 698, — Minn. —.

Construction.

3. A statutory provision forbidding the discharge of sewage into a river from which a public drinking-water supply is taken is not limited by other provisions of the same statute establishing for inspection purposes a watershed extending 15 miles above the point of intake of such supply. *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

4. In construing the provisions of an act providing for a new system of raising revenue, and changing the former methods of procedure relating to matters of taxation, the courts are not bound by any administrative construction of the former revenue

law. *Royal Highlanders v. State*, 7: 380, 108 N. W. 183, — Neb. —.

Implied repeal.

5. That a statute providing a limitation period for the presentation of overdue state bonds does not in express terms repeal a statute authorizing them to be tendered in payment for state lands, does not leave the rights accorded by such statute in force, where it provides that, after the expiration of the limitation period, the owner shall be debarred from deriving any benefit from them, and that they shall thereafter be void. *Tipton v. Smythe*, 7: 714, 94 S. W. 678, 78 Ark. 392.

Amendment.

6. An act may be amended without specific reference to it, where it is itself an amendment of a former act into which, by its terms, it is incorporated, and to which reference is made. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641.

Re-enactment.

7. The efficacy of a statute against lynching is not impaired by splitting it up when carrying it into a revision, and placing the different sections under appropriate heads. *State v. Lewis*, 7: 669, 55 S. E. 600, 142 N. C. 626.

STREET RAILWAYS.

As carrier, see *Carriers*.

Exercise of eminent domain by, see *Eminent Domain*, 2, 3.

Duty of purchaser at receiver's sale to operate, see *Receivers*.

Rights in highway.

Jurisdiction of equity to require removal of tracks from highway, see *Equity*.

Estoppel of municipality to require removal of tracks, see *Estoppel*, 1.

Mandamus to compel issuance of permit to remove tracks, see *Mandamus*, 2.

Mandamus to compel street commissioner to determine question of right to remove street car tracks, see *Mandamus*, 3.

1. A street commissioner cannot refuse to permit the tearing up of a street to remove rails therefrom merely because he hopes that someone may be found to continue the operation of the railway. *French v. Jones*, 7: 525, 78 N. E. 118, 191 Mass. 522.

Care in operation.

Proximate cause of injury by, see *Proximate Cause*, 4.

2. The motorman in charge of a car approaching one discharging passengers at a street crossing is bound to keep a sharp lookout for passengers who may attempt to cross the tracks behind the standing car and have his car under such control that he can stop it at a moment's warning upon the appearance of danger. *Louisville City R. Co. v. Hudgins*, 7: 132, 98 S. W. 275, — Ky.

3. A street car company is liable for injury to a person walking on its track, by the propelling against him of a car running at high speed, with no watchfulness on the part of the motorman for persons on the track, notwithstanding he may be guilty of some negligence in being on the track, if he is not negligent in failing to discover the approach of the car, so that his negligence is merely a remote cause of the accident. *Indianapolis Traction & T. Co. v. Kidd*, 7: 143, 79 N. E. 347, — Ind. —.

4. That a passenger alighting from a street car and passing back of it to cross the street is negligent in stepping upon the parallel track without looking for an approaching car does not relieve the street car company from liability for injuries inflicted by such car, if those in charge of it, by the exercise of ordinary care, could have discovered the peril and prevented the injury. *Louisville City R. Co. v. Hudgins*, 7: 132, 98 S. W. 275, — Ky. —.

SUICIDE.

Of insured, see *Insurance*, 15, 16.

An attempt to commit suicide is not a crime in the absence of statute making it such, or making suicide a crime. *May v. Pennell*, 7: 286, 64 Atl. 885, 101 Me. 516.

(Annotated)

SURETY COMPANY.

Guarantying fidelity of employee, see *Bonds*.

SURFACE WATER.

See *Waters*, 9.

TAXES.

Assumpsit to recover back, see *Assumpsit*.

Mortgage of infant's property to pay, see *Infants*, 2-4.

Construction of statute providing new system of raising revenue, see *Statutes*, 4.

For what purpose.

1. The power to levy taxes, reposed in the general assembly of the state of Ohio, is subject, without express prohibition, to the inherent limitation that it may be exercised only for a public purpose. *Davies v. State ex rel. Boyles*, 7: 1196, 78 N. E. 955, 75 Ohio St. 114.

2. The provisions of 97 Ohio Laws, p. 392, that all male blind persons over the age of twenty-one years, and all female blind persons over the age of eighteen years who have been residents of the state for five years and of the county for one year, and have no property or means by which to support themselves, shall be entitled to receive not more than \$25 *per capita* quarterly from the county treasury, — are unconstitutional for the reason that they require the expenditure for a private purpose of public funds raised by taxation. *Davies v. State ex rel. Boyles*, 7: 1196, 78 N. E. 955, 75 Ohio St. 114. (Annotated)

What taxable; exemptions.

3. Personal property of a nonresident, which, for the performance of a railroad-construction contract, is in the state on the day taxes are to be assessed, is subject to assessment under a statute making taxable all real and personal property in the state. *Eoff v. Kennefick*, 7: 704, 96 S. W. 986, — Ark. —. (Annotated)

4. There is no implied exemption of state bonds from taxation. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641. (Annotated)

5. An attempted exemption from taxation of state bonds violates a constitutional provision that all property shall be taxed. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641.

6. That the revenue law providing for the taxation of old line insurance companies upon their gross premiums for the preceding year exempts fraternal beneficiary associations from such taxation does not evince an intention not to tax them at all, but rather to impose upon their property the same tax that is placed upon the property of individuals, corporations, and other domestic associations. *Royal Highlanders v. State*, 7: 380, 108 N. W. 183, — Neb. —.

7. A fraternal beneficiary association conducted for the mutual benefit of its members and for the purpose of providing, by the collection of stated dues and fees from its members, a fund for the payment of a specified amount upon the death of each member, to a beneficiary named by him, is not a charitable association, and its property and funds are not used exclusively for charitable purposes so as to be exempt from taxation by the laws of the state of Nebraska. *Royal Highlanders v. State*, 7: 380, 108 N. W. 183, — Neb. —. (Annotated)

Valuation.

8. In determining the true value of the credits of a fraternal beneficiary association for assessment purposes, the association is entitled, under the rule that the word "credits," as used in the revenue law, means "net credits," to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against securities in its fidelity or mortuary fund, set apart and devoted exclusively to the payment of such certificates. *Royal Highlanders v. State*, 7: 380, 108 N. W. 183, — Neb. —.

Review; correction; equalization.

9. The objection that a member of a board of equalization was incompetent to serve cannot be raised upon a collateral attack upon the assessment. *State Nat. Bank v. Memphis*, 7: 663, 94 S. W. 606, 116 Tenn. 641.

10. An appeal is not necessary to enable a board of equalization to revise a tax assessment under a statute providing that the board was created for the purpose of revising the assessment when returned by the tax assessor. *State Nat. Bank v. 7 L.R.A. (N.S.)*

Memphis, 7: 663, 94 S. W. 606, 116 Tenn. 641.

TELEPHONE.

As additional servitude on highway, see *Eminent Domain*, 5.

Injunction against cutting trees in erection of poles and wires, see *Injunction*, 6.

TENDER.

Of consideration as condition of rescission of contract, see *Contracts*, 8.

TORT.

Malicious injury to the business of another will give a right of action to the injured party. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

TRADEMARK.

Use of national flag as part of, see *Flag*.

TRADING STAMPS.

Ordinance forbidding use of, see *Municipal Corporations*, 2, 3.

TRANSFERS.

See *Carriers*, 13-16.

TREES.

Injunction against cutting, see *Injunction*, 6.

TRESPASS.

Duty of carrier toward trespasser on train, see *Carriers*, 4, 5.

Injunction to restrain, see *Injunction*, 5.
As proximate cause of injuries resulting from fright caused by, see *Proximate Cause*, 8.

TRIAL.**Conduct and disposal.**

1. Upon discovering an error in the admission of evidence, the court need not discharge the jury and award a new trial, but may cure the error by instructing the jury to disregard the testimony. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

2. Counsel cannot be required to disclose whether or not an insurance company is interested in an action to recover damages for personal injuries, notwithstanding the information is wanted for the purpose of determining the qualification of jurors by ascertaining whether or not they are connected with such companies. *Chybowsky v. Bucyrus Co.* 7: 357, 106 N. W. 833, 127 Wis. 332.

Election between counts.

3. A party setting forth two or more counts in his petition will not be required to elect as to which count he will proceed upon, where each sets forth a separate and distinct cause of action. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

Reception of evidence.

4. Upon a trial for murder, it is not

error to admit in evidence the name and address on a card found in the pocket of accused, in connection with a slip of paper found near the dead body, containing a name and address which are alleged to have been written shortly after the crime was committed, and which are similar to that on the card, as tending to connect accused, through an association of ideas, with the writing on the paper. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

5. Since the fact that a carrier is operating under a lease of tracks and station facilities which makes it subject to the rules and regulations of the lessor does not of itself absolve it from liability for failure to exercise supervision over persons coming to the station to take its trains, necessary to prevent injury by crowding into the cars, it is not error to exclude from evidence the lease, in an action against the carrier for injury caused by such a crowd. *Kuhlen v. Boston & N. Street R. Co.* 7: 729, 79 N. E. 815, — Mass. —.

6. A mere offer of evidence that, prior to the throwing of a missile at a street car to the injury of a passenger, other missiles had been thrown at cars for failure to stop them, is too indefinite. *Woas v. St. Louis Transit Co.* 7: 231, 96 S. W. 1017, 198 Mo. 664.

Statements of counsel.

7. In the absence of anything to show want of good faith on the part of the prosecuting attorney in making statements in his opening speech to the jury, the court is not in error in relying upon them, although he is not able to produce evidence promised. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

8. It is improper for counsel to attempt to get before the jury by argument evidence which could not be produced by direct proof. *Little Rock R. & E. Co. v. Goerner*, 7: 97, 95 S. W. 1007, — Ark. —.

Sufficiency of evidence to go to jury.

9. One injured while riding on a freight train is not entitled to have his action for damages go to the jury on the theory that the carrier owed him the measure of duty prescribed for either a passenger or an employee, in the absence of any evidence showing the existence of either relation. *Vassor v. Atlantic Coast Line R. Co.* 7: 950, 54 S. E. 849, 142 N. C. 68.

10. Suggested defects causing an alleged erratic movement of a machine to the injury of an employee are not sufficient to carry the case to the jury if they amount to no more than baseless conjecture. *Chybowski v. Bucyrus Co.* 7: 357, 106 N. W. 833, 127 Wis. 332.

11. Evidence that one attempted to use dynamite in blasting, though inexperienced, without smothering the blasts, in consequence of which a rock was cast upon a neighboring house, is sufficient to carry to the jury the question of his negligence. *Kimberly v. Howland*, 7: 545, 55 S. E. 778, — N. C. —.

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Questions of law and fact.

12. Whether or not a stipulation in a bill of lading limiting the liability of the carrier to his own line is understood and assented to by the consignor is a question for the jury to determine. *Wabash R. Co. v. Thomas*, 7: 1041, 78 N. E. 777, 222 Ill. 337.

13. It cannot be said, as matter of law, that a stipulation in a bill of lading that a claim for damages for injury to freight must be presented within ten days after the freight is removed from the car is reasonable, when applied to live stock, the character of the injury to which cannot be determined within ten days. *Wabash R. Co. v. Thomas*, 7: 1041, 78 N. E. 777, 222 Ill. 337. (Annotated)

14. Whether or not a depositor exercises reasonable care and diligence in examining his pass book and returned vouchers, and in supervising the conduct of his agent if the latter is permitted to make the examination, is a question for the jury, where there is evidence tending to show that he has not done so. *First Nat. Bank v. Richmond Electric Co.* 7: 744, 56 S. E. 152, — Va. —.

15. The question whether or not the point where animals killed on a railroad track entered thereon was a part of depot grounds is for the jury, where the evidence is conflicting, or different inferences might be drawn from it. *Wilmot v. Oregon R. & Nav. Co.* 7: 202, 87 Pac. 528, — Or. —.

16. Whether or not the turning of horses out to graze upon uninclosed land near a depot is such contributory negligence as will preclude a recovery in case they wander onto the tracks and are killed is a question for the jury. *Wilmot v. Oregon R. & Nav. Co.* 7: 202, 87 Pac. 528, — Or. —.

17. Although the preliminary question as to the authenticity of standards for the comparison of handwriting is for the court, it is not error to submit the final determination of that question to the jury. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

18. A question of negligence cannot be taken from the jury, although the facts are not disputed, if they are such that from them different minds might honestly draw different conclusions. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

19. It is only in the clearest cases that the court can take from the jury a question of contributory negligence. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

20. The jury must determine whether or not an employee in a mine, knowing of water in a neighboring mine, knew, or ought to have known, the danger to himself therefrom. *Williams v. Sleepy Hollow Min. Co.* 7: 1170, 86 Pac. 337, — Colo. —.

21. Whether or not a child is guilty of contributory negligence in any given case is a question for the jury in view of his age, intelligence, knowledge of the sur-

roundings, and capacity to know and appreciate the danger. *Rolin v. R. J. Reynolds Tobacco Co.* 7: 335, 53 S. E. 891, 141 N. C. 300.

22. The jury must determine whether or not a carrier is bound to provide extra men at certain hours of the day to prevent injury to intending passengers on its platforms, the crowding of which at such times is unavoidable. *Kuhlen v. Boston & N. Street R. Co.* 7: 729, 79 N. E. 815, — Mass. —.

23. The question whether or not a master has furnished his servant a reasonably safe machine when he has left an uncovered cogwheel at a point to which the servant's duties may call him is for the jury. *Strickland v. Capital City Mills*, 7: 426, 54 S. E. 220, 74 S. C. 16.

24. The court cannot say, as matter of law, that a reasonable doubt in the mind of the attending physician as to the contagious character of the disease of a patient would justify the omission to inform the nurse assigned to the case that it might be of a contagious character. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 556.

25. Whether or not managers of a hospital exercise ordinary prudence in delegating a nurse to attend a patient whom they know to be suffering from a contagious disease, but of which fact the nurse is ignorant, is a question for the jury, where their conduct may be explainable upon a theory consistent with due care, or upon a theory showing the absence of due care. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 556.

26. Whether the proprietor of a laundry, after notice that an employee had caught her fingers between the rollers of an ironing mangle which she was operating, exercised ordinary care to release her and to alleviate her suffering, is a question for the jury, where he started the machine, which had been stopped, thereby drawing her hand further in and greatly increasing the injury. *Raasch v. Elite Laundry Co.* 7: 940, 108 N. W. 477, 98 Minn. 357.

27. In an action for false imprisonment, it is a question for the jury whether the submission of the plaintiff to the control of the defendant was voluntary, or was brought about by fear that force would be used, unless it is clear that there was no reasonable apprehension of force. *Hebrew v. Pulis* (N. J. Err. & App.) 7: 580, 64 Atl. 121, — N. J. —.

Direction of verdict.

28. When the evidence in plaintiff's favor in an action for personal injuries is contrary to all reasonable probabilities, the court should direct a verdict in favor of defendant. *Chybowski v. Bucyrus Co.* 7: 357, 106 N. W. 833, 127 Wis. 332.

Instructions.

29. The jury should not be instructed as to the rights of a street-car passenger whose transfer was dishonored if he intended to 7 L.R.A. (N.S.)

pay his fare, where the evidence is that he intended to rely on his transfer and refuse further payment. *Little Rock R. & E. Co. v. Goerner*, 7: 97, 95 S. W. 1007, — Ark. —.

30. An instruction that a street-car passenger is entitled to courteous treatment, and that the carrier is liable if he is not treated with care and courtesy, without more explicitly defining the duty of the carrier towards him, is too uncertain. *Little Rock R. & E. Co. v. Goerner*, 7: 97, 95 S. W. 1007, — Ark. —.

31. A charge as to the worldly circumstances of the parties is erroneous in the absence of any evidence upon the subject. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

32. In an action in which the petition contains two counts, to but one of which an instruction on the worldly circumstances of the parties would be appropriate, the instruction of the court should be such as to inform the jury that the question of worldly circumstances is to be considered only in connection with the one count. *Southern R. Co. v. Chambers*, 7: 926, 55 S. E. 37, 126 Ga. 404.

33. The court's neglect to instruct the jury of its own motion upon the lesser degrees of the crime for which accused is on trial is not error, in the absence of any exception or request for more specific instructions. *State v. Parsons*, 7: 566, 87 Pac. 349, — Wash. —.

34. An instruction is not erroneous, in an action for negligent killing, as requiring the jury to determine the proximate cause of death, which informs them that, if the diversion of an electric current was the proximate cause of the death, then defendant is liable, where they have been told the facts necessary to create liability, so that a verdict for plaintiff would merely announce that such facts existed from which the law imposes the liability. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 E. 37, 126 Ga. 404.

35. An instruction is not erroneous in assuming, in an action for injury by a grounded electric-light current, that two grounds existed, when it was conceded by both parties that to cause an accident two grounds must have existed, and the accident was established. *Harrison v. Kansas City Electric Light Co.* 7: 293, 93 S. W. 951, 195 Mo. 606.

Verdict or findings of jury.

36. Judgment cannot be entered in favor of an employer against whom a verdict is rendered for negligence of his servant, who has obtained a verdict in his favor, on the theory that the verdict is general and controlled by the special verdict in favor of the servant, where there is nothing to indicate which verdict is general and which special. *Hewett v. Woman's Hospital Aid Asso.* 7: 496, 64 Atl. 190, 73 N. H. 556.

Remittitur.

37. A verdict for damages founded in

part on incompetent evidence cannot be corrected by the court's requiring a remittitur of the amount, made up of the items to which the incompetent evidence related. *Jayne v. Loder*, 7: 984, 149 Fed. 21, — C. C. A. —.

TRUST DEED.

See Mortgage.

TRUSTEES.

See Trusts.

TRUSTS.

Action to enforce, see Action or Suit, 2.
Adverse possession against minor trustee, see Adverse Possession, 3.

Charitable trusts, see Charities.

For married woman, see Husband and Wife, 6-10.

Laches as bar to proceeding to contest validity of, see Limitation of Actions, 2.

Laches as defense to constructive trust, see Limitation of Actions, 3.

Creation.

By will, see Wills, 4.

1. A trust cannot exist where the same person possesses both the legal estate and the beneficial interest. *Doan v. Vestry of the Parish of the Ascension*, 7: 1119, 64 Atl. 314, 103 Md. 662.

2. A devise to the vestry of a parish, to be used for such church purposes as the rector of said church shall or may direct, creates no trust, but is for the corporate purposes of the vestry, and vests the absolute title in it. *Doan v. Vestry of the Parish of the Ascension*, 7: 1119, 64 Atl. 314, 103 Md. 662. (Annotated)

Constructive and resulting trusts.

3. Use of trust property in violation of the trust, by a trustee under an express trust, in the purchase of land which is conveyed to another, who has notice of the trust, creates a constructive, and not an express, trust in the latter. *Newman v. Newman*, 7: 370, 55 S. E. 377, — W. Va. —.

4. A parol agreement between two persons to purchase a single tract of land together or in partnership, which purchase was finally made by one of them, who paid the whole of the purchase price and took the title to himself, the other simply agreeing to pay him half thereof on demand, will not give rise to a resulting trust in favor of the one who contributed nothing to the payment of the purchase money. *Norton v. Brink*, 7: 945, 110 N. W. 669, — Neb. —.

Termination.

5. The conveyance of his property by the remainderman, in case property is devised in trust to hold it for the life of one person and convey the remainder to another, will, whether he has acquired the legal title or not, vest the remainder in the grantee; so that, upon the falling in of the life estate and termination of the trust, the statute will vest the use in the grantee, and perfect his title to the whole estate. 7 L.R.A. (N.S.)

Smith v. Moore, 7: 684, 55 S. E. 275, 142 N. C. 277.

6. A testamentary trustee who is instructed to turn the property over to testator's son upon his reaching majority has no authority, after that event, to release property of the testator held by absolute title, to a debtor of the estate who claims that the property was held merely as security for the debt. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179.

7. No equity is created in favor of the assignor of a mortgage, as collateral security for his debt, by his inducing testamentary trustees of the creditor, after their authority has expired, to quitclaim to him the property which the testator had bought in under foreclosure of the mortgage, on the theory that he held the property in trust to secure the debt; although the debtor, in consequence of the agreement for such deed, continues his payments on the original debt, which payments, however, do not much, if any, exceed the amount remaining due after crediting him with the amount of the bid. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179.

Trustees.

Liability of trustee of charity for acts of servant, see Charities, 9.

Descent upon children of trustee at his death, of trust estate, see Descent and Distribution.

8. The executors have power to mortgage the trust estate under a will placing an estate in their hands in trust to use the income for the maintenance of testator's son, for the accomplishment of which purpose they are given power to manage the property, sell land, or convey the whole or any part thereof as the testator might himself do, where, without the mortgage, the income does not exceed the necessary expenses of maintaining the estate, while, by means of it, sufficient to maintain the son will be secured. *Re Lueft*, 7: 263, 109 N. W. 652, — Wis. —. (Annotated)

USES.

See Trusts, 5.

VARIANCE.

See Evidence, 55.

VENDOR AND PURCHASER.

Injunction against collection of purchase price of land because title is defective, see Injunction, 10-14.

One purchasing real estate in the chain of title to which is an undelivered deed acquires no title, and therefore is not entitled to protection as a bona fide purchaser because he had no notice of the fact of nondelivery. *Alabama Coal & C. Co. v. Gulf Coal & C. Co.* 7: 712, 40 So. 397, — Ala. —.

VENUE.

Permitting grand jury of one county to indict for crimes in adjoining county, see Criminal Law, 1.

The venue of a prosecution for ob-

taining a draft by false pretenses is properly laid in the county in which the draft was mailed to the defendant, although he received it in another county. *State v. Briggs*, 7: 278, 86 Pac. 447, — Kan. —.

VERDICT.

See Appeal and Error, 6, 26; Trial, 28, 36.

VESTED RIGHTS.

See Constitutional Law, 1.

VOTERS AND ELECTIONS.

See Elections.

VOTING MACHINES.

See Elections, 1-3; Injunction, 9; Statutes, 2.

WAIVER.

Of error as to taking or admission of evidence, see Appeal and Error, 14, 15.

Of forfeiture of insurance policy, see Insurance, 13-15.

Acceptance of article purchased as waiver of damages, see Sale, 2.

WARRANT.

Arrest without, see Arrest.

WATERS.

Covenants as to. see Covenant, 1, 2.

Damages for cutting off supply, see Damages, 12.

Injunction to compel removal of jetty from stream, see Injunction, 7.

Negligence in navigating steamship, see Negligence, 2.

Change of bed.

1. The common-law rule that riparian owners on a navigable river which suddenly changes its channel and leaves its former bed retain title to the line of the former thread of the stream is not inconsistent with the Constitution of the United States, or the Constitution or statutes of Nebraska, and is applicable in the latter state. *Kinkead v. Turgeon*, 7: 316, 109 N. W. 744, — Neb. —.

2. An owner of lands fronting on a navigable river and holding title to the thread of the stream, subject to the public easement of navigation, is entitled, where the river suddenly changes its course and abandons its former bed, to the possession and ownership of the land to the line of the former thread of the stream, and may maintain ejectment to oust squatters within such limits. *Kinkead v. Turgeon*, 7: 316, 109 N. W. 744, — Neb. —.

Use of water; diversion; obstruction.

3. The additional daily flow due to the storage of water during a wet season, to be let down during a dry one, is to be treated as part of the natural flow, in determining the right of a lower mill owner in reference to the use of other mill owners further down the stream. *Mason v. Whitney*, 7: 289, 78 N. E. 881, — Mass. —.
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4. The rights of lower mill owners on a stream are not enlarged by suing jointly to restrain the owner of an upper pond from running his wheels throughout the twenty-four hours, thereby depriving them of the benefit of his storage reservoir. *Mason v. Whitney*, 7: 289, 78 N. E. 881, — Mass. —.

5. It is not unreasonable for a mill owner, if his own interest requires it, to use the water of the stream in his business, nights as well as days, so long as he leaves the natural flow of the water unobstructed and undiminished during the ordinary working hours of the day; and this is true, although those using the water above him send down most of it during the daytime. *Mason v. Whitney*, 7: 289, 78 N. E. 881, — Mass. —.
(Annotated)

6. A riparian proprietor cannot, even to protect his own land, project jetties into the stream if the effect is to deflect the current or shoal the water to the injury of a lower proprietor. *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151, — Or. —.
(Annotated)

7. The passage between an island and the main land through which a portion of the river flows is a channel which cannot be obstructed by one riparian owner to the injury of another. *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151, — Or. —.
Pollution.

Injunction against. see Injunction, 8.
Power to forbid discharge of sewage into river, see Constitutional Law, 9.

Construction of statute prohibiting discharge of sewage into, see Statutes, 3.

8. The availability of another water supply will not prevent the operation of a statute forbidding the casting of sewage into a river from which a public drinking-water supply is taken. *Durham v. Eno Cotton Mills*, 7: 321, 54 S. E. 453, 141 N. C. 615.

Surface water.

9. The swollen current of a stream during floods, which has not become separated from the main body of the stream, is not surface water which the riparian proprietor may combat as a common enemy, to the injury of adjoining proprietors. *Morton v. Oregon Short Line R. Co.* 7: 344, 87 Pac. 151, — Or. —.

Adverse use; artificial condition.

10. The mere fact that for a long period of time it has been the custom of the owners of mills along a stream to run them only during the working hours of the day, by reason of which the lower owners have gratuitously received the benefit of the pond of an upper mill owner which stored the water of the stream during the idle hours and let it all down during the working hours, does not give them a right to insist on his continuance of such practice, so as to prevent his running his wheels throughout the twenty-four hours. *Mason v. Whitney*, 7: 289, 78 N. E. 881, — Mass. —.

Water supply; remedy for breach of duty.

See also *supra*, 8.

11. A private corporation exercising a franchise granted by a municipal corporation pursuant to statute, which confers upon it the right to use the streets of the city on condition that it lays therein its main and furnishes the municipality and its inhabitants with a supply of water at fixed tolls, is liable as a public service corporation for its wrongful act in cutting off the supply of water which it is under a duty to furnish to one of its patrons as a member of the public at large. *Freeman v. Macon Gas Light & W. Co.* 7: 917, 56 S. E. 61, 126 Ga. 843.

12. Breach of a contract to connect property with a water main and erect a hydrant for its protection from fire does not, where no time is fixed when delivery of the water shall commence, render the company liable for the value of the property in case it is destroyed by fire for want of water to extinguish it, since such injury cannot be reasonably supposed to have been in contemplation of the parties as the result of the breach. *Hunt Bros. Co. v. San Lorenzo Water Co.* 7: 913, 87 Pac. 1093, — Cal. —.

WATERWORKS.

See *Waters*, 11, 12.

WILLS.

Creation of trust by, see *Trusts*, 2.

Signature of attesting witness.

1. A proper attestation of a will by a witness is effected, the other requirements being present, if he holds the end of the pen while it is guided by another in the writing of his name; and it is immaterial that such aid is not necessary because the witness can write. *Re Pope*, 7: 1193, 52 S. E. 235, 139 N. C. 484. (Annotated)

Misnomer of beneficiary.

2. A misnomer of a corporation will not defeat a devise or bequest to it if its identity is otherwise sufficiently certain. *Doan v. Vestry of the Parish of the Ascension*, 7: 1119, 64 Atl. 314, 103 Md. 662.

Nature of estate or interest created.

3. A life estate with remainder in succession to the lineal descendants of testator's sons, the surviving son, and testator's brothers and sisters, and not a fee in the sons with executory devises, is created by will giving a moiety of testator's estate to each of his two sons, and continuing: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one half both of the decedent's original portion, as well as one half of the portion taken by survivorship, shall go to" one of testator's brothers, and the other half to his surviving brothers and sisters. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179.

4. A will giving the testator's widow

the power of disposing of his estate "when it shall be for the benefit of the family" does not vest in the widow an absolute estate in fee, but confers a life estate, and creates a trust in her as trustee for the benefit of her children. *Newman v. Newman*, 7: 370, 55 S. E. 377, — W. Va. —.

Reducing or enlarging interest by other provision.

5. A provision in a will devising property to the vestry of a parish, that it shall be used for such church purposes as shall be designated by the rector, is void for repugnance to the fee. *Doan v. Vestry of the Parish of the Ascension*, 7: 1119, 64 Atl. 314, 103 Md. 662. (Annotated)

6. A life estate in real estate is not enlarged by a power to dispose of the property by will upon reaching twenty-one years of age. *Anderson v. Messinger*, 7: 1094, 146 Fed. 929, 77 C. C. A. 179.

Contingent remainder.

7. A contingent remainder with a double aspect, and not an executory devise, is created by a devise to one for life and then to the issue of her body then living, their heirs and assigns, but, in case of want of issue, then to another, his heirs and assigns forever. *McCreary v. Coggeshall*, 7: 433, 53 S. E. 978, 74 S. C. 42.

Ademption.

8. A bequest by a woman of all money which may become due from insurance upon her husband's life at the time it shall be actually collected and received by her executors is specific, and adeemed by the collection of the fund by the testatrix and her commingling it with her other funds. *Nusly v. Curtiss*, 7: 592, 85 Pac. 846, — Colo. —. (Annotated)

WITNESSES.

Admissibility of evidence to contradict, see *Evidence*, 48.

To will, see *Wills*, 1.

Competency.

1. In an action to set aside a deed for fraud, the grantor cannot testify as to statements made in the presence of the grantee by his attorney at the time of the execution of the deed, where the grantee is dead, under the statute forbidding the admission of evidence of transactions with a person since deceased,—especially where the attorney is dead also. *Smith v. Moore*, 7: 684, 55 S. E. 275, 142 N. C. 277. (Annotated)

Corroboration.

2. The mere making of contradictory statements on cross-examination does not justify the admission of evidence of prior statements to support the witness by corroborating the testimony given on direct examination, although the contradiction consisted of the admission of the making of prior statements in conflict with the testimony given, so that it may be contended that the testimony is a matter of recent contrivance. *Com. v. Tucker*, 7: 1056, 76 N. E. 127, 189 Mass. 457.

3. The view of the cross-examination of a witness taken by the attorney general in arguing the case to the jury cannot affect a ruling upon the admissibility of evidence to support the witness, under a view of the cross-examination which the court had a right to take at the time. Com. v. Tucker, 7: 1056, 76 N. E. 127, 189 Mass. 457.

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4. The mere fact that a witness admits that he has talked with a person assisting in preparing the defense in a criminal case does not show such bias or moral duress as to make admissible evidence of statements made prior to that time, tending to support his testimony. Com. v. Tucker, 7: 1056, 76 N. E. 127, 189 Mass. 457.

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